FEDERAL TRADE COMMISSION DECISIONS

FINDINGS, OPINIONS, AND ORDERS JANUARY 1, 2014, TO JUNE 30, 2014

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MEMBERS OF THE FEDERAL TRADE COMMISSION
DURING THE PERIOD
JANUARY 1, 2014 TO JUNE 30, 2014

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Took oath of office April 5, 2010.

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Took oath of office April 6, 2010.

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Took oath of office January 3, 2013.

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Appointed August 28, 1988.

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FEDERAL TRADE COMMISSION DECISIONS

FINDINGS, OPINIONS, AND ORDERS
JANUARY 1, 2014, TO JUNE 30, 2014

IN THE MATTER OF

TRENDNET, INC.

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

Docket No. C-4426; File No. 122 3090
Complaint, January 16,2014 – Decision, January 16, 2014

This consent order addresses TRENDnet, Inc.'s claims regarding the security settings of their SecurView products. The complaint alleges that TRENDnet falsely represented that it had taken reasonable steps to ensure that its IP cameras and mobile apps are a secure means to monitor private areas of a consumer's home or workplace. The complaint also alleges that TRENDnet misrepresented that it had taken reasonable steps to ensure that a user's security settings on its devices would be honored. Finally, the Commission's complaint alleges that TRENDnet engaged in a number of practices that, taken together, failed to provide reasonable security to prevent unauthorized access to personal information, namely the live feeds from the IP cameras. The consent order prohibits TRENDnet from misrepresenting (1) the extent to which TRENDnet or its products or services maintain and protect the security of covered device functionality or the security, privacy, confidentiality, or integrity of any covered information; and (2) the extent to which a consumer can control the security of any covered information input into, stored on, captured with, accessed, or transmitted by a covered device. The order also requires TRENDnet to establish and implement, and thereafter maintain, a comprehensive security program to (1) address security risks that could result in unauthorized access to or use of the functions of 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.

Participants

For the *Commission*: *Andrea V. Arias* and *Laura D. Berger.*

For the *Respondents*: *John L. Sun, Law Offices of John L. Sun.*

COMPLAINT

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

1. Respondent TRENDnet, Inc. ("TRENDnet" or "respondent") is a California corporation with its principal office or place of business at 20675 Manhattan Place, Torrance, California 90501.

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. Respondent is a retailer that among other things, sells networking devices, such as routers, modems, and Internet Protocol ("IP") cameras, to home users and to small- and medium-sized businesses. In 2010, respondent had approximately $64 million in total revenue, and obtained approximately $6.3 million of this amount from the sale of IP cameras. In 2011, respondent had approximately $66 million in total revenue and obtained approximately $5.28 million of this amount from the sale of its IP cameras. Similarly, in 2012, the company had approximately $62 million in total revenue and obtained approximately $7.4 million of this amount from the sale of IP cameras. During this time, the company had approximately 80 employees.

4. Respondent offers its IP cameras for consumers to conduct security monitoring of their homes or businesses, by accessing live video and audio feeds ("live feeds") from their cameras over the Internet. In many instances, these cameras are marketed under the trade name "SecurView." According to respondent, the IP cameras may be used to monitor "babies at home, patients in the hospital, offices and banks, and more."

5. By default, respondent has required users to enter a user name and password ("login credentials"), in order to access the live feeds from their cameras over the Internet. In addition, since at least February 2010, respondent has provided users with a Direct Video Stream Authentication setting ("DVSA setting"), the same as or similar to the one depicted below. The DVSA setting allows users to turn off the login credentials requirement for their cameras, so that they can make their live feeds public. To remove the login credentials requirement, a user would uncheck the box next to the word "Enable," and then "Apply" this selection.

6. Respondent also has provided software applications that enable users to access their live feeds from a mobile device ("mobile apps"), including its SecurView Mobile Android app, which respondent launched in January 2011, and its SecurView PRO Android app, which respondent launched in October 2012. Both apps require that a user enter login credentials the first time that the user employs the app on a particular mobile device. Both apps then store the user's login credentials on that mobile device, so that the user will not be required to enter login credentials on that device in the future.

RESPONDENT'S STATEMENTS TO CONSUMERS

7. From at least January 1, 2010, until the present, in many instances, in marketing or offering for sale its IP cameras, respondent has:

a. used the trade name SecurView:

i. in the product names and descriptions displayed on the cameras' packaging (*see, e.g.*, Exhs. A-J);

ii. in product descriptions on respondent's website and in other advertisements (*see, e.g.*, Exhs. K-L); and

iii. in the name of its SecurView Mobile and SecurView PRO Android apps, described in **Paragraph 6**.

b. described the IP cameras as "secure" or suitable for maintaining security, including through:

i. a sticker affixed to the cameras' packaging, the same as or similar to the one depicted below, which displays a lock icon and the word "security" (*see, e.g.*, Exhs. B, D, F-H, J);

ii. a statement on the cameras' packaging that it may be used to "secure," or "protect" a user's home, family, property, or business (*see, e.g.*, Exhs. A, B, I); and

iii. product descriptions on respondent's website and in other advertisements (*see, e.g.*, Exhs. K-M);

c. provided an authentication feature, which requires users to enter login credentials before accessing the live feeds from their IP cameras over the Internet; and

d. provided the DVSA setting, described in **Paragraph 5**, which purports to allow users to choose whether login credentials will be required to access the live feeds from their IP cameras over the Internet.

RESPONDENT'S FAILURE TO REASONABLY SECURE ITS IP CAMERAS AGAINST UNAUTHORIZED ACCESS

8. Respondent has engaged in a number of practices that, taken together, failed to provide reasonable security to prevent unauthorized access to sensitive information, namely the live feeds from the IP cameras. Among other things:

a. since at least April 2010, respondent has transmitted user login credentials in clear, readable text over the Internet, despite the existence of free software, publicly available since at least 2008, that would have enabled respondent to secure such transmissions;

b. since January 2011, respondent has stored user login credentials in clear, readable text on a user's mobile device, despite the existence of free software, publicly available since at least 2008, that would have enabled respondent to secure such stored credentials;

c. since at least April 2010, respondent has failed to implement a process to actively monitor security vulnerability reports from third-party researchers, academics, or other members of the public, despite the existence of free tools to conduct such monitoring, thereby delaying the opportunity to correct discovered vulnerabilities or respond to incidents;

d. since at least April 2010, respondent has failed to employ reasonable and appropriate security in the design and testing of the software that it provided consumers for its IP cameras. Among other things, respondent, either directly or through its service providers, failed to:

i. perform security review and testing of the software at key points, such as upon the release of the IP camera or upon the release of software for the IP camera, through measures such as:

1. a security architecture review to evaluate the effectiveness of the software's security;

2. vulnerability and penetration testing of the software, such as by inputting invalid, unanticipated, or random data to the software;

3. reasonable and appropriate code review and testing of the software to verify that access to data is restricted consistent with a user's privacy and security settings; and

ii. implement reasonable guidance or training for any employees responsible for testing, designing, and reviewing the security of its IP cameras and related software.

RESPONDENT'S BREACH

9. As a result of the failures described in **Paragraph 8**, respondent has subjected its users to a significant risk that their sensitive information, namely the live feeds from its IP cameras, will be subject to unauthorized access. As a result of the failures described in **Paragraph 8(d)**, from approximately April 2010 until February 7, 2012, the DVSA setting, described in **Paragraph 5**, did not function properly for twenty models of respondent's IP cameras. (*See* Appendix A, listing the affected models.) In particular, the DVSA setting failed to honor a user's choice to require login credentials and allowed all users' live

feeds to be publicly accessible, regardless of the choice reflected by a user's DVSA setting and with no notice to the user.

10. Hackers could and did exploit the vulnerability described in **Paragraph 9**, to compromise hundreds of respondent's IP cameras. Specifically, on approximately January 10, 2012, a hacker visited respondent's website and reviewed the software that respondent makes available for its cameras. The hacker was able to identify a web address that appeared to support the public sharing of users' live feeds, for those users who had made their feeds public. Because of the flaw in respondent's DVSA setting, however, the hacker could access all live feeds at this web address, without entering login credentials, even for users who had not made their feeds public. Thereafter, by typing the term "netcam" into a popular search engine that enables users to search for computers based on certain criteria, such as location or software, the hacker identified and obtained IP addresses for hundreds of respondent's IP cameras that could be compromised. The hacker posted information about the breach online; thereafter, hackers posted links to the live feeds for nearly 700 of respondent's IP cameras. Among other things, these compromised live feeds displayed private areas of users' homes and allowed the unauthorized surveillance of infants sleeping in their cribs, young children playing, and adults engaging in typical daily activities. The breach was widely reported in news articles online, many of which featured photos taken from the compromised live feeds or hyperlinks to access such feeds. Based on the cameras' IP addresses, news stories also depicted the geographical location (*e.g.*, city and state) of many of the compromised cameras.

11. Respondent learned of the breach on January 13, 2012, when a customer who had read about the breach contacted respondent's technical support staff to report the issue. Shortly thereafter, respondent made available new software to eliminate the vulnerability, and encouraged users to install the new software by posting notices on its website and sending emails to registered users.

THE IMPACT OF RESPONDENT'S FAILURES ON CONSUMERS

12. As demonstrated by the breach, respondent's failures to provide reasonable and appropriate security led to a significant risk that users' live feeds would be compromised, thereby causing significant injury to consumers.

13. The exposure of sensitive information through respondent's IP cameras increases the likelihood that consumers or their property will be targeted for theft or other criminal activity, increases the likelihood that consumers' personal activities and conversations or those of their family members, including young children, will be observed and recorded by strangers over the Internet. This risk impairs consumers' peaceful enjoyment of their homes, increases consumers' susceptibility to physical tracking or stalking, and reduces consumers' ability to control the dissemination of personal or proprietary information (*e.g.*, intimate video and audio feeds or images and conversations from business properties). Consumers had little, if any, reason to know that their information was at risk, particularly those consumers who maintained login credentials for their cameras or who were merely unwitting third parties present in locations under surveillance by the cameras.

COUNT 1

14. As described in **Paragraph 7**, respondent has represented, expressly or by implication, that respondent has taken reasonable steps to ensure that its IP cameras and mobile apps are a secure means to monitor private areas of a consumer's home or workplace.

15. In truth and in fact, as described in **Paragraphs 8-11**, respondent has not taken reasonable steps to ensure that its IP cameras are a secure means to monitor private areas of a consumer's home or workplace. Therefore, the representation set forth in **Paragraph 14** constitutes a false or misleading representation.

COUNT 2

16. As described in **Paragraphs 5 and 7**, respondent has represented, expressly or by implication, that respondent has taken reasonable steps to ensure that a user's security settings will be honored.

17. In truth and in fact, as described in **Paragraphs 8-11**, respondent has not taken reasonable steps to ensure that a user's security settings will be honored. Therefore, the representation set forth in **Paragraph 16** constitutes a false or misleading representation.

COUNT 3

18. As set forth in **Paragraphs 8-11**, respondent has failed to provide reasonable security to prevent unauthorized access to the live feeds from its IP cameras, which respondent offered to consumers for the purpose of monitoring and securing private areas of their homes and businesses. Respondent's practices caused, or are likely to cause, substantial injury to consumers that is not offset by countervailing benefits to consumers or competition and is not reasonably avoidable by consumers. This practice was, and is, an unfair act or practice.

19. 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 sixteenth day of January, 2014, has issued this complaint against respondent.

By the Commission.

COMPLAINT APPENDIX A

1. TV-IP110 (Version A1.xR)
2. TV-IP110W (Version A1.xR)
3. TV-IP110WN (Versions A1.xR & V2.0R)
4. TV-IP121W (Version A1.xR)
5. TV-IP121WN (Versions V1.0R & V2.0R)
6. TV-IP212 (Version A1.xR)
7. TV-IP212W (Version A1.xR)
8. TV-IP252P (Version B1.xR)
9. TV-IP312 (Version A1.xR)
10. TV-IP312W (Version A1.xr)
11. TV-IP312WN (Version A1.xR)
12. TV-IP322P (Version V1.0R)
13. TV-IP410 (Version A1.XR)
14. TV-IP410W (Version A1.xR)
15. TV-IP410WN (Version V1.0R)
16. TV-IP422 (Versions A1.xR & A2.xR)
17. TV-IP422W (Versions A1.xR & A2.xR)
18. TV-IP422WN (Version V1.0R)
19. TV-VS1 (Version V1.0R)
20. TV-VS1P (Version V1.0R)

Complaint

Exhibit A

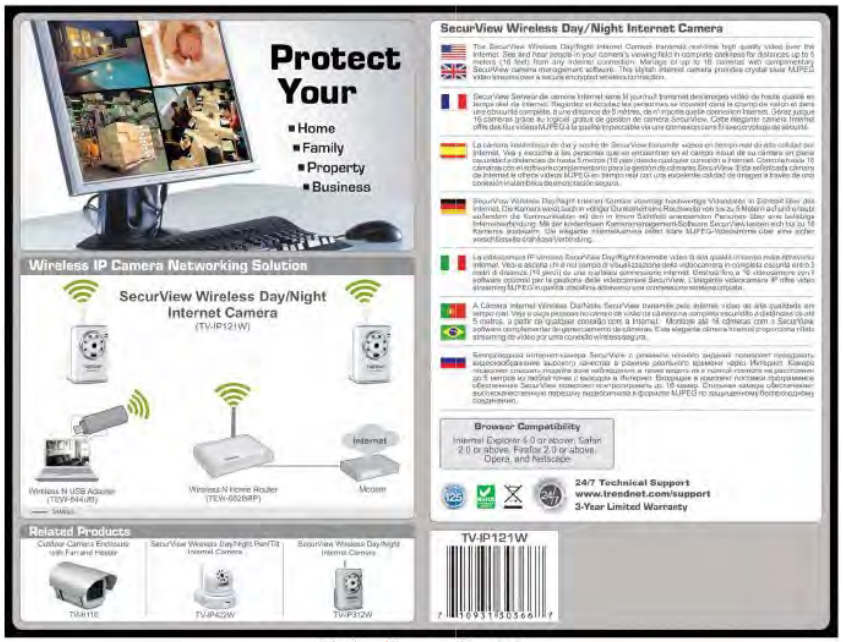
Exh. A, p. 1 of 2

Exh. A, p. 2 of 2

Complaint

Exhibit B

Exh. B, p. 1 of 2



Exh. B, p. 2 of 2

Complaint

Exhibit C

Exh. C, p. 1 of 1

Complaint

Exhibit D

Complaint

Exhibit E


TRENDnet
2-Way Audio
Internet Camera Server
TV-IP212
Features
Hardware
- Built-in USB port allows you to store still images directly onto a USB flash or hard drive*
- Supports TCP/IP networking, SMTP Email, HTTP, Samba and other Internet related protocols
Monitoring
- High quality MPEG-4 and MJPEG video recording with up to 30 frames per second
- Hear and talk to people in your camera's viewing area through your computer
- Record streaming video to your computer or Network Storage
- Supports still image snapshot to FTP, Email and Flash drive
- Motion detection with Email notification
- Supports two adjustable motion detection windows with just-in-time snapshot
- Supports time stamp overlay
Ease of Use
- Quick Universal Plug and Play installation
- Free SecurView™ software: view and record up to 16 cameras simultaneously (Windows only)* *
* USB port supports up to a 500mA powered device with FAT16/32 format
* * Monitoring multiple cameras may require a high performance CPU
Package Contents
TV-IP212
Multi-language quick installation guide
Utility CD-ROM
Camera stand
1.8M (5.9ft) Cat. 5 Fast Ethernet cable
Power adapter (5VDC, 2.5A)

Exh. E, p. 2 of 2

Complaint

Exhibit F

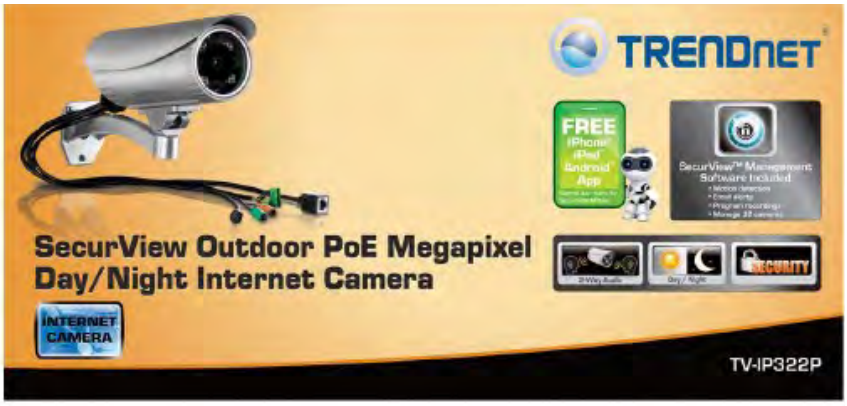
Exh. F, p. 1 of 1

Complaint

Exhibit G

Complaint

Exhibit H



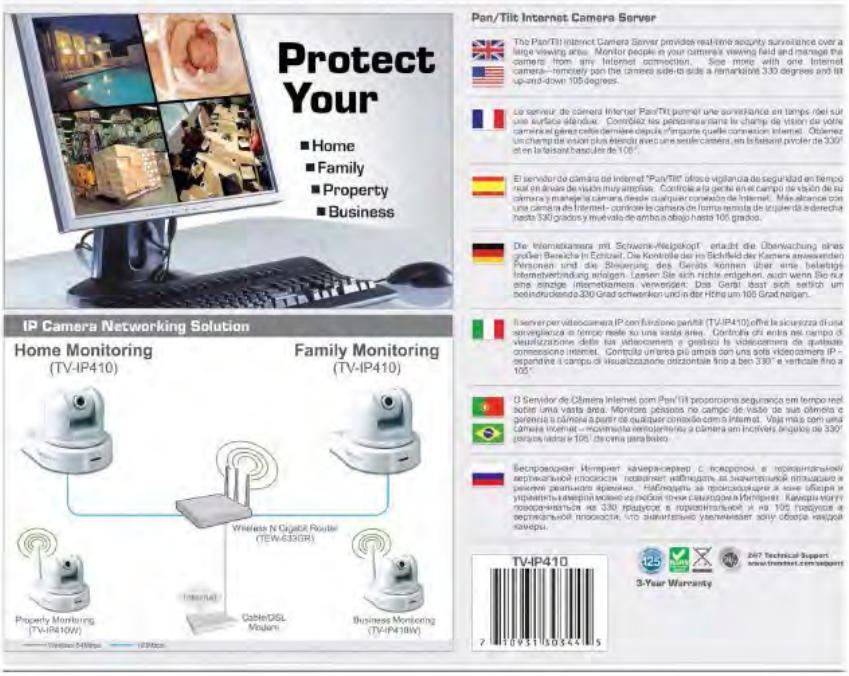
Exh. H, p. 1 of 1

Complaint

Exhibit I

Exh. I, p. 1 of 2

Complaint



Exh. I, p. 2 of 2

Complaint

Exhibit J

Complaint

Exhibit K

Exh. K, p. 1 of 1

Complaint

Exhibit L

Complaint

Exhibit M

Exh. M, p. 1 of 1

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 Commission Rule 2.34, 16 C.F.R. § 2.34, now in further conformity with the procedure prescribed in Commission Rule 2.34, the Commission hereby issues its complaint, makes the following jurisdictional findings, and enters the following Decision and Order ("Order"):

1. Respondent TRENDnet, Inc. ("TRENDnet") is a California corporation with its principal office or place of business at 20675 Manhattan Place, Torrance, California 90501.

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

ORDER

DEFINITIONS

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

A. "Affected Consumers" shall mean persons who purchased and installed one of the following Cameras with software last updated prior to February 7, 2012: TV-IP110 (Version A1.xR); TV-IP110W (Version A1.xR); TV-IP110WN (Version A1.xR); TV-IP110WN (Version V2.0R); TV-IP121W (Version A1.xR); TV-IP121WN (Version V1.0R); TV-IP121WN (Version V2.0R); TV-IP212 (Version A1.xR); TV-IP212W (Version A1.xR); TV-IP252P (Version B1.xR); TV-IP312 (Version A1.xR); TV-IP312W (Version A1.xr); TV-IP312WN (Version A1.xR); TV-IP322P (Version V1.0R); TV-IP410 (Version A1.XR); TV-IP410W (Version A1.xR); TV-IP410WN (Version V1.0R); TV-IP422 (Versions A1.xR/A2.xR); TV-IP422W (Versions A1.xR/A2.xR); TV-IP422WN (Version V1.0R); TV-VS1 (Version V1.0R); and TV-VS1P (Version V1.0R).

B. "App" or "Apps" shall mean any software application or related code developed, branded, or provided by respondent for a mobile device, including, but not limited to, any iPhone, iPod touch, iPad, BlackBerry, Android, Amazon Kindle, or Microsoft Windows device.

C. "Cameras" shall mean any Internet Protocol ("IP") camera, cloud camera, or other Internet-accessible camera advertised, developed, branded, or sold by respondent, or on behalf of respondent, or any corporation, subsidiary, division or affiliate owned or controlled by respondent that transmits, or allows for

the transmission of Live Feed Information over the Internet.

D. "Clear(ly) and prominent(ly)" shall mean:

1. In textual communications (*e.g.*, printed publications or words displayed on the screen of a computer or device), the required disclosures are of a type, size, and location sufficiently noticeable for an ordinary consumer to read and comprehend them, in print that contrasts highly with the background on which they appear;

2. In communications disseminated orally or through audible means (*e.g.*, radio or streaming audio), the required disclosures are delivered in a volume and cadence sufficient for an ordinary consumer to hear and comprehend them;

3. In communications disseminated through video means (*e.g.*, television or streaming video), the required disclosures are in writing in a form 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, and in the same language as the predominant language that is used in the communication; and

4. In all instances, the required disclosures (1) are presented in an understandable language and syntax; and (2) include nothing contrary to, inconsistent with, or in mitigation of any other statements or disclosures provided by respondent.

E. "Commerce" shall mean commerce among the several States or with foreign nations, or in any Territory of the United States or in the District of Columbia, or between any such Territory and another, or between any such Territory and any State or foreign nation, or between the District of Columbia and any State or

Territory or foreign nation, as defined in Section 4 of the Federal Trade Commission Act, 15 U.S.C. § 44.

F. "Covered Device" shall mean: (1) any Internet-accessible electronic product or device, including but not limited to "Cameras," advertised, developed, branded, or sold by respondent, or on behalf of respondent, or any corporation, subsidiary, division or affiliate owned or controlled by respondent that transmits or allows for the transmission of Covered Information over the Internet; and (2) any App or software advertised, developed, branded, or provided by respondent or any corporation, subsidiary, division or affiliate owned or controlled by respondent used to operate, manage, access, or view the product or device.

G. "Covered Device Functionality" shall mean any capability of a Covered Device to capture, access, store, or transmit Covered Information.

H. "Covered Information" shall mean individually-identifiable information from or about an individual consumer input into, stored on, captured with, accessed, or transmitted through a Covered Device, including but not limited to: (a) a first or last name; (b) a home or other physical address, including street name and name of city or town; (c) an email address or other online contact information, such as a user identifier or screen name; (d) photos; (e) videos; (f) pre-recorded and live-streaming audio; (g) an IP address, User ID or other persistent identifier; or (h) an authentication credential, such as a username or password.

I. "Live Feed Information" shall mean video, audio, or audiovisual data.

J. Unless otherwise specified, "respondent" shall mean TRENDnet, Inc., and its successors and assigns.

I.

IT IS ORDERED that respondent and its officers, agents, representatives, and employees, directly or through any corporation, subsidiary, division, website, other device, or an affiliate owned or controlled by respondent, in or affecting commerce, shall not misrepresent in any manner, expressly or by implication:

A. The extent to which respondent or its products or services maintain and protect:

1. The security of Covered Device Functionality;

2. The security, privacy, confidentiality, or integrity of any Covered Information; and

B. The extent to which a consumer can control the security of any Covered Information input into, stored on, captured with, accessed, or transmitted by a Covered Device.

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 that could result in unauthorized access to or use of Covered Device Functionality, 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, development, and testing; 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 but not limited to reasonable and appropriate software security testing techniques, such as: (1) vulnerability and penetration testing; (2) security architecture reviews; (3) code reviews; and (4) other reasonable and appropriate assessments, audits, reviews, or other tests to identify potential security failures and verify that access to Covered Information is restricted consistent with a user's security settings;

F. Regular testing or monitoring of the effectiveness of the safeguards' key controls, systems, and procedures;

G. 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 establish and implement, and thereafter maintain, appropriate safeguards consistent with this Order; and

H. The evaluation and adjustment of the security program in light of the results of the testing and monitoring required by Subpart F, any material changes to the 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.

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 Secure Software Lifecycle Professional (CSSLP) with experience programming secure Covered Devices or other similar Internet-accessible consumer-grade devices; or as a Certified Information System Security Professional (CISSP) with professional experience in the Software Development Security domain and in programming secure Covered Devices or other similar Internet-accessible consumer-grade devices; or a similarly qualified person or organization; 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 TRENDnet, Inc.*, FTC File No. 1223090, Docket No. C-4426. *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:

A. Notify Affected Consumers, clearly and prominently, that their Cameras had a flaw that allowed third parties to access their Live Feed Information without inputting authentication credentials, despite their security setting choices; and provide instructions on how to remove this flaw. Notification shall include, but not be limited to, each of the following means:

1. On or before ten (10) 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 notice on its website;

2. On or before ten (10) 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 a Camera; and

3. On or before ten (10) 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 register, or who have registered, their Camera with respondent; and

B. Provide prompt and free support with clear and prominent contact information to help consumers update and/or uninstall a Camera. For two (2) years after the date of service of this Order, this support shall include toll-free, telephonic and electronic mail support.

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 five (5) years after the date of preparation of each Assessment required under Part III of this Order, all materials relied upon to prepare the Assessment, whether prepared by or on behalf of 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 Part III of this Order, for the compliance period covered by such Assessment;

B. Unless covered by V.A, for a period of five (5) years from the date of preparation or dissemination, whichever is later, all other documents relating to compliance with this Order, including but not limited to:

1. All advertisements, promotional materials, installation and user guides, and packaging 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 (1) current and future subsidiaries, (2) current and future principals, officers, directors, and managers, (3) current and future employees, agents, and representatives having responsibilities relating to the subject matter of this Order, and (4) current and future manufacturers and service providers of the Covered Products. Respondent shall deliver this Order to such current subsidiaries, personnel, manufacturers, and service providers within thirty (30) days after service of this Order, and to such future subsidiaries, personnel, manufacturers, and service providers 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 VII, delivery shall be at

least ten (10) days prior to the change in structure. Respondent must secure a signed and dated statement acknowledging receipt of this Order, within thirty (30) days of delivery, from all persons receiving a copy of the Order pursuant to this section.

VII.

IT IS FURTHER ORDERED that respondent shall notify the Commission at least thirty (30) days prior to any change 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 TRENDnet, Inc.*, FTC File No. 1223090, Docket No. C-4426. *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 January 16, 2034, or twenty (20) years from the most recent date that the United States or the Commission files a complaint (with or without an accompanying consent decree) in federal court alleging any violation of the Order, whichever comes later; provided, however, that the filing of such a complaint will not affect the duration of:

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

B. This Order's application to any respondent that is not named as a defendant in such complaint; and

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

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

By the Commission.

ANALYSIS OF CONSENT ORDER TO AID PUBLIC COMMENT

The Federal Trade Commission has accepted, subject to final approval, an agreement containing a consent order applicable to TRENDnet, Inc. ("TRENDnet").

Analysis to Aid Public Comment

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

TRENDnet is a California corporation that among other things, sells networking devices, such as routers, modems, and Internet Protocol ("IP") security cameras that allow users to conduct remote surveillance of their homes and businesses via the Internet. In many instances, TRENDnet markets its IP cameras under the trade name "SecurView," and tells consumers they may use the cameras to monitor "babies at home, patients in the hospital, offices and banks, and more." By default, these IP cameras are subject to security settings, such as a requirement to enter a user name and password ("login credentials") in order to access the live video and audio feeds ("live feeds") over the Internet. On approximately January 10, 2012, a hacker discovered a flaw in the IP cameras that allowed access to these live feeds without entering login credentials, resulting in hundreds of previously private live feeds being made public.

The Commission's complaint alleges that TRENDnet violated Section 5(a) of the FTC Act by falsely representing that it had taken reasonable steps to ensure that its IP cameras and mobile apps are a secure means to monitor private areas of a consumer's home or workplace. The complaint also alleges that TRENDnet misrepresented that it had taken reasonable steps to ensure that a user's security settings on its devices would be honored. Finally, the Commission's complaint alleges that TRENDnet engaged in a number of practices that, taken together, failed to provide reasonable security to prevent unauthorized access to personal information, namely the live feeds from the IP cameras. Among other things, TRENDnet:

(1) transmitted user login credentials in clear, readable text over the Internet, despite the existence of free code libraries (i.e., repositories of programming language that can be integrated by third parties), publicly available since

at least 2008, that would have enabled respondent to secure such transmissions;

(2) stored user login credentials in clear, readable text on a user's mobile device, despite the existence of free software, publicly available since 2008, that would have enabled respondent to secure such stored credentials;

(3) failed to implement a process to actively monitor security vulnerability reports from third-party researchers, academics, or other members of the public, despite the existence of free tools to conduct such monitoring, thereby delaying the opportunity to correct discovered vulnerabilities or respond to incidents;

(4) failed to employ reasonable and appropriate security in the design and testing of the software that it provided consumers to install, operate, and access its IP cameras. Among other things, TRENDnet, either directly or through its service providers, failed to:

a) perform security review and testing of the software at key points, such as upon the release of the IP camera or upon the release of software to install, operate, or access the IP camera, including measures such as:

i. a security architecture review to evaluate the effectiveness of the software's security infrastructure;

ii. vulnerability and penetration testing of the software, such as by inputting invalid, unanticipated, or random data to the software;

iii. reasonable and appropriate code review and testing of the software to verify that access to data is restricted consistent with a user's privacy and security settings; and

b) implement reasonable guidance or training for any employees responsible for the testing, designing, and

reviewing the security of its IP cameras and related software.

The complaint further alleges that, due to these failures, TRENDnet subjected users to a significant risk that their live feeds would be compromised, thereby causing significant injury to consumers. Moreover, the complaint alleges that affected consumers include not only those consumers who maintained login credentials for their cameras, but also unwitting third parties who were present in locations under surveillance by the cameras. The exposure of personal information through TRENDnet's IP cameras increases the likelihood that consumers or their property will be targeted for theft or other criminal activity, increases the likelihood that consumers' personal activities or the activities of their young children or other family members will be observed and recorded by strangers over the Internet, impairs consumers' peaceful enjoyment of their homes, increases consumers' susceptibility to physical tracking or stalking, and reduces consumers' ability to control the dissemination of personal or proprietary information (e.g., intimate video and audio streams or images from business properties). Indeed, consumers had little, if any, reason to know that their information was at risk, particularly if those consumers maintained login credentials for their cameras or were merely unwitting third parties present in locations where the cameras were used.

The proposed order contains provisions designed to prevent TRENDnet from engaging in the future in practices similar to those alleged in the complaint.

Part I of the proposed order prohibits TRENDnet from misrepresenting (1) the extent to which TRENDnet or its products or services maintain and protect the security of covered device functionality or the security, privacy, confidentiality, or integrity of any covered information; and (2) the extent to which a consumer can control the security of any covered information input into, stored on, captured with, accessed, or transmitted by a covered device.

Part II of the proposed order requires TRENDnet to establish and implement, and thereafter maintain, a comprehensive security program to (1) address security risks that could result in

unauthorized access to or use of the functions of 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 TRENDnet'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 TRENDnet to:

(1) designate an employee or employees to coordinate and be accountable for the security program;

(2) 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;

(3) 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 TRENDnet'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;

(4) consider risks in each area of relevant operation, including but not limited to (a) employee training and management; (b) product design, development and research; (c) secure software design, development, and testing; and (d) review, assessment, and response to third-party security vulnerability reports;

(5) design and implement reasonable safeguards to control the risks identified through risk assessments, including but not limited to reasonable and appropriate software security testing techniques, such as: (a) vulnerability and penetration testing; (b) security architecture reviews; (c)

code reviews; and (d) other reasonable and appropriate assessments, audits, reviews, or other tests to identify potential security failures and verify that access to covered information is restricted consistent with a user's security settings;

(6) regularly test or monitor the effectiveness of the safeguards' key controls, systems, and procedures;

(7) 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 establish and implement, and thereafter maintain, appropriate safeguards; and

(8) evaluate and adjust its information security program in light of the results of testing and monitoring, any material changes to TRENDnet'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.

Part III of the proposed order requires TRENDnet 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.

Part IV of the proposed order requires TRENDnet to notify consumers whose cameras were affected by the breach that their IP cameras had a flaw that allowed third parties to access their live feeds without inputting login credentials; and provide instructions to such consumers on how to remove this flaw. In addition, TRENDnet must provide prompt and free support with clear and prominent contact information to help consumers update and/or uninstall their IP cameras. TRENDnet must provide this

support via a toll-free, telephonic number and via electronic mail for two (2) years.

Parts V through IX of the proposed order are reporting and compliance provisions. Part V requires TRENDnet to retain documents relating to its compliance with the order for a five-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 TRENDnet 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.

Complaint

IN THE MATTER OF

AB ACQUISITION, LLC

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

Docket No. C-4424; File No. 131 0227
Complaint, December 23, 2013 – Decision, January 28, 2014

This consent order addresses the acquisition by AB Acquisition, LLC of United Supermarkets, L.L.C. The complaint alleges that the proposed merger, if consummated, would violate Section 7 of the Clayton Act and Section 5 of the Federal Trade Commission Act by removing an actual, direct, and substantial supermarket competitor in Amarillo and Wichita Falls, Texas. The consent order requires Respondent to divest its supermarkets in the two affected markets.

Participants

For the *Commission*: *Chester Choi* and *Jeremy Morrison.*

For the *Respondents*: *Michael Cutini* and *Michael E. Swartz, Schulte Roth & Zabel LLP; John Goheen* and *Matthew J. Reilly, Simpson Thacher & Bartlett LLP*.

COMPLAINT

Pursuant to the Clayton Act and the Federal Trade Commission Act ("FTC Act"), and by virtue of the authority vested in it by said Acts, the Federal Trade Commission ("Commission"), having reason to believe that AB Acquisition, LLC, a limited liability company, subject to the jurisdiction of the Commission, entered into a merger agreement with United Supermarkets, L.L.C. ("United"), a limited liability company, subject to the jurisdiction of the Commission, in violation of Section 7 of the Clayton Act, as amended, 15 U.S.C. § 18, and Section 5 of the FTC Act, as amended, 15 U.S.C. § 45, and it appearing to the Commission that a proceeding in respect thereof would be in the public interest, hereby issues its Complaint, stating its charges as follows:

I. RESPONDENT

1. Respondent AB Acquisition, 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 corporate headquarters and principal place of business located at 250 Parkcenter Boulevard, Boise, Idaho.

2. Respondent, through its wholly owned indirect subsidiary, Albertson's LLC ("Albertson's"), owns and operates 606 supermarkets in the Western and Southern United States. In Texas, Respondent owns and operates 72 supermarkets under the Albertsons banner--ten of which are located in the West Texas zone, which consists of North and West Texas.

II. THE ACQUIRED COMPANY

3. United is a limited liability company organized, existing, and doing business under and by virtue of the laws of Texas, with its office and principal place of business located at 7830 Orlando Avenue, Lubbock, Texas 79423.

4. United owns and operates 51 supermarkets in North and West Texas. United operates these supermarkets under three banners--United Supermarkets, Market Street, and Amigos. United Supermarkets is a traditional supermarket banner. Market Street offers everyday grocery needs, as well as gourmet and specialty items, whole health products, and prepared food. Amigos is operated as a specialty store with a focus on traditional and authentic items targeted to Hispanic shoppers.

III. JURISDICTION

5. Respondent is, and at all times relevant herein has been, engaged in commerce, or in activities affecting commerce, within the meaning of Section 1 of the Clayton Act, 15 U.S.C. § 12, and Section 4 of the FTC Act, 15 U.S.C. § 44.

6. United is, and at all times relevant herein has been, engaged in commerce, or in activities affecting commerce, within the meaning of Section 1 of the Clayton Act, 15 U.S.C. § 12, and Section 4 of the FTC Act, 15 U.S.C. § 44.

IV. THE PROPOSED MERGER

7. On September 9, 2013, Respondent and United entered into a merger agreement pursuant to which Respondent would acquire 100% of United's equity for a purchase price of approximately $385 million ("the Proposed Merger").

8. The Proposed Merger would combine two of the only three retail sellers of food and other grocery products in full-line supermarkets in Amarillo and Wichita Falls, Texas. Respondent and United both own and operate supermarkets in these areas and compete and promote their businesses in these areas.

V. THE RELEVANT PRODUCT MARKET

9. The relevant line of commerce in which to analyze the acquisition is the retail sale of food and other grocery products in supermarkets.

10. For purposes of this complaint, the term "supermarket" means any full-line retail grocery store that enables customers to purchase substantially all of their weekly food and grocery shopping requirements in a single shopping visit with substantial offerings in each of the following product categories: bread and baked goods; dairy products; refrigerated food and beverage products; frozen food and beverage products; fresh and prepared meats and poultry; fresh fruits and vegetables; shelf-stable food and beverage products, including canned, jarred, bottled, boxed and other types of packaged products; staple foodstuffs, which may include salt, sugar, flour, sauces, spices, coffee, tea and other staples; other grocery products, including nonfood items such as soaps, detergents, paper goods, other household products, and health and beauty aids; pharmaceutical products and pharmacy services (where provided); and, to the extent permitted by law, wine, beer and/or distilled spirits.

11. Supermarkets provide a distinct set of products and services and offer consumers convenient one-stop shopping for food and grocery products. Supermarkets typically carry more than 10,000 different items, typically referred to as stock-keeping units or SKUs, as well as a deep inventory of those items. In order to accommodate the large number of food and non-food

products necessary for one-stop shopping, supermarkets are large stores that typically have at least 10,000 square feet of selling space.

12. Supermarkets compete primarily with other supermarkets that provide one-stop shopping opportunities for food and grocery products. Supermarkets base their food and grocery prices primarily on the prices of food and grocery products sold at other nearby competing supermarkets. Supermarkets do not regularly conduct price checks of food and grocery products sold at other types of stores and do not typically set or change their food and grocery prices in response to prices at other types of stores.

13. Although retail stores other than supermarkets also sell food and grocery products--including convenience stores, specialty food stores, limited assortment stores, hard-discounters, and club stores--these types of stores do not, individually or collectively, provide sufficient competition to effectively constrain prices at supermarkets. These retail stores do not offer a supermarket's distinct set of products and services that provide consumers with the convenience of one-stop shopping for food and grocery products. The vast majority of consumers shopping for food and grocery products at supermarkets are not likely to start shopping elsewhere, or significantly increase grocery purchases elsewhere, in response to a small but significant price increase by supermarkets.

VI. THE RELEVANT GEOGRAPHIC MARKET

14. Customers shopping at supermarkets are motivated by convenience and, as a result, competition for supermarkets is local in nature. Generally, the overwhelming majority of consumers' grocery shopping occurs at stores located very close to where they live.

15. Respondent and United operate supermarkets under the Albertsons, United Supermarkets, and Market Street banners within approximately two to five miles of each other in both the western half of Amarillo, Texas and the southwest region of Wichita Falls, Texas. The primary trade area of Respondent's and United's banners in both Amarillo and Wichita Falls overlap significantly.

16. The relevant geographic markets in which to assess the competitive effects of the acquisition are localized areas within Amarillo and Wichita Falls. Specifically, in Amarillo, the relevant geographic market is the area encompassing the area from the western city limit to the railroad tracks that run parallel to, and are located to the east of, the Interstate 40 and the U.S. Route 87/287 corridor ("West Amarillo"). In Wichita Falls, the relevant geographic market is the area within the city limits that runs south of U.S. Route 277 and west of U.S. Route 281 ("Southwest Wichita Falls"). A hypothetical monopolist controlling all supermarkets in these areas could profitably raise prices by a small but significant amount.

VII. MARKET CONCENTRATION

17. The relevant markets of West Amarillo and Southwest Wichita Falls, Texas already are highly concentrated, and the Proposed Merger will substantially increase concentration, whether measured by the Herfindahl Hirschman Index ("HHI") or by the number of competitively significant firms remaining in the markets post-acquisition.

18. In West Amarillo, the post-merger HHI in the relevant geographic market would increase 503 points from 4501 to 5004, when measured by revenues. This market concentration level gives rise to a presumption that the Proposed Merger is unlawful in the West Amarillo geographic market.

19. In Southwest Wichita Falls, the post-merger HHI in the relevant geographic market would increase 811 points from 4193 to 5004. This market concentration level, once again, gives rise to a presumption that the acquisition is unlawful in the Southwest Wichita Falls geographic market.

20. The Proposed Merger reduces the number of supermarket competitors in the relevant geographic markets from three to two in both West Amarillo and Southwest Wichita Falls.

VIII. ENTRY CONDITIONS

21. Entry into the relevant markets would not be timely, likely, or sufficient in magnitude to prevent or deter the likely

anticompetitive effects of the Proposed Merger. Significant entry barriers include the time and costs associated with conducting necessary market research, selecting an appropriate location for a supermarket, obtaining necessary permits and approvals, constructing a new supermarket or converting an existing structure to a supermarket, and generating sufficient sales to have a meaningful impact on the market.

IX. EFFECTS OF THE ACQUISITION

22. The Proposed Merger, if consummated, is likely to substantially lessen competition for the retail sale of food and other grocery products in supermarkets in the relevant geographic markets identified in Paragraph 16 in the following ways, among others:

a. by eliminating direct and substantial competition between Respondent and United; and

b. by increasing the likelihood that Respondent will unilaterally exercise market power.

23. The ultimate effect of the Proposed Merger would be to increase the likelihood that the prices of food, groceries, or services will increase, and that the quality and selection of food, groceries, or services will decrease, in the relevant sections of the country.

X. VIOLATIONS CHARGED

24. The agreement described in Paragraph 7 constitutes a violation of Section 5 of the FTC Act, as amended, 15 U.S.C. § 45, and the acquisition, if consummated, would violate Section 7 of the Clayton Act, as amended, 15 U.S.C. § 18, and Section 5 of the FTC Act, as amended, 15 U.S.C. § 45.

WHEREFORE, THE PREMISES CONSIDERED, Federal Trade Commission on this twenty-third day of December 2013, 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 AB Acquisition, LLC ("Albertson's" or "Respondent") of United Supermarkets L.L.C. ("United"), and Respondent 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 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 as set forth in the aforesaid draft Complaint, a statement that the signing of said Consent Agreement is for settlement purposes only and does not constitute an admission by Respondent that the law has been violated as alleged in such Complaint, or that the facts as alleged in such Complaint, other than jurisdictional facts, are true, and waivers and other provisions as required by the Commission's Rules; and

The Commission, having thereafter considered the matter and having determined that it had reason to believe that the Respondent has violated the said Acts, and that a Complaint should issue stating its charges in that respect, and having determined to accept the executed Consent Agreement and to place the Consent Agreement on the public record for a period of thirty (30) days for the receipt and consideration of public comments, the Commission hereby issues its Complaint, makes the following jurisdictional findings, and issues this Order to Maintain Assets:

1. Respondent AB Acquisition, LLC is a company organized, existing, and doing business under and by virtue of the laws of the State of Delaware, with its company headquarters and principal place of business located at 250 Parkcenter Boulevard, Boise, Idaho;

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.

I.

IT IS ORDERED that, as used in this Order to Maintain Assets, the definitions used in the Consent Agreement and the Decision and Order shall apply. In addition, "Supermarket To Be Maintained" means any Supermarket business identified as part of the Assets To Be Divested under the Decision and Order.

II.

IT IS FURTHER ORDERED that:

A. Respondent shall maintain the viability, marketability, and competitiveness of the Assets To Be Divested, and shall not cause the wasting or deterioration of the Assets To Be Divested, nor shall it cause the Assets To Be Divested to be operated in a manner inconsistent with applicable laws, nor shall it sell, transfer, encumber or otherwise impair the viability, marketability or competitiveness of the Assets To Be Divested. Respondent shall conduct or cause to be conducted the business of the Assets To Be Divested in the regular and ordinary course and in accordance with past practice (including regular repair and maintenance efforts) and shall use best efforts to preserve the existing relationships with suppliers, customers, employees, and others having business relations with the Assets To Be Divested in the ordinary course of business and in accordance with past practice.

B. Respondent shall not terminate the operation of any Supermarket To Be Maintained. Respondent shall continue to maintain the inventory of each Supermarket To Be Maintained at levels and selections consistent with those maintained by Respondent at such Supermarket in the ordinary course of business consistent with past practice. Respondent shall use best

efforts to keep the organization and properties of each Supermarket To Be Maintained intact, including current business operations, physical facilities, working conditions, staffing levels, and a work force of equivalent size, training, and expertise associated with the Supermarket To Be Maintained. Included in the above obligations, Respondent shall, without limitation:

1. Maintain all operations and departments, and not reduce hours, at each Supermarket To Be Maintained;

2. Not transfer inventory from any Supermarket To Be Maintained, other than in the ordinary course of business consistent with past practice;

3. Make any payment required to be paid under any contract or lease when due, and otherwise pay all liabilities and satisfy all obligations associated with each Supermarket To Be Maintained, in each case in a manner consistent with past practice;

4. Maintain the books and records of each Supermarket To Be Maintained;

5. Not display any signs or conduct any advertising (e.g., direct mailing, point-of-purchase coupons) that indicates that Respondent is moving its operations at a Supermarket To Be Maintained to another location, or that indicates a Supermarket To Be Maintained will close;

6. Not conduct any "going out of business," "close-out," "liquidation" or similar sales or promotions at or relating to any Supermarket To Be Maintained; and

7. Not change or modify in any material respect the existing advertising practices, programs and policies for each Supermarket To Be Maintained, other than changes in the ordinary course of

business consistent with past practice for Supermarkets of the Respondent not being closed or relocated.

III.

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 the Respondent, including but not limited to assignment and the creation or dissolution of subsidiaries, if such change might affect compliance obligations arising out of this Order to Maintain Assets.

IV.

IT IS FURTHER ORDERED that, for the purpose of determining or securing compliance with this Order to Maintain Assets, and subject to any legally recognized privilege, and upon written request with reasonable notice to Respondent made to its principal United States offices, 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 to Maintain Assets, which copying services shall be provided by Respondents 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 any such matters.

V.

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

A. Three (3) business days after the Commission withdraws its acceptance of the Consent Agreement pursuant to the provisions of Commission Rule 2.34, 16 C.F.R. § 2.34; or

B. With respect to each Supermarket To Be Maintained, the day after Respondent's (or a Divestiture Trustee's) completion of the divestiture of Assets To Be Divested related to such Supermarket, as described in and required by the Decision and Order.

Provided, however, that if the Commission, pursuant to Paragraph II.A. of the Decision and Order, requires the Respondent to rescind any or all of the divestitures contemplated by any Purchaser Agreement, then, upon rescission, the requirements of this Order to Maintain Assets shall again be in effect with respect to the relevant Assets To Be Divested until the day after Respondent's (or a Divestiture Trustee's) completion of the divestiture(s) of the relevant Assets To Be Divested, as described in and required by the Decision and Order.

By the Commission.

DECISION AND ORDER
[Public Record Version]

The Federal Trade Commission ("Commission") having initiated an investigation of the proposed acquisition by AB Acquisition, LLC ("Albertson's" or "Respondent") of United

Supermarkets L.L.C. ("United"), 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 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 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 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 AB Acquisition, LLC is a corporation organized, existing, and doing business under and by virtue of the laws of the State of Delaware, with its corporate headquarters and principal place of business located at 250 Parkcenter Boulevard, Boise, Idaho.

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

ORDER

I.

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

A. "Albertson's" or "Respondent" means Respondent AB Acquisition, LLC, its directors, officers, employees, agents, representatives, successors, and assigns; its joint ventures, subsidiaries, divisions, groups, and affiliates controlled by AB Acquisition, LLC (including Albertson's LLC and New Albertson's, Inc.) and the respective directors, officers, employees, agents, representatives, successors, and assigns of each. Following the Acquisition, "Albertson's" or "Respondent" also includes United.

B. "United" means United Supermarkets, L.L.C., a company organized, existing and doing business under and by virtue of the laws of the State of Texas, with its headquarters and principal place of business located at 7830 Orlando Avenue, Lubbock, Texas, 79423.

C. "Acquisition" means Albertson's proposed acquisition of United pursuant to the Agreement and Plan of Merger dated as of September 9, 2013.

D. "Assets To Be Divested" means the Amarillo Supermarket Assets and the Wichita Falls Supermarket Assets.

E. "Amarillo Supermarket Assets" means the Albertson's Supermarket No. 4203, located at 2200 South Bell Street in Amarillo, Texas, and all rights, title, and interest in and to all assets, tangible and intangible, relating to, used in, and/or reserved for use in, the Supermarket business conducted at that location, including but not limited to all properties, leases, leasehold interests, equipment and fixtures, books and records, government approvals and permits (to the extent transferable), telephone and fax numbers, and

goodwill. At the Acquirer's option, the Amarillo Supermarket Assets shall also include any or all inventory as of the Divestiture Date.

Provided, however, that Amarillo Supermarket Assets shall not include those assets consisting of or pertaining to any of the Respondent's trademarks, trade dress, service marks or trade names, *except* with respect to any purchased inventory (including private label inventory) or as may be allowed pursuant to any Transition Services Agreement.

F. "Wichita Falls Supermarket Assets" means the Albertson's Supermarket No. 4235, located at 2720 Southwest Parkway, Wichita Falls, Texas, and all rights, title, and interest in and to all assets, tangible and intangible, relating to, used in, and/or reserved for use in, the Supermarket business conducted at that location, including but not limited to all properties, leases, leasehold interests, equipment and fixtures, books and records, government approvals and permits (to the extent transferable), telephone and fax numbers, and goodwill. At the Acquirer's option, the Wichita Falls Supermarket Assets shall also include any or all inventory as of the Divestiture Date.

Provided, however, that Wichita Falls Supermarket Assets shall not include those assets consisting of or pertaining to any of the Respondent's trademarks, trade dress, service marks or trade names, *except* with respect to any purchased inventory (including private label inventory) or as may be allowed pursuant to any Transition Services Agreement.

G. "Acquirer" means any entity approved by the Commission to acquire any or all of the Assets To Be Divested pursuant to this Order.

H. "Divestiture Agreement" means any agreement between the Respondent and an Acquirer (or a Divestiture Trustee appointed pursuant to Paragraph III of this Order and an Acquirer) and all amendments,

exhibits, attachments, agreements, and schedules thereto, related to any of the Assets To Be Divested that have been approved by the Commission to accomplish the requirements of this Order. The term "Divestiture Agreement" includes, as appropriate, the Lawrence Brothers Divestiture Agreement.

I. "Divestiture Date" means the closing date of the respective divestitures required by this Order.

J. "Divestiture Trustee" means any person or entity appointed by the Commission pursuant to Paragraph III of the Order to act as a trustee in this matter.

K. "Proposed Acquirer" means any proposed acquirer of any of the Assets To Be Divested submitted to the Commission for its approval under this Order; "Proposed Acquirer" includes, as appropriate, Lawrence Brothers.

L. "Lawrence Brothers" means MAL Enterprises, Inc., a Supermarket operator organized, existing and doing business under and by virtue of the laws of the State of Texas, with its offices and principle place of business located at 300 Hailey Street, Sweetwater, Texas.

M. "Lawrence Brothers Divestiture Agreement" means the asset purchase agreement entered into on December 12, 2013, by and between Albertson's and Lawrence Brothers, attached as non-public Appendix I, for the divestiture by Respondent of the Assets To Be Divested.

N. "Relevant Areas" means Randall, Potter and Wichita Counties in Texas.

O. "Supermarket" means any full-line retail grocery store that enables customers to purchase substantially all of their weekly food and grocery shopping requirements in a single shopping visit with substantial offerings in each of the following product categories: bread and baked goods; dairy products; refrigerated food and

beverage products; frozen food and beverage products; fresh and prepared meats and poultry; fresh fruits and vegetables; shelf-stable food and beverage products, including canned, jarred, bottled, boxed and other types of packaged products; staple foodstuffs, which may include salt, sugar, flour, sauces, spices, coffee, tea and other staples; other grocery products, including nonfood items such as soaps, detergents, paper goods, other household products, and health and beauty aids; pharmaceutical products and pharmacy services (where provided); and, to the extent permitted by law, wine, beer and/or distilled spirits.

P. "Third Party Consents" means all consents from any person other than the Respondent, including all landlords, that are necessary to effect the complete transfer to the Acquirer(s) of the Assets To Be Divested.

Q. "Transition Services Agreement" means an agreement that receives the prior approval of the Commission between Respondent and an Acquirer of any of the assets divested under this Order to provide, at the option of each Acquirer, any services (or training for an Acquirer to provide services for itself) necessary to transfer the divested assets to the Acquirer in a manner consistent with the purposes of this Order.

II.

IT IS FURTHER ORDERED that:

A. Respondent shall divest, by (a) 10 days after the date on which the Acquisition is consummated, or (b) January 13, 2014, whichever is later, absolutely and in good faith, the Assets To Be Divested as ongoing Supermarket businesses to Lawrence Brothers, pursuant to and in accordance with the Lawrence Brothers Divestiture Agreement;

Provided, however, that in cases in which books or records included in the Assets To Be Divested contain

information (a) that relates both to the Assets To Be Divested and to other retained business of Respondent or (b) such that Respondent has a legal obligation to retain the original copies, then Respondent shall be required to provide only copies or relevant excerpts of the materials containing such information. In instances where such copies are provided, the Respondent shall provide access to original materials under circumstances where copies of materials are insufficient for regulatory or evidentiary purposes.

Provided, further, that if, prior to the date this Order becomes final, Respondent has divested the Assets To Be Divested to Lawrence Brothers pursuant to the Lawrence Brothers Divestiture Agreement and if, at the time the Commission determines to make this Order final, the Commission notifies Respondent that:

1. Lawrence Brothers is not an acceptable Acquirer, then Respondent shall, within five days of notification by the Commission, rescind such transaction with Lawrence Brothers, and shall divest such assets as ongoing Supermarket businesses, absolutely and in good faith, at no minimum price, to an Acquirer and in a manner that receives the prior approval of the Commission, within 90 days of the date the Commission notified Respondent that Lawrence Brothers is not an acceptable Acquirer; or

2. The manner in which the divestiture was accomplished is not acceptable, the Commission may direct the Respondent, or appoint a Divestiture Trustee pursuant to Paragraph III of this Order, to effect such modifications to the manner of divesting those assets to Lawrence Brothers (including, but not limited to, entering into additional agreements or arrangements, or modifying the Lawrence Brothers Divestiture Agreement) as may be necessary to satisfy the requirements of this Order.

B. Respondent shall obtain at their sole expense all required Third Party Consents relating to the divestiture of all Assets To Be Divested prior to the applicable Divestiture Date.

C. All Divestiture Agreements approved by the Commission:

1. Shall be deemed incorporated by reference into this Order, and any failure by Respondent to comply with the terms of any such Divestiture Agreement shall constitute a violation of this Order.

2. Shall not limit or contradict, or be construed to limit or contradict, the terms of this Order, it being understood that nothing in this Order shall be construed to reduce any rights or benefits of any Acquirer or to reduce any obligation of Respondent under such agreement. If any term of any Divestiture Agreement varies from the terms of this Order ("Order Term"), then to the extent that Respondent cannot fully comply with both terms, the Order Term shall determine Respondent's obligations under this Order.

D. At the option of the Acquirer of any Assets To Be Divested, and subject to the prior approval of the Commission, Respondent shall enter into a Transition Services Agreement for a term extending up to 180 days following the relevant Divestiture Date. The services subject to the Transition Services Agreement shall be provided at no more than Respondent's direct costs and may include, but are not limited to, payroll, employee benefits, accounting, IT systems, distribution, warehousing, use of trademarks or trade names for transitional purposes, and other logistical and administrative support.

E. Pending divestiture of any of the Assets To Be Divested, Respondent shall:

1. Take such actions as are necessary to maintain the full economic viability, marketability, and competitiveness of the Assets To Be Divested, to minimize any risk of loss of competitive potential for the Assets To Be Divested, and to prevent the destruction, removal, wasting, deterioration, or impairment of the Assets To Be Divested, except for ordinary wear and tear; and

2. Not sell, transfer, encumber, or otherwise impair the Assets To Be Divested (other than in the manner prescribed in this Decision and Order) nor take any action that lessens the full economic viability, marketability, or competitiveness of the Assets To Be Divested.

F. With respect to each Divestiture Agreement:

1. No later than fifteen (15) days after signing each Divestiture Agreement, Respondent shall provide an opportunity for the Proposed Acquirer to:

   a. Meet personally, and outside of the presence or hearing of any employee or agent of Respondent, with any one or more of the employees of the Assets To Be Divested pursuant to the Divestiture Agreement; and

   b. Make offers of employment to any one or more of the employees of the Assets To Be Divested pursuant to the Divestiture Agreement; and

2. Respondent shall: not interfere with the hiring or employing by the Acquirer of employees of the divested Supermarkets; remove any impediments within the control of Respondent that may deter those employees from accepting employment with such Acquirer (including, but not limited to, any non-compete or confidentiality provisions of employment or other contracts with Respondent that would affect the ability or incentive of those individuals to be employed by such Acquirer); and

not make any counteroffer to any employee who has an outstanding offer of employment from such Acquirer. This obligation shall continue for a period of one (1) year from the date of the divestiture of any of the Assets To Be Divested to an Acquirer.

G. The purpose of the divestitures is to ensure the continuation of the Assets To Be Divested as ongoing, viable enterprises engaged in the Supermarket business and to remedy the lessening of competition resulting from the Acquisition as alleged in the Commission's Complaint.

III.

IT IS FURTHER ORDERED that:

A. If Respondent has not divested all of the Assets To Be Divested as required by Paragraph II of this Order, the Commission may appoint a Divestiture Trustee to divest the remaining Assets To Be Divested in a manner that satisfies the requirements of this Order. In the event that the Commission or the Attorney General brings an action pursuant to § 5(l) of the Federal Trade Commission Act, 15 U.S.C. § 45(l), or any other statute enforced by the Commission, Respondent shall consent to the appointment of a Divestiture Trustee in such action. Neither the appointment of a Divestiture Trustee nor a decision not to appoint a Divestiture Trustee under this Paragraph shall preclude the Commission or the Attorney General from seeking civil penalties or any other relief available to it, including a court-appointed Divestiture Trustee, pursuant to § 5(l) of the Federal Trade Commission Act, or any other statute enforced by the Commission, for any failure by Respondent to comply with this Order.

B. If a Divestiture Trustee is appointed by the Commission or a court pursuant to this Order, Respondent shall consent to the following terms and

conditions regarding the Divestiture Trustee's powers, duties, authority, and responsibilities:

1. The Commission shall select the Divestiture Trustee, subject to the consent of Respondent, which consent shall not be unreasonably withheld. The Divestiture Trustee shall be a person with experience and expertise in acquisitions and divestitures. If Respondent has not opposed, in writing, including the reasons for opposing, the selection of any proposed Divestiture Trustee within ten (10) days after notice by the staff of the Commission to Respondent of the identity of any proposed Divestiture Trustee, Respondent shall be deemed to have consented to the selection of the proposed Divestiture Trustee.

2. Subject to the prior approval of the Commission, the Divestiture Trustee shall have the exclusive power and authority to sell, assign, grant, license, divest, transfer, contract, deliver, or otherwise convey the relevant assets or rights that are required to be sold, assigned, granted, licensed, divested, transferred, contracted, delivered, or otherwise conveyed by this Order.

3. Within ten (10) days after appointment of the Divestiture Trustee, Respondent shall execute a trust agreement that, subject to the prior approval of the Commission, transfers to the Divestiture Trustee all rights and powers necessary to permit the Divestiture Trustee to effect the relevant divestitures or transfers required by the Order.

4. The Divestiture Trustee shall have twelve (12) months from the date the Commission approves the trust agreement described in Paragraph III.B.3. to accomplish the divestiture(s), which shall be subject to the prior approval of the Commission. If, however, at the end of the twelve-month period, the Divestiture Trustee has submitted a plan of divestiture or believes that the divestiture(s) 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.

5. Subject to any demonstrated legally recognized privilege, the Divestiture Trustee shall have full and complete access to the personnel, books, records and facilities relating to the relevant assets that are required to be assigned, granted, licensed, divested, transferred, contracted, delivered, or otherwise conveyed by this Order or to any other relevant information, as the Divestiture Trustee may request. Respondent shall develop such financial or other information as the Divestiture Trustee may request and shall cooperate with the Divestiture Trustee. Respondent shall take no action to interfere with or impede the Divestiture Trustee's accomplishment of the divestiture(s). Any delays in divestiture caused by Respondent shall extend the time for divestiture under this Paragraph in an amount equal to the delay, as determined by the Commission or, for a court-appointed Divestiture Trustee, by the court.

6. The Divestiture Trustee shall use commercially reasonable best efforts to negotiate the most favorable price and terms available in each contract that is submitted to the Commission, subject to Respondent's absolute and unconditional obligation to divest expeditiously at no minimum price. The divestiture(s) 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 the Amarillo Supermarket Assets or for the Wichita Falls Supermarket Assets, and if the Commission determines to approve more than one such acquiring entity for either Supermarket, the Divestiture Trustee shall divest such Supermarket 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.

7. The Divestiture Trustee shall serve, without bond or other security, at the cost and expense of Respondent, on such reasonable and customary terms and conditions as the Commission or a court may set. The Divestiture Trustee shall have the authority to employ, at the cost and expense of Respondent, such consultants, accountants, attorneys, investment bankers, business brokers, appraisers, and other representatives and assistants as are necessary to carry out the Divestiture Trustee's duties and responsibilities. The Divestiture Trustee shall account for all monies derived from the divestiture(s) and all expenses incurred. After approval by the Commission and, in the case of a court-appointed Divestiture Trustee, by the court, of the account of the Divestiture Trustee, including fees for his or her services, all remaining monies shall be paid at the direction of the Respondent, and the Divestiture Trustee's power shall be terminated. The compensation of the Divestiture Trustee shall be based at least in significant part on a commission arrangement contingent on the divestiture of all of the relevant assets required to be divested by this Order.

8. Respondent shall indemnify the Divestiture Trustee and hold the Divestiture Trustee harmless against any losses, claims, damages, liabilities, or expenses arising out of, or in connection with, the performance of the Divestiture Trustee's duties, including all reasonable fees of counsel and other expenses incurred in connection with the preparation for, or defense of, any claim, whether or not resulting in any liability, except to the extent that such losses, claims, damages, liabilities, or expenses result from malsfeasance, gross

negligence, willful or wanton acts, or bad faith by the Divestiture Trustee.

9. If the Commission determines that the Divestiture Trustee has ceased to act or failed to act diligently, the Commission may appoint a substitute Divestiture Trustee in the same manner as provided in this Paragraph III.

10. The Commission or, in the case of a court-appointed trustee, the court, may on its own initiative or at the request of the Divestiture Trustee issue such additional orders or directions as may be necessary or appropriate to accomplish the divestiture(s) required by this Order.

11. The Divestiture Trustee shall have no obligation or authority to operate or maintain the relevant assets required to be divested by this Order.

12. The Divestiture Trustee shall report in writing to Respondent and the Commission every thirty (30) days concerning the Divestiture Trustee's efforts to accomplish the divestiture(s).

13. Respondent may require the Divestiture Trustee and each of the Divestiture Trustee's consultants, accountants, attorneys, and other representatives and assistants to sign a customary confidentiality agreement; *provided, however*, such agreement shall not restrict the Divestiture Trustee from providing any information to the Commission.

14. The Commission may, among other things, require the Divestiture Trustee and each of the Divestiture Trustee's consultants, accountants, attorneys, 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 and responsibilities.

IV.

IT IS FURTHER ORDERED that, for a period of ten (10) years commencing on the date this Order is issued, Respondent shall not, directly or indirectly, through subsidiaries, partnerships or otherwise, without providing advance written notification to the Commission:

A. Acquire any ownership or leasehold interest in any facility that has operated as a Supermarket within six (6) months prior to the date of such proposed acquisition in any of the Relevant Areas.

B. Acquire any stock, share capital, equity, or other interest in any entity that owns any interest in or operates any Supermarket, or owned any interest in or operated any Supermarket within six (6) months prior to such proposed acquisition, in any of the Relevant Areas.

Provided, however, that advance written notification shall not apply to the construction of new facilities by Respondent or the acquisition or leasing of a facility that has not operated as a Supermarket within six (6) months prior to Respondent's offer to purchase or lease such facility.

Said notification shall be given on the Notification and Report Form set forth in the Appendix to Part 803 of Title 16 of the Code of Federal Regulations as amended, and shall be prepared and transmitted in accordance with the requirements of that part, except that no filing fee will be required for any such notification, notification shall be filed with the Secretary of the Commission, notification need not be made to the United States Department of Justice, and notification is required only of Respondent and not of any other party to the transaction. Respondent shall provide the notification to the Commission at least thirty (30) days prior to consummating any such transaction (hereinafter referred to as the "first waiting period"). If, within the first waiting period,

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

V.

IT IS FURTHER ORDERED that:

A. Within thirty (30) days after the date this Order becomes final and every thirty (30) days thereafter until the Respondent has fully complied with the provisions of Paragraphs II and III of this Order, Respondent shall submit to the Commission verified written reports setting forth in detail the manner and form in which it intends to comply, is complying, and has complied with Paragraphs II and III of this Order. 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 Paragraphs II and III of this Order, including a description of all substantive contacts or negotiations for the divestitures and the identity of all parties contacted. Respondent shall include in its reports copies of all material written communications to and from such parties, all non-privileged internal memoranda, reports and recommendations concerning completing the obligations; and

B. One (1) year from the date this Order becomes final, annually for the next nine (9) years on the anniversary of the date this Order becomes final, and at other times as the Commission may require, Respondent shall file

verified written reports with the Commission setting forth in detail the manner and form in which it has complied and is complying with this Order.

VI.

IT IS FURTHER ORDERED that 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 the Respondent, including but not limited to, assignment and the creation or dissolution of subsidiaries, if such change might affect compliance obligations arising out of this Order.

VII.

IT IS FURTHER ORDERED that, for the purpose of determining or securing compliance with this Order, and subject to any legally recognized privilege, upon written request and upon five (5) days' notice to Respondent made to its principal United States office, 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 such Respondent at the request of the authorized representative(s) of the Commission and at the expense of Respondent; and

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

VIII.

IT IS FURTHER ORDERED that this Order shall terminate on January 28, 2024.

By the Commission.

APPENDIX I

Lawrence Brothers Divestiture Agreement

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

ANALYSIS OF CONSENT ORDER TO AID PUBLIC COMMENT

I. INTRODUCTION AND BACKGROUND

The Federal Trade Commission ("Commission") has accepted for public comment, subject to final approval, an Agreement Containing Consent Order ("Consent Order") from AB Acquisition, LLC ("Respondent"). The purpose of the proposed Consent Order is to remedy the anticompetitive effects that otherwise would result from the merger of Respondent with United Supermarkets, L.L.C. ("United"). Under the terms of the proposed Consent Order, Respondent is required to divest its supermarkets and related assets in Amarillo and Wichita Falls, Texas to a Commission-approved purchaser. The divestitures must be completed no later than 10 days following the date of Respondent's merger with United.

The proposed Consent Order has been placed on the public record for 30 days to solicit comments from interested persons. Comments received during this period will become part of the public record. After 30 days, the Commission again will review the proposed Consent Order and any comments received, and decide whether it should withdraw the Consent Order, modify the Consent Order, or make it final.

On September 9, 2013, Respondent and United entered into a merger agreement whereby Respondent agreed to purchase 100% of United's equity. The Commission's Complaint alleges that the proposed merger, if consummated, would violate Section 7 of the Clayton Act, as amended, 15 U.S.C. § 18, and Section 5 of the Federal Trade Commission Act, as amended, 15 U.S.C. § 45, by removing an actual, direct, and substantial supermarket competitor in Amarillo and Wichita Falls, Texas. The elimination of this competition would result in significant competitive harm, specifically higher prices and diminished quality and service levels in both markets. The proposed Consent Order would remedy the alleged violations by requiring Respondent to divest its supermarkets in the two affected markets. The divestitures will establish a new independent competitor to Respondent in both relevant areas, replacing the competition that otherwise would be lost as a result of the proposed merger.

THE PARTIES

Respondent, through its wholly owned indirect subsidiary, Albertson's LLC ("Albertson's"), owns and operates 606 supermarkets in the western and southern United States under the Albertsons banner. In Texas, Albertson's operates 72 supermarkets under the Albertsons banner, the majority of which are in the Dallas-Fort Worth Metroplex. Albertson's operates 10 Albertsons banner stores in North and West Texas.

United is a privately held regional grocery retailer that owns and operates 51 traditional and specialty supermarkets and 7 convenience stores across North and West Texas. United operates its supermarkets under three different banners: United Supermarkets, Market Street, and Amigos. United Supermarkets is a traditional supermarket banner. Market Street offers everyday grocery needs, as well as gourmet and specialty items, whole

health products, and prepared food. Amigos is operated as a specialty store with a focus on traditional and authentic items targeted to Hispanic shoppers. United also owns three distribution centers, an ice manufacturing plant, and a food manufacturing plant.

SUPERMARKET COMPETITION IN AMARILLO AND WICHITA FALLS, TEXAS

Respondent's proposed merger with United poses substantial antitrust concerns for the retail sale of food and other grocery products in supermarkets. Supermarkets are defined as traditional full-line retail grocery stores that sell, on a large-scale basis, food and non-food products that customers regularly consume at home—including, but not limited to, fresh meat, dairy products, frozen foods, beverages, bakery goods, dry groceries, detergents, and health and beauty products. This broad set of products and services provides a "one-stop shopping" experience for consumers by enabling them to shop in a single store for all of their food and grocery needs. The ability to offer consumers one-stop shopping is a critical differentiating factor between supermarkets and other food retailers.

The relevant product market includes supermarkets within "hypermarkets," such as Wal-Mart Supercenters. Hypermarkets also sell an array of products that would not be found in traditional supermarkets. However, hypermarkets, like conventional supermarkets, contain bakeries, delis, dairy, produce, fresh meat, and sufficient product offerings to enable customers to purchase all of their weekly grocery requirements in a single shopping visit.

Other types of retailers – such as hard discounters, convenience stores, specialty food stores and club stores – also sell food and grocery items. However, these types of retailers are not in the relevant product market because they do not have a supermarket's full complement of products and services. Shoppers typically do not view these other food and grocery retailers as adequate substitutes for supermarkets. Further, although these other types of retailers offer some competition, supermarkets do not view them as providing as close competition

as traditional supermarkets.[1] Thus, consistent with prior Commission precedent, grocery items sold in stores other than supermarkets are excluded from the relevant product market.[2]

There are two relevant geographic markets in which to analyze the merger's effects: (1) the western half of Amarillo, Texas ("West Amarillo"), and (2) the southwest area of Wichita Fall, Texas ("Southwest Wichita Falls"). Specifically, West Amarillo includes the area from the western city limit to the railroad tracks that run parallel to, and are located to the east of, the Interstate 40 and U.S. Route 87/287 corridor. Southwest Wichita Falls is the area within the city limits that runs south of U.S. Route 277 and west of U.S. Route 281. A hypothetical monopolist of the retail sale of food and other grocery products in supermarkets in each relevant area could profitably impose a small but significant non-transitory increase in price.

Interviews with the merging parties' executives and market participants, as well as a review of party documents, demonstrate that Albertson's and United are close and vigorous competitors in terms of format, service, product offerings, promotional activity, and location in the West Amarillo and Southwest Wichita Falls markets. For example, Albertson's and United are the only supermarkets in Amarillo and Wichita Falls that retain a traditional supermarket format, with both emphasizing specialty departments like meat and fresh seafood. Both are also the only traditional supermarket operators in Amarillo and Wichita Falls

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[1] Shoppers typically do not view these other food and grocery retailers as adequate substitutes for supermarkets and would be unlikely to switch to one of these retailers in response to a small but significant price increase or "SSNIP" by a hypothetical supermarket monopolist. *See* U.S. DOJ and FTC Horizontal Merger Guidelines § 4.1.1 (2010).

[2] *See, e.g.*, *Konkinlijke Ahold N.V./Safeway Inc.*, Docket C-4367 (August 17, 2012); *Shaw's/Star Markets*, Docket C- 3934 (June 28, 1999); *Kroger/Fred Meyer*, Docket C-3917 (January 10, 2000); *Albertson's/American Stores*, Docket C–3986 (June 22, 1999); *Ahold/Giant*, Docket C-3861 (April 5, 1999); *Albertson's/Buttrey*, Docket C-3838 (December 8, 1998); *Jitney-Jungle Stores of America, Inc.*, Docket C-3784 (January 30, 1998). *But see Wal-Mart/Supermercados Amigo*, Docket C-4066 (November 21, 2002) (the Commission's complaint alleged that in Puerto Rico, club stores should be included in a product market that included supermarkets because club stores in Puerto Rico enabled consumers to purchase substantially all of their weekly food and grocery requirements in a single shopping visit).

that carry a broad range of products catering to the entire community. Additionally, Albertson's and United's stores have the most similar store formats and size among supermarket operators in Amarillo and Wichita Falls, including the amount of floor space devoted to food and other grocery products. Absent relief, the proposed merger would eliminate significant head-to-head competition between Respondent and United and would increase Respondent's ability and incentive to raise prices unilaterally post-merger. The proposed merger would also decrease incentives to compete on non-price factors, such as service levels, convenience, and quality.

The West Amarillo and Southwest Wichita Falls markets already are highly concentrated, and would become significantly more so post-merger. The merger would reduce the number of supermarket competitors from three to two; Wal-Mart Supercenter would be the only remaining competitor in each of the two relevant areas. In West Amarillo, the proposed merger would increase the Herfindahl-Hirschman Index ("HHI"), which is the standard measure of market concentration under the 2010 Department of Justice and Federal Trade Commission Horizontal Merger Guidelines ("HMG"), 503 points, from 4501 to 5004. In Southwest Wichita Falls, the proposed merger would increase the HHI 811 points, from 4193 to 5004. Under the HMG, these concentration levels trigger the presumption that the merger likely enhances Respondent's market power in West Amarillo and Southwest Wichita Falls.

New entry or expansion in the relevant markets is unlikely to deter or counteract the anticompetitive effects of the proposed merger. Moreover, even if a prospective entrant existed, the entrant must secure a viable location, obtain the necessary permits and governmental approvals, build its retail establishment or renovate an existing building, and open to customers before it could begin operating and serve as a relevant competitive constraint. It is unlikely that entry sufficient to achieve a significant market impact and act as a competitive constraint would occur in a timely manner.

THE PROPOSED CONSENT ORDER

The proposed remedy, which requires the divestiture of the Albertson's supermarkets in Amarillo and Wichita Falls to a Commission-approved purchaser, will restore fully the competition that otherwise would be eliminated in these markets as a result of the merger. Respondent has agreed to divest the Albertson's supermarkets in Amarillo and Wichita Falls to MAL Enterprises, Inc., which operates as Lawrence Brothers IGA ("Lawrence Brothers"). Lawrence Brothers is a family owned and operated supermarket chain based in Sweetwater, Texas, with 18 supermarkets located throughout West Texas and two in New Mexico, all of which are located outside the two relevant geographic markets.[3] Lawrence Brothers appears to be a highly suitable purchaser, and it is well positioned to enter the relevant markets and prevent the increase in market concentration and likely competitive harm that otherwise would have resulted from the merger.

The proposed Order requires Respondent to divest Albertson's Amarillo and Wichita Falls stores and related assets to Lawrence by the later of: (a) January 13, 2014, or (b) 10 days following Albertson's merger with United. If Lawrence Brothers is not approved by the Commission to purchase the assets, Albertson's must immediately rescind the divestiture agreement and divest the Albertson's stores and related assets to a buyer that receives the Commission's prior approval. The proposed Consent Order contains additional provisions designed to ensure the adequacy of the proposed relief. For example, for a period of one year, the Consent Order prohibits Albertson's from interfering with Lawrence Brothers' hiring or employment of any employees currently working at the Albertson's stores in Amarillo and Wichita Falls. Additionally, for a period of 10 years, Respondent is required to give the Commission prior notice of plans to acquire

[3] Lawrence Brothers operates 14 stores under the "Lawrence Brothers" banner, four stores under the "Cash Saver" banner, and two stores under the "Save-A-Lot" banner. Lawrence Brothers plans to convert the two Albertson's stores in Amarillo and Wichita Falls to Cash Saver stores. Cash Saver stores are traditional supermarkets with specialty departments such as pharmacies, delis, and bakeries. Cash Saver prices all grocery products in its stores at 10% above cost.

any interest in a supermarket, or an interest in a supermarket, that has operated or is operating in Amarillo and Wichita Falls.

* * *

The sole purpose of this Analysis is to facilitate public comment on the proposed Consent Order. This Analysis does not constitute an official interpretation of the proposed Consent Order, nor does it modify its terms in any way.

Complaint

IN THE MATTER OF

GANLEY FORD WEST, INC.

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

Docket No. C-4428; File No. 122 3269
Complaint, January 28, 2014 – Decision, January 28, 2014

This consent order addresses Ganley Ford West, Inc.'s failure to disclose material information to consumers wishing to purchase motor vehicles. The complaint alleges that respondent has advertised that particular Ford models are available at a specific dealer discount however, once consumers reach the dealership, they find out that respondent has failed to disclose that the specific discounts are only available for some, but not all, of the Ford models advertised. The consent order prohibits respondent from misrepresenting any material fact about the price, sale, financing, or leasing of motor vehicles; and from representing that a discount, rebate, bonus, incentive or price is available to consumers unless the representation clearly and conspicuously discloses all material qualifications or restrictions, if any, including but not limited to qualifications or restrictions on: (a) a consumer's ability to obtain the discount, rebate, bonus, incentive or price or (b) the vehicles available at the discount, rebate, bonus, incentive or price.

Participants

For the *Commission*: *Teresa N. Kosmidis* and *Peter Lamberton.*

For the *Respondent*: *A. Steven Dever, A. Steven Dever, LPA.*

COMPLAINT

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

1.Respondent Ganley Ford West, Inc. is an Ohio corporation with its principal office or place of business at 16100 Lorain Avenue, Cleveland, OH 44111. Respondent offers motor vehicles for sale or lease.

2.The acts or practices of respondent 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.Since at least August 4, 2012, respondent has disseminated, or has caused to be disseminated, advertisements promoting the purchase, financing, and leasing of its motor vehicles.

4.Respondent's advertisements include, but are not necessarily limited to, advertisements posted on the website www.ganleyfordwest.com, copies of which are attached as Exhibits A and B. These advertisements list specific discounts from the manufacturer's suggested retail price ("MSRP") for Ford models. These advertisements include the following statements:

A. NEW 2013 FORD
F-150
$12,000
OFF MSRP!

(Exhibit A).

B. NEW 2012 FORD
F-150
$10,000 OFF
MSRP

(Exhibit B).

5.In fact, in numerous instances when consumers have tried to obtain advertised discounts, they have learned that the discounts are only available for a particular version of the vehicle, often one of the more expensive versions. For example, in many instances when the promotion in Exhibit A was offered, the only 2013 Ford F-150 available for $12,000 off the MSRP was the Ford F-150 Lariat, with an MSRP of $47,000. In those instances, the discount was not available on any other versions of the F-150, including the base model, which has an MSRP of $23,670.

VIOLATIONS OF THE FEDERAL TRADE COMMISSION ACT

6.Through the means described in Paragraph 4, including but not necessarily limited to Exhibits A and B, respondent has represented expressly or by implication that particular Ford models are available at a specific dealer discount.

7.Respondent has failed to disclose that these specific dealer discounts are only available for some, but not all, of the Ford models advertised. This fact would be material to consumers in their purchase of the motor vehicles offered for sale in the advertisements. In light of the representations made, the failure to disclose this fact was, and is, a deceptive practice.

8.The acts and practices of respondent as alleged in this complaint constitute deceptive acts or practices, in or affecting commerce, in violation of Section 5(a) of the FTC Act, 15 U.S.C. § 45(a).

THEREFORE, the Federal Trade Commission, this twenty-eighth day of January, 2014, has issued this complaint against respondent.

By the Commission.

Complaint

Exhibit A

Complaint

Exhibit B

DECISION AND ORDER

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

Respondent, Respondent's attorney, and counsel for the Commission having thereafter executed an agreement containing a consent order ("consent agreement"), an admission by 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 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 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 consent agreement on the public record for a period of thirty (30) days for the receipt and consideration of public comments, and having duly considered the comments received from interested persons pursuant to section 2.34 of its Rules, now in further conformity with the procedure prescribed in § 2.34 of its Rules, the Commission hereby issues its complaint, makes the following jurisdictional findings, and enters the following order:

1. Respondent is an Ohio corporation with its principal office or place of business at 16100 Lorain Avenue, Cleveland, OH.

2. The Federal Trade Commission has jurisdiction of the subject matter of this proceeding and of the

Respondent, and the proceeding is in the public interest.

ORDER

DEFINITIONS

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

A. Unless otherwise specified, "respondent" shall mean Ganley Ford West, Inc., and its successors and assigns.

B. "Advertisement" shall mean a commercial message in any medium that directly or indirectly promotes a consumer transaction.

C. "Clearly and conspicuously" shall mean as follows:

1. In a print advertisement, the disclosure shall be in a type size, location, and in print that contrasts with the background against which it appears, sufficient for an ordinary consumer to notice, read, and comprehend it.

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

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

4. In a radio advertisement, the disclosure shall be delivered in a volume and cadence sufficient for an ordinary consumer to hear and comprehend it.

5. In all advertisements, the disclosure shall be in understandable language and syntax. Nothing contrary to, inconsistent with, or in mitigation of the disclosure shall be used in any advertisement or promotion.

D. "Material" shall mean likely to affect a person's choice of, or conduct regarding, goods or services.

E. "Motor Vehicle" shall mean:

1. Any self-propelled vehicle designed for transporting persons or property on a street, highway, or other road;

2. Recreational boats and marine equipment;

3. Motorcycles;

4. Motor homes, recreational vehicle trailers, and slide-in campers; and

5. Other vehicles that are titled and sold through dealers.

I.

IT IS HEREBY ORDERED that respondent and its officers, agents, representatives, and employees, directly or indirectly, in connection with the advertising, marketing, or offering for sale, financing, or leasing of motor vehicles shall not, in any manner, expressly or by implication:

A. Represent that a discount, rebate, bonus, incentive or price is available unless the representation clearly and conspicuously discloses all material qualifications or restrictions, if any, including but not limited to qualifications or restrictions on: (a) a consumer's

ability to obtain the discount, rebate, bonus, incentive, or price and (b) the vehicles available at the discount, rebate, bonus, incentive, or price.

B. Misrepresent the following:

1. The existence or amount of any discount, rebate, bonus, incentive, or price;

2. The existence, price, value, coverage, or features of any product or service associated with the motor vehicle purchase;

3. The number of vehicles available at particular prices; or

4. Any other material fact about the price, sale, financing, or leasing of motor vehicles.

II.

IT IS FURTHER ORDERED that respondent 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 and promotional materials containing the representation;

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

C. All evidence in its possession or control that contradicts, qualifies, or calls 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. Any documents reasonably necessary to demonstrate full compliance with each provision of this order, including but not limited to all documents obtained,

created, generated, or that in any way relate to the requirements, provisions, or terms of this order, and all reports submitted to the Commission pursuant to this order.

III.

IT IS FURTHER ORDERED that respondent shall deliver a copy of this order to all current and future principals, officers, directors, and managers, and to all current and future employees, agents, and representatives having responsibilities 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 this order, and to future personnel within thirty (30) days after the person assumes such position or responsibilities.

IV.

IT IS FURTHER ORDERED that respondent shall notify the Commission at least thirty (30) days prior to any change in the corporation(s) that may affect compliance obligations arising under this order, including but not limited to a dissolution, assignment, sale, merger, or other action that would result in the emergence of a successor corporation; the creation or dissolution of a subsidiary, parent, or affiliate that engages in any acts or practices subject to this order; the proposed filing of a bankruptcy petition; or a change in the corporate name or address. *Provided, however*, that, with respect to any proposed change in the corporation about which respondent learns less than thirty (30) days prior to the date such action is to take place, respondent shall notify the Commission as soon as is practicable after obtaining such knowledge. 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 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: *In re Ganley Ford West, Inc.*, FTC File No. 122 3269, Docket No. C-4426.

V.

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 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.

VI.

This order will terminate on January 28, 2034, or twenty (20) years from the most recent date that the United States or the Federal Trade Commission files a complaint (with or without an accompanying consent decree) in federal court alleging any violation of the order, whichever comes later; *provided, however*, that the filing of such a complaint will not affect the duration of:

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

B. This order's application to any respondent that is not named as a defendant in such complaint; and

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

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

By the Commission.

ANALYSIS OF CONSENT ORDER TO AID PUBLIC COMMENT

The Federal Trade Commission ("FTC") has accepted, subject to final approval, an agreement containing a consent order from Ganley Ford West, 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 FTC 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 respondent is a motor vehicle dealer. According to the FTC complaint, respondent has advertised that particular Ford models are available at a specific dealer discount. The complaint alleges that, in fact, once consumers reach the dealership, they find out that respondent has failed to disclose that the specific discounts are only available for some, but not all, of the Ford models advertised. The failure to disclose this information could be materially misleading to consumers wishing to purchase one of the numerous other versions of the model. The complaint alleges, therefore, that the representations constitute deceptive acts or practices in violation of Section 5 of the FTC Act.

The proposed order is designed to prevent the respondent from engaging in similar deceptive practices in the future. Section I.A of the proposed consent order prohibits respondent from representing that a discount, rebate, bonus, incentive or price is available to consumers unless the representation clearly and conspicuously discloses all material qualifications or restrictions, if any, including but not limited to qualifications or restrictions on: (a) a consumer's ability to obtain the discount, rebate, bonus, incentive or price or (b) the vehicles available at the discount, rebate, bonus, incentive or price.

Section I.B. prohibits respondent from misrepresenting: 1) the existence or amount of any discount, rebate, bonus, incentive or price; 2) the existence, price, value, coverage, or features of any product or service; 3) the number of vehicles available at

particular prices; or 4) any other material fact about the price, sale, financing, or leasing of motor vehicles.

Part II of the proposed order requires respondent to keep copies of relevant advertisements and materials substantiating claims made in the advertisements. Part III requires that respondent provide copies of the order to certain of its personnel. Part IV requires notification to the Commission regarding changes in corporate structure that might affect compliance obligations under the order. Part V requires the respondent to file compliance reports with the Commission. Finally, 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 complaint or proposed order, or to modify in any way the proposed order's terms.

Complaint

IN THE MATTER OF

TIMONIUM CHRYSLER, INC.
D/B/A
DON WHITE'S TIMONIUM CHRYSLER JEEP DODGE

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

Docket No. C-4429; File No. 132 3014
Complaint, January 28, 2014 – Decision, January 28, 2014

This consent order addresses Timonium Chrysler, Inc. d/b/a Don White's Timonium Chrysler Jeep Dodge's failure to disclose material information to consumers wishing to purchase motor vehicles. The complaint alleges that respondent has advertised that specific dealer discounts and prices are generally available to consumers. The complaint further alleges that, in fact, once consumers reach the dealership, they find out that there are significant restrictions on obtaining the advertised discounts or that the advertised discounts are not available in full. The consent order prohibits respondent from misrepresenting: 1) the existence or amount of any discount, rebate, bonus, incentive or price; 2) the existence, price, value, coverage, or features of any product or service associated with the motor vehicle purchase; 3) the number of vehicles available at particular prices; or 4) any other material fact about the price, sale, financing, or leasing of motor vehicles.

Participants

For the *Commission*: *Teresa N. Kosmidis* and *Peter Lamberton.*

For the *Respondent*: *Steven Byerts, Bass Sox Mercer.*

COMPLAINT

The Federal Trade Commission, having reason to believe that Timonium Chrysler, Inc. d/b/a Don White's Timonium Chrysler Jeep Dodge, a corporation ("respondent"), has violated provisions of the Federal Trade Commission Act ("FTC Act"), and it appearing to the Commission that this proceeding is in the public interest, alleges:

1. Respondent is a Maryland corporation with its principal office or place of business at 10300 York Road, Cockeysville, MD. Respondent offers motor vehicles for sale or lease.

2. The acts or practices of respondent 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. Since at least May 21, 2012, respondent has disseminated or has caused to be disseminated advertisements promoting the purchase, financing, and leasing of their motor vehicles.

4. Respondent's advertisements include, but are not necessarily limited to, advertisements posted on the website www.donwhites.com, selected pages of which are attached as Exhibit A. These advertisements list specific "Dealer Discount[s]" and "Internet Price[s]" for particular motor vehicles. For example, one web page advertises a 2013 Chrysler 200 Limited Sedan as follows:

MSRP*	$27,320
Dealer Discount	-$7,499
Internet Price	$19,821

Further down on the web page, the following information appears:

*__All Prices must be confirmed by the Internet Department and are only valid through the Internet Department.__ Please contact us via phone, chat, email, or website form to verify availability and price. *Adjusted price does not include applicable sales tax, documentation fee, title, freight or tag fees.* [Italicized text in red print] Some incentives may be included, but not all customers will qualify for all incentives. Please ask for additional incentives that are not listed in the price. Internet Price not valid in conjunction with any other advertised price, promotion, discount, coupon offer or prior sales. **Vehicle is subject to availability so please confirm before you visit.** (emphasis in original).

Exhibit A at 2.

5. In fact, in numerous instances, the advertised discount and price are not generally available to consumers. In numerous instances, the advertised discount and price are subject to various qualifications or restrictions. Such qualifications or restrictions have included, for example, being a member of the military, being a recent college graduate, possessing a bank account at a particular bank, or owning a vehicle that has a lien on it. In numerous instances, even if consumers meet all of these qualifications or restrictions, they cannot obtain the advertised discount and price.

VIOLATION OF THE FEDERAL TRADE COMMISSION ACT

6. Through the means described in Paragraph 4, including but not necessarily limited to Exhibit A, respondent has represented expressly or by implication that specific dealer discounts and prices are generally available to consumers.

7. In truth and in fact, the specific dealer discounts and prices are not generally available to consumers.

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

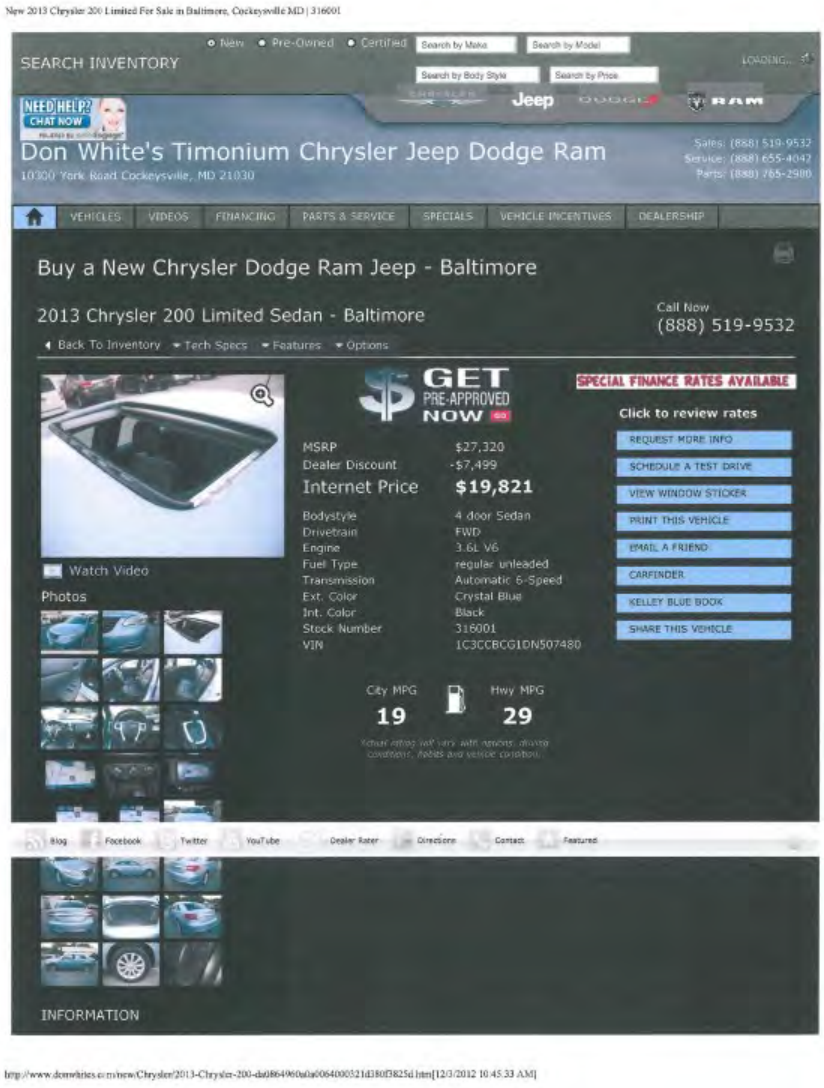
9. The acts and practices of respondent as alleged in this complaint constitute deceptive acts or practices in or affecting commerce in violation of Section 5(a) of the FTC Act, 15 U.S.C. § 45(a).

THEREFORE, the Federal Trade Commission, this twenty-eighth day of January, 2014, has issued this complaint against respondent.

By the Commission.

Complaint

Exhibit A



Complaint

New 2013 Chrysler 200 Limited For Sale in Baltimore, Cockeysville MD | 316001

Comments

Safety Features Include: ABS, Traction control...It has nice features like: Power locks, Power windows... To lock in your Internet Price, confirm availability and receive an itemized quote, please call the Internet Department at 888-519-9532 or click to request more information. Appointments are strongly recommended. You must ask for the Internet Department to receive special Internet pricing.

Special!

Price and availability can not be guaranteed unless verified with our Internet Team prior to visit (Please give us a call, email or chat). Optional equipment listed below subject to error, contact *Ryan, Kendra or Thomas with any questions, to confirm availability or to schedule your test drive and vehicle review.* ***888-519-9532***.

*All of our Vehicles are priced very competitively - some well below factory invoice. We include all factory rebates, bonus cash, loyalty cash, certificates, military rebate, and finance incentives that are offered. Not all Customers will qualify for all incentives. Additionally please add sales tax, MVA tag and title fees, destination charge, and processing fee.

Don White's Price
DOES NOT INCLUDE MANY OTHER AVAILABLE INCENTIVES
If you qualify for these additional incentives, we will deduct them from our Internet Price.

DON WHITE'S TIMONIUM

Lifetime Oil Changes

Lifetime Car Washes

Lifetime Engine Protection

Lifetime Tire Rotations

Lifetime Multi-Point Inspections

Call and ask for SHAWN RYAN with any questions regarding this vehicle

Click Request More Info button above for Internet price and additional rebates which may be available on this vehicle.

***All Prices must be confirmed by the Internet Department and are only valid through the Internet Department.** Please contact us via phone, chat, email, or website form to verify availability and price. Adjusted Price does not include applicable sales tax, documentation fee, title, freight or tag fees. Some incentives may be included, but not all customers will qualify for all incentives. Please ask for additional incentives that are not listed in the price. Internet Price not valid in conjunction with any other advertised price, promotion, discount, coupon, offer or prior sale. **Vehicle is subject to availability so please confirm before you visit.**

Rate (%)	Cash/Trade ($)	Term	Estimated Monthly Payment
4.99	5000	72 Months	$239

This vehicle is located at
Don White's Timonium Chrysler Jeep Dodge Ram
10300 York Road
Cockeysville, MD 21030

Please Call
(888) 519-9532

GET DIRECTIONS

Please ASK FOR the INTERNET DEPARTMENT who are trained to assist you with every aspect of your online experience with Don White's.

Our Baltimore Chrysler dealership

Search our Baltimore Chrysler car dealership's inventory for a similar 2013 Chrysler 200 Limited for sale in Baltimore.

Similare New cars in Cockeysville

2012 Dodge Charger SE
Internet Price $20,570

VIEW DETAILS

2013 Dodge Dart SXT/Rallye
Internet Price $18,833

VIEW DETAILS

New 2013 Chrysler 200 Limited For Sale in Baltimore, Cockeysville MD | 316001

Inspections

Don White's Difference Rewards Program

2013 Chrysler 200 Limited
Internet Price $19,821

2013 Chrysler 200 Limited
Internet Price $19,821

2013 Chrysler 200 Limited
Internet Price $19,821

Information on this website is subject to error. Inventory subject to availability so please contact our Internet Department for verification. All prices must be confirmed by Fatima McArthur and are subject to change and/or error. Please ask for Fatima, Ryan, or Thomas when you call or visit.

Proudly Serving Baltimore, Cockeysville, Towson & Timonium, Maryland

Visit our Timonium new car dealership in Cockeysville. We offer new 2012 Chrysler, Jeep, Ram, Dodge, used cars and auto parts. Our expert finance team will custom fit an auto loan or lease to suit your specific needs, and our auto repair shop and auto body repair shop will keep your car running and looking like new. Stop by Don White's Chrysler Dodge Jeep for all you automotive needs. We are your destination dealership for **new and used cars in Baltimore**. We look forward to serving you.

User Reviews

No comments have been posted.

POST A COMMENT

2013 Chrysler 200 Limited Sedan - Baltimore

Options

- 50 State Emissions
- Engine: 3.6L V6 24V VVT
- Leather Trimmed Bucket Seats
- Quick Order Package 27V
- Radio: UConnect 730N CD/DVD/MP3/HDD/NAV
- Sun/Sound Group
- Power Express Open/Close Sunroof
- Transmission: 6-Speed Automatic

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Features

CONVENIENCE FEATURES

- 1-touch down
- Driver vanity mirror
- Tilt steering wheel
- Auto-dimming rearview mirror
- Air conditioning
- Garage door transmitter
- Front beverage holders
- Speed control
- Illuminated entry
- Rear door bins
- Telescoping steering wheel
- Rear beverage holders
- Automatic temperature control
- Power windows
- Passenger door bin
- Remote keyless entry
- Passenger vanity mirror
- Driver door bin
- Voice recorder

Tech Specs

POWERTRAIN

- Fuel economy city: 19mpg
- Fuel economy highway: 29mpg
- Variable valve control
- Transmission: multi-speed automatic
- Recommended fuel: regular unleaded
- Engine location: front
- Sequential multi-point fuel injection
- Manual-shift auto: AUTOSTICK
- Drive type: front-wheel

SPECS AND DIMENSIONS

- Rear legroom: 919mm (36.2")
- Front headroom: 963mm (37.9")
- Turning radius: 5.7m (18.8')
- Passenger volume: 2,840L (100.3 cu.ft.)
- Exterior height: 1,483mm (58.4")

Complaint

1-touch up
- Power moonroof

ENTERTAINMENT FEATURES
- Radio data system
- DVD-Audio
- MP3 decoder
- AM/FM radio
- Speakers: 6
- Steering wheel mounted audio controls
- CD player

SEATS AND TRIM
- Heated front seats
- Max seating capacity: 5
- Rear seats: bench
- Front seats: bucket
- Front center armrest: w/storage
- Power driver seat
- Leather upholstery
- Rear seat center armrest
- Split folding rear seat

WARRANTY
- Basic warranty: 36 months/36,000miles
- Roadside assistance coverage: 60 months/100,000miles
- Powertrain warranty: 60 months/100,000miles
- Corrosion perforation warranty: 60 months/100,000miles

BODY EXTERIOR
- Rear cargo: trunk
- Power door mirrors
- Bumpers: body-color
- Heated door mirrors

SAFETY AND SECURITY
- Traction control
- Brake assist
- Electronic stability
- Dual front impact airbags
- ABS brakes
- Perimeter/approach lights
- Security system
- Dual front side impact airbags
- Anti-whiplash front head restraints
- 4 wheel disc brakes
- Panic alarm
- Overhead airbag
- Ignition disable

LIGHTING, VISIBILITY AND INSTRUMENTATION
- Fully automatic headlights
- Tachometer
- Delay-off headlights
- Trip computer

- Front shoulder room: 1,430mm (56.3")
- Wheelbase: 2,766mm (108.9")
- Exterior body width: 1,843mm (72.6")
- Towing capacity: 454kg (1,000lbs)
- Rear hiproom: 1,341mm (52.8")
- Air Pollution Score (AP): 6
- Rear headroom: 975mm (38.4")
- Front legroom: 1,077mm (42.4")
- Greenhouse Gas Score (GG): 5
- Interior maximum cargo volume: 385 L (14 cu.ft.)
- Exterior length: 4,869mm (191.7")
- Rear shoulder room: 1,422mm (56.0")
- Interior cargo volume: 385 L (14 cu.ft.)
- Front hiproom: 1,336mm (52.6")

SUSPENSION/HANDLING
- Four wheel independent suspension
- Rear anti-roll bar
- Power steering
- Front anti-roll bar
- Alloy wheels

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New 2013 Chrysler 200 Limited For Sale in Baltimore, Cockeysville MD | 316001
Variably intermittent wipers
• Rear window defroster
• Low tire pressure warning
• Speed sensitive wipers
• Outside temperature display
• Front fog lights
• Front reading lights
• Compass
• Rear reading lights
↑ To Top
* While every reasonable effort is made to ensure the accuracy of this data, we are not responsible for any errors or omissions contained on these pages. Please verify any information in question with a dealership sales representative.
* MSRP is the Manufacturer's Suggested Retail Price (MSRP) of the vehicle. It does not include any taxes, fees or other charges. Pricing and availability may vary based on a variety of factors, including options, dealer, specials, fees, and financing qualifications. Consult your dealer for actual price and complete details. Vehicles shown may have optional equipment at additional cost.
* The estimated selling price that appears after calculating dealer offers is for informational purposes, only. You may not qualify for the offers, incentives, discounts, or financing. Offers, incentives, discounts, or financing are subject to expiration and other restrictions. See dealer for qualifications and complete details.
* Images, pricing and options shown are examples, only, and may not reflect exact vehicle color, trim, options, pricing or other specifications.
* In transit means that vehicles have been built, but have not yet arrived at your dealer. Images shown may not necessarily represent identical vehicles in transit to your dealership. See your dealer for actual price, payments and complete details.
website by DEALER.COM
ABOUT US | DIRECTIONS | CONTACT US | PRIVACY | LEGAL NOTIFICATIONS AND DISCLAIMERS | SITEMAP

DECISION AND ORDER

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

Respondent, Respondent's attorney, and counsel for the Commission having thereafter executed an agreement containing a consent order ("consent agreement"), an admission by 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 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 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 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 received from an interested person pursuant to section 2.34 of its Rules, now in further conformity with the procedure prescribed in § 2.34 of its Rules, the Commission hereby issues its complaint, makes the following jurisdictional findings, and enters the following order:

1. Respondent is a Maryland corporation with its principal office or place of business at 10300 York Road, Cockeysville, MD.

2. The Federal Trade Commission has jurisdiction of the subject matter of this proceeding and of the

Respondent, and the proceeding is in the public interest.

ORDER

DEFINITIONS

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

A. Unless otherwise specified, "respondent" shall mean Timonium Chrysler, Inc., and its successors and assigns.

B. "Advertisement" shall mean a commercial message in any medium that directly or indirectly promotes a consumer transaction.

C. "Clearly and conspicuously" shall mean as follows:

1. In a print advertisement, the disclosure shall be in a type size, location, and in print that contrasts with the background against which it appears, sufficient for an ordinary consumer to notice, read, and comprehend it.

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

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

4. In a radio advertisement, the disclosure shall be delivered in a volume and cadence sufficient for an ordinary consumer to hear and comprehend it.

5. In all advertisements, the disclosure shall be in understandable language and syntax. Nothing contrary to, inconsistent with, or in mitigation of the disclosure shall be used in any advertisement or promotion.

D. "Material" shall mean likely to affect a person's choice of, or conduct regarding, goods or services.

E. "Motor vehicle" shall mean:

1. Any self-propelled vehicle designed for transporting persons or property on a street, highway, or other road;

2. Recreational boats and marine equipment;

3. Motorcycles;

4. Motor homes, recreational vehicle trailers, and slide-in campers; and

5. Other vehicles that are titled and sold through dealers.

I.

IT IS HEREBY ORDERED that respondent and its officers, agents, representatives, and employees, directly or indirectly, in connection with the advertising, marketing, or offering for sale, financing, or leasing of motor vehicles shall not, in any manner, expressly or by implication:

A. Represent that a discount, rebate, bonus, incentive or price is available unless the representation clearly and conspicuously discloses any material qualifications or restrictions, including but not limited to qualifications or restrictions on: (a) a consumer's ability to obtain the

discount, rebate, bonus, incentive, or price and (b) the vehicles available at the discount, rebate, bonus, incentive, or price.

B. Misrepresent the following:

1. The existence or amount of any discount, rebate, bonus, incentive, or price;

2. The existence, price, value, coverage, or features of any product or service associated with the motor vehicle purchase;

3. The number of vehicles available at particular prices; or

4. Any other material fact about the price, sale, financing, or leasing of motor vehicles.

II.

IT IS FURTHER ORDERED that respondent 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 and promotional materials containing the representation;

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

C. All evidence in its possession or control that contradicts, qualifies, or calls 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. Any documents reasonably necessary to demonstrate full compliance with each provision of this order, including but not limited to all documents obtained,

created, generated, or that in any way relate to the requirements, provisions, or terms of this order, and all reports submitted to the Commission pursuant to this order.

III.

IT IS FURTHER ORDERED that respondent shall deliver a copy of this order to all current and future principals, officers, directors, and managers, and to all current and future employees, agents, and representatives having responsibilities 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 this order, and to future personnel within thirty (30) days after the person assumes such position or responsibilities.

IV.

IT IS FURTHER ORDERED that respondent shall notify the Commission at least thirty (30) days prior to any change in the corporation(s) that may affect compliance obligations arising under this order, including but not limited to a dissolution, assignment, sale, merger, or other action that would result in the emergence of a successor corporation; the creation or dissolution of a subsidiary, parent, or affiliate that engages in any acts or practices subject to this order; the proposed filing of a bankruptcy petition; or a change in the corporate name or address. *Provided, however*, that, with respect to any proposed change in the corporation about which respondent learns less than thirty (30) days prior to the date such action is to take place, respondent shall notify the Commission as soon as is practicable after obtaining such knowledge. 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 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: *In re Timonium Chrysler, Inc.*, FTC File No. 132 3014, Docket No. C-4429.

V.

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 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.

VI.

This order will terminate on January 28, 2034, 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 a respondent did not violate any provision of the order, and the dismissal or ruling is either not appealed or upheld on appeal, then the order will terminate according to this Part as though the complaint had never been filed, except that the order will not terminate between the date such complaint is filed and the later of the deadline for appealing such dismissal or ruling and the date such dismissal or ruling is upheld on appeal.

By the Commission.

ANALYSIS OF CONSENT ORDER TO AID PUBLIC COMMENT

The Federal Trade Commission ("FTC") has accepted, subject to final approval, an agreement containing a consent order from Timonium Chrysler, Inc. d/b/a Don White's Timonium Chrysler Jeep Dodge. 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 FTC 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 respondent is a motor vehicle dealer. According to the FTC complaint, respondent has advertised that specific dealer discounts and prices are generally available to consumers. The complaint alleges that, in fact, once consumers reach the dealership, they find out that there are significant restrictions on obtaining the advertised discounts or that the advertised discounts are not available in full. The complaint alleges therefore that the respondent's representations are false or misleading in violation of Section 5 of the FTC Act.

The proposed order is designed to prevent the respondent from engaging in similar deceptive practices in the future. Section I.A of the proposed consent order prohibits respondent from representing that a discount, rebate, bonus, incentive or price is available to consumers unless the representation clearly and conspicuously discloses all material qualifications or restrictions, if any, including but not limited to qualifications or restrictions on: (a) a consumer's ability to obtain the discount, rebate, bonus, incentive or price and (b) the vehicles available at the discount, rebate, bonus, incentive or price.

Section I.B. prohibits respondent from misrepresenting: 1) the existence or amount of any discount, rebate, bonus, incentive or price; 2) the existence, price, value, coverage, or features of any product or service associated with the motor vehicle purchase; 3) the number of vehicles available at particular prices; or 4) any

other material fact about the price, sale, financing, or leasing of motor vehicles.

Part II of the proposed order requires respondent to keep copies of relevant advertisements and materials substantiating claims made in the advertisements. Part III requires that respondent provide copies of the order to certain of its personnel. Part IV requires notification to the Commission regarding changes in corporate structure that might affect compliance obligations under the order. Part V requires the respondent to file compliance reports with the Commission. Finally, Part VI is a provision Asunsetting@ 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 complaint or proposed order, or to modify in any way the proposed order's terms.

Opinion of the Commission

IN THE MATTER OF

MCWANE, INC.
AND
STAR PIPE PRODUCTS, LTD.

OPINION OF THE COMMISSION AFFIRMING THE INITIAL DECISION AND FINAL ORDER IN REGARD TO ALLEGED VIOLATIONS OF SEC. 5 OF THE FEDERAL TRADE COMMISSION ACT

Docket No. 9351; File No. 101 0080
Complaint, January 4, 2012 – Initial Decision, May 1, 2013
Opinion and Final Order, January 30, 2014

In January 2012, the Commission issued an administrative complaint against respondents McWane, Inc. ("McWane") and Star Pipe Products, Ltd. ("Star Pipe"), 155 F.T.C. 1482 (2013)., 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, 155 F.T.C. 903 (2013), 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.

OPINION OF THE COMMISSION

By Chairwoman Edith Ramirez,

I. INTRODUCTION

In this decision we address alleged anticompetitive conduct by respondent McWane, Inc. in the ductile iron pipe fittings industry. Pipe fittings join together pipes and help direct the flow of pressurized water in pipeline systems. They are sold to municipal and regional water authorities and their contractors for waterworks projects, and are distributed mainly through independent wholesalers.

The U.S. market for the sale of small and medium diameter ductile iron pipe fittings (hereafter "fittings") is an oligopoly. Three firms--McWane, Star Pipe Products, Ltd., and Sigma Corporation--account for over 90% of fittings sales in the United States. McWane is the industry leader with a market share of about 45-50%; Sigma and Star are second and third, respectively, with shares of roughly 30% and 20%. IDF 355-56.

Complaint Counsel alleges that McWane engaged in unlawful collusion, information exchange, and exclusionary conduct. The first three counts of the Complaint relate to an alleged McWane-led conspiracy to raise and stabilize fittings prices in 2008. According to Complaint Counsel, McWane, Sigma, and Star conspired to curtail "project pricing," a form of discounting that is the main form of price competition in the industry. Counts 4 through 7 focus on alleged efforts by McWane in 2009 to maintain its monopoly in the market for domestically-manufactured fittings. In particular, Complaint Counsel charges that McWane entered into a Master Distribution Agreement (the "MDA") with Sigma to prevent Sigma from becoming an independent competitor in domestic fittings and imposed an exclusive dealing policy on its distributors to stop Star from becoming a viable rival. The Administrative Law Judge ("ALJ") found that Complaint Counsel failed to establish liability on

Counts 1 through 3 but held McWane liable on Counts 4 through 7. Both McWane and Complaint Counsel have appealed.[1]

On *de novo* review, we affirm the ALJ and find McWane liable on Count 6 for unlawfully maintaining its monopoly in the domestic fittings market. We dismiss all of the remaining counts. Specifically, two Commissioners find that Counts 1 and 2 alleging an unlawful conspiracy and information exchange have been proven and two Commissioners do not. In the absence of a majority decision, we dismiss these counts in the public interest. We reverse the ALJ on Count 4 and conclude that Complaint Counsel failed to establish that the distribution relationship under the MDA between Sigma and McWane was unlawful. In light of our conclusions on Counts 4 and 6, we find it unnecessary to reach Count 5, alleging that McWane and Sigma conspired to monopolize the domestic fittings market through their distribution agreement, and Count 7, alleging that McWane's exclusive dealing policy constituted attempted monopolization of the domestic fittings market.

Having found liability on Count 6, we enter an order remedying McWane's exclusionary conduct and imposing certain fencing-in requirements designed to prevent the unlawful conduct from recurring.[2]

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1 Of the counts dismissed by the ALJ, Complaint Counsel appealed Counts 1 and 2, but not Count 3, which alleged that McWane invited Sigma and Star to collude to fix prices. McWane appealed all four counts on which the ALJ found liability.

2 This opinion uses the following abbreviations for citations to the record:

ID:	Initial Decision of the Administrative Law Judge
IDF:	Numbered Findings of Fact in the ALJ's Initial Decision
CX:	Complaint Counsel's Exhibit
CCAppB:	Complaint Counsel's Appeal Brief
CCAnsB:	Complaint Counsel's Answering Brief to Respondent's Appeal Brief
CCRB:	Complaint Counsel's Reply Brief
RX:	Respondent's Exhibit
Tr.:	Transcript of Trial before the ALJ
JSLF:	Joint Stipulations of Law and Fact
RAppB:	Respondent's Appeal Brief
RAnsB:	Respondent's Answering Brief to Complaint Counsel's Appeal Brief

II. PROCEDURAL HISTORY

A. THE ALLEGATIONS

On January 4, 2012, the Commission issued a seven-count administrative complaint against McWane and Star after Sigma had separately entered into a consent agreement with the Commission. Later, on May 12, 2012, Star also entered into a consent agreement, and McWane remained the only respondent in the case.

Count 1 of the Complaint charges a violation of Section 5 of the Federal Trade Commission Act, 15 U.S.C. § 45, focusing on two rounds of price increases in the fittings market, the first in January 2008 and the second in June 2008. With respect to the January increase, the Complaint alleges that McWane devised a plan to trade its support for higher list prices in exchange for Sigma's and Star's curtailment of "project pricing"; that McWane communicated the terms of its plan to Sigma and Star; 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." Complaint ¶¶ 31-32, 64. The Complaint further alleges, with respect to the June price increase, that McWane traded its support for higher prices in exchange for monthly shipment information from Sigma and Star disseminated through their industry association, the Ductile Iron Fittings Research Association ("DIFRA"). *Id*. ¶¶ 33-34.

Count 2 alleges that McWane's agreement to exchange information through DIFRA facilitated collusion and is therefore an independent violation of Section 5. In particular, the Complaint asserts that the exchange of aggregated data regarding the firms' fittings shipments, including shipment information typically no more than two months old, "enabled each of the Sellers to determine and to monitor its own market share and, indirectly, the output levels of its rivals," and "[i]n this way, . . . facilitated price coordination among the Sellers on the pricing of [fittings]." *Id*. ¶¶ 35-36.

The remaining counts relate to the domestic fittings market. McWane, as the only major supplier with domestic production capability, is alleged to be a monopolist in that market. The

Complaint alleges that the February 2009 enactment of the American Recovery and Reinvestment Act of 2009 ("ARRA"), which conditioned funding on the use of domestically-produced fittings, "significantly altered the competitive dynamics of the [fittings] industry, and upset the terms of coordination" among McWane, Sigma, and Star by spurring Sigma and Star to seek to enter the domestic fittings market. *Id.* ¶¶ 3, 18, 44. Counts 4 through 7 are based on McWane's alleged efforts to exclude competitors from this market.

Count 4 charges that McWane entered into the MDA with Sigma to prevent Sigma from becoming an independent competitor in the domestic fittings market, and therefore that the MDA unreasonably restrains trade. *Id.* ¶¶ 48, 67. Count 5 alleges that McWane and Sigma entered into the MDA to monopolize the domestic fittings market and exclude their rivals. *Id.* ¶ 68. In Counts 6 and 7, the Complaint alleges that McWane adopted a restrictive and exclusive distribution policy to impede or delay the ability of Star and others to enter the domestic fittings market. *Id.* ¶¶ 57, 61. Count 6 charges McWane with monopolization, and Count 7 alleges that McWane engaged in attempted monopolization. *Id.* ¶¶ 69-70.

In its Answer, McWane denied all of the substantive allegations of the Complaint.

B. SUMMARY DECISION MOTIONS AND TRIAL

In August 2012, both parties moved for summary decision. McWane sought summary decision on all counts. Complaint Counsel sought summary decision on one episode of alleged price-fixing involving McWane and Star in the Spring of 2009. The Commission denied both motions, concluding that a trial was necessary to resolve disputed issues of fact. *In re McWane, Inc. & Star Pipe Prods., Ltd.*, Docket No. 9351, Order and Decision Denying Respondent's Motion for Summary Decision and Complaint Counsel's Motion for Partial Summary Decision, August 9, 2012.

The evidentiary hearing before Administrative Law Judge D. Michael Chappell commenced on September 4 and concluded on November 2, 2012. Complaint Counsel called 15 fact witnesses,

including executives from McWane, Star, and Sigma, and an economic expert, Dr. Laurence Schumann. McWane called one witness, economic expert Dr. Parker Normann.

C. THE INITIAL DECISION

On May 1, 2013, the ALJ issued a 464-page opinion. He dismissed the first three counts relating to the alleged price conspiracy, concluding that Complaint Counsel had failed to establish liability by a preponderance of the evidence. He explained that "Complaint Counsel's conspiracy theory is not implausible; it is indeed 'possible' that there is some truth in the story Complaint Counsel tells." ID at 351. However, he found that, "[w]hen 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." *Id.* "At best," he concluded, "the evidence shows interdependent or consciously parallel conduct, unaided by an agreement, which is not illegal." *Id.*

With respect to Count 2, the ALJ found that the agreement by McWane, Star, and Sigma to participate in the DIFRA information exchange was not an unlawful facilitating practice. He reasoned that while Complaint Counsel had shown that the fittings market was an oligopoly susceptible to tacit coordination, the nature of the information exchanged—aggregated, historic shipment volumes—was insufficiently specific and not the type of information, like pricing-related data, that can facilitate price coordination. ID at 352-62.

The ALJ ruled in favor of Complaint Counsel with respect to Counts 4 through 7. On Count 4, the ALJ found that by entering into the MDA with Sigma, McWane had unreasonably restrained trade in the domestic fittings market. The ALJ focused on the provisions of the MDA that barred Sigma from producing its own domestic fittings and required Sigma to charge prices close to those charged by McWane. He concluded that, although the evidence failed to show that Sigma was a potential competitor in the domestic fittings market, the availability of reasonable, less restrictive alternatives and the absence of any valid procompetitive justifications rendered the MDA unlawful under the rule of reason. ID at 433-37. The ALJ also determined that,

through the MDA, McWane had conspired with Sigma to monopolize the domestic fittings market, as alleged in Count 5. ID at 445. As to Count 6, he found that sales requiring domestic fittings constituted a separate product market in which McWane held monopoly power. He ruled that McWane's so-called "Full Support Program" was an exclusive dealing arrangement that foreclosed Star from a substantial share of the domestic fittings market and thereby unlawfully maintained McWane's monopoly. The ALJ also found that this conduct amounted to attempted monopolization of the domestic fittings market, as alleged in Count 7. ID at 419.

On May 13, 2013, the parties filed timely notices of appeal. Complaint Counsel appeals the ALJ's ruling with respect to Counts 1 and 2, and McWane appeals his findings on Counts 4 through 7.

III. FACTUAL BACKGROUND[3]

A. THE DUCTILE IRON PIPE FITTINGS INDUSTRY

Fittings are small but essential components of pressurized water distribution and treatment systems. They are used to join pipes, valves and hydrants, and to change, direct or divide the flow of water. IDF 5, 278. Although there are several thousand unique configurations of fittings in different shapes, sizes and coatings, approximately 80% of the demand may be serviced with only about 100 commonly-used fittings. IDF 286, 306.

Fittings are commodity products produced to American Water Works Association ("AWWA") standards and can be made anywhere in the world. Any fitting that meets AWWA specifications is functionally interchangeable with other fittings made to that standard, regardless of the country of origin. IDF 322-23. Despite the commodity nature of these fittings, however, some waterworks projects are closed to bids that include fittings made outside of the United States. IDF 346. A "domestic" or "domestic-only" specification or project requires fittings manufactured in the United States because of either end-user

3 Because there is no majority position with respect to Counts 1 and 2, the facts described herein are limited to those relevant to Counts 4 through 7.

preferences or legal procurement requirements. IDF 347-48, 519-23. Projects that do not require domestic fittings are referred to as "open specification" projects. IDF 349. Domestic fittings sold for use in projects with domestic-only specifications generally command substantially higher prices than imported fittings or domestic fittings sold for use in projects with open specifications. IDF 547, 1075-76.

A few decades ago, most fittings were manufactured in the United States, and there were a number of full-line domestic fittings manufacturers, including U.S. Pipe and Foundry Co. ("U.S. Pipe"), Griffin Pipe Products Co., and American Cast Iron Pipe Co. ("ACIPCO"), as well as McWane. IDF 462. However, in the mid-1980s, importers, including Star and Sigma, began to make significant inroads, and, by 2005, imported fittings made up the vast majority of sales. IDF 463, 465-67. Faced with competition from lower-cost and lower-priced imports, several domestic manufacturers, including U.S. Pipe, Griffin, and ACIPCO, dramatically reduced or ceased domestic fittings production. IDF 472-76. From April 2006 until Star entered the domestic fittings market in late 2009, McWane was the only significant supplier of domestic fittings. IDF 1040.

B. FITTINGS INDUSTRY SUPPLIERS

1. McWane

McWane manufactures, imports, and sells various products for the waterworks industry, including fittings, which account for about 5% of McWane's business. Its principal place of business is in Birmingham, Alabama. IDF 1-2, 13. Until November 2008 McWane produced fittings at two foundries, one in Anniston, Alabama, and the other in Tyler, Texas. IDF 15. In 2005, it also began producing fittings in China, and in 2007 it consolidated its fittings business into a single division, Tyler/Union. IDF 17. Faced with high levels of inventory and low demand, McWane closed the Tyler, Texas foundry in November 2008. IDF 18.

The key McWane employee for purposes of this case is Mr. Richard Tatman, who joined the company in May 2006 and became Vice President and General Manager in charge of Tyler/Union in 2007. IDF 20-27.

2. Sigma

Based in Cream Ridge, New Jersey, Sigma has imported and sold a range of waterworks products, including fittings, in the United States since roughly 1985. IDF 51. Sigma sells to distributors and original equipment manufacturers, making it both a competitor and supplier to McWane. IDF 59-60. Fittings are Sigma's primary product line, accounting for 40-45% of its revenues in 2008 and 2009. IDF 52. Unlike McWane, Sigma has no production facilities. It uses a "virtual manufacturing" model, providing technical know-how and quality control but relying on foundries in China, Mexico, and India for the manufacture of its fittings. IDF 57.

The Sigma employees most relevant here include Victor Pais, one of Sigma's founders and its CEO and President (IDF 64-69), and Mitchell Rona, Sigma's OEM business manager (IDF 82).

3. Star

Star also imports and sells fittings and a variety of other waterworks products. IDF 108. It was founded in 1981 and has sold fittings since approximately 1985. IDF 109. Like Sigma, fittings are Star's primary product line, accounting for about 50% of Star's total sales. IDF 111. It sources its fittings primarily from foundries in China. IDF 113. However, beginning in 2009, Star contracted with a number of U.S. foundries to produce domestic fittings in competition with McWane. IDF 112.

4. Others

There are also a number of pipe and other companies that manufacture or sell certain types and sizes of fittings as ancillary product lines, but none is a significant supplier. IDF 154-57, 161-62, 164-67, 169-73, 176-81, 186-88, 190-93, 196-99.

C. MARKET STRUCTURE

The fittings market is an oligopoly with three major suppliers: McWane, Star, and Sigma. Together they account for over 90% of all fittings sold in the United States. IDF 354-55, 362. During

the relevant time period, McWane was the market leader with approximately [redacted]% of the market in 2008; Sigma had about [redacted]% of the market that year, and Star roughly [redacted]%. IDF 356, *in camera*. As of 2008, Sigma and Star only sold fittings manufactured abroad, primarily in China. IDF 56, 113-15. As discussed further below, in late 2009, Star began selling fittings produced by several U.S. foundries in response to the passage of ARRA. IDF 112, 1094-1113, 1127-29. By 2010, Star accounted for about [redacted]% of domestic fittings sales and by 2011 about [redacted]%. IDF 357, *in camera*.

McWane, Sigma, and Star sell fittings to wholesale waterworks distributors, which then resell them to end users, typically municipalities, regional water authorities, and contractors. IDF 363, 367, 373-74. There are two national distributors: HD Supply and Ferguson, which together account for about 60% of the overall waterworks distribution market. IDF 222, 227, 377-79. There are also a few regional distributors, as well as hundreds of local ones. IDF 236-277, 375. Most distribution business is conducted on a bid-by-bid basis, with distributors competing on the basis of service as well as price. IDF 383-84, 386-87.

D. PRICING

Fittings prices have two main components: (i) a nationwide list price, typically issued by suppliers once a year or even less frequently; and (ii) published "multipliers," which vary by region and are discounts off the list price. IDF 413, 416-19. The "published" or "standard" price for a given fitting is the list price multiplied by the applicable regional multiplier. IDF 414.

Virtually no customer buys fittings at the list price. IDF 418. At the very least, sale prices usually reflect the multiplier discount. IDF 425. Suppliers often also offer a variety of other price concessions, the most important of which are discounts variously referred to as "job prices," "special prices," or "project prices," which are discounts off the published or standard price. IDF 428, 430-33. Project prices are the primary form of price competition among suppliers, but, unlike the published list prices and multipliers, they are not transparent. IDF 435, 442.

E. DOMESTIC FITTINGS, THE FULL SUPPORT PROGRAM, AND THE MASTER DISTRIBUTION AGREEMENT

1. Expected Growth in Sales of Domestic Fittings

In February 2009, Congress passed ARRA, which allocated more than $6 billion to water infrastructure projects. JSLF ¶¶ 19-20; IDF 524. Waterworks projects funded by ARRA were required to use domestically manufactured fittings and to be "under contract or under construction" within 12 months of ARRA's enactment.[4] IDF 525-27.

Given the anticipated increase in domestic fittings demand due to ARRA funding, both Star and Sigma began exploring options to enter the market. IDF 1094, 1421. In June 2009, Star sent a letter to customers and publicly announced at an AWWA industry conference that it would offer domestic fittings starting in September 2009. IDF 1095-96. Sigma initially considered two approaches for entering the domestic fittings market—purchasing Sigma-branded fittings manufactured by McWane or producing domestic fittings by contracting with independent domestic foundries. IDF 1423. In April 2009, Sigma contacted McWane to ask that it supply Sigma with "private label" domestic fittings, advising McWane that Sigma would pursue its own domestic production if McWane did not supply it with domestic fittings. IDF 1425-26.

The possible entry of Star and Sigma into the domestic fittings market created significant concerns for McWane. Not surprisingly, McWane did not want to share domestic sales and worried that entry by Star and Sigma would threaten to undermine its domestic fittings prices. IDF 1148-49, 1151-53.

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4 During the distribution of funds provided by ARRA, the Environmental Protection Agency granted certain waivers of the "Buy American" requirement. IDF 530-46. These included public interest waivers, cost waivers if using domestic materials resulted in an overall cost increase of more than 25%, and waivers when domestic materials were unavailable in adequate quantities. IDF 531-33.

2. Development of McWane's Full Support Program

By May 2009, the Vice President and General Manager in charge of McWane's fittings business, Mr. Tatman, was developing McWane's strategic response to possible domestic entry. He noted in a May 26 "brainstorming" document that any competitor seeking to enter the domestic fittings market could face "significant blocking issues" if they lacked a full line of domestic fittings. IDF 1155. A few weeks later, in a June e-mail exchange with other McWane executives about how to deal with entry, Mr. Tatman laid out his strategic vision for protecting McWane. He wrote:

> [A]t this stage the chance for profitable cohabitation with Star owning a [piece] of the Domestic market is slim. . . . 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.

IDF 1150.

As of late June, Mr. Tatman had developed three potential options for McWane's response to domestic entry: "Wait and See"; "Handle on a Job by Job basis"; or "Force Distribution to Pick their Horse." CX0076 at 009. He explained the advantages of the third approach: (1) "Avoids the job by job auction scenario within a particular distributor"; (2) "Potentially raises the level of supply concern among contractors"; and (3) "Forces Star/Sigma to absorb the costs associated with having a more full line before they can secure major distribution[.]" *Id.* When considering how to implement such a program, Mr. Tatman outlined a "Soft Approach" in which a "Domestic rebate would require exclusivity," and a "Hard Approach – Full Line or No Line," whereby access to McWane's domestic fittings would "require[] exclusivity for Domestic fitting items we manufacture." *Id.* at 010.

By August, McWane had determined to implement an exclusive dealing requirement for distributors. Mr. Tatman explained the plan: "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." CX0113 at 001. McWane's management emphasized to its sales staff that the "new policy" meant that "if a customer buys Star domestic . . . the customer will no longer have access to [McWane] domestic [fittings]." IDF 1179.

3. McWane Announces and Implements the "Full Support Program"

McWane announced its exclusive dealing policy, called the "Full Support Program," in a September 22, 2009 letter to distributors. IDF 1173. McWane's executives and sales force proceeded to contact customers to discuss the program, explaining it would be applied to them on a "company-wide basis"—if one branch purchased domestic fittings from Star, "all branches would be cut off." IDF 1180-82. There were only two exceptions permitting the purchase of another company's domestic fittings: where McWane products were not readily available or where the customer bought domestic fittings and accessories along with another manufacturer's ductile iron pipe. IDF 1173.

The message was received, and nearly all customers believed they would lose rebates or be cut off from purchasing McWane's domestic fittings if any branch bought domestic fittings from Star. IDF 1184-85, 1188-89, 1191-92, 1300. As a consequence, unless an exception applied, major distributors purchased only from McWane. *See* IDF 1231-51, 1259-64, 1299-1304, 1334-40, 1313-18, 1353-58, 1364.

McWane's enforcement of the Full Support Program was consistent with what it had described to customers. Distributor Hajoca Corporation provides one example. Because Hajoca's branches operated independently, Hajoca asked McWane to modify the Full Support Program so that not all Hajoca branches would be penalized if one branch bought from Star. McWane refused. IDF 1197-1202. Later, when Hajoca's Tulsa branch purchased Star domestic fittings, McWane cut off sales of its

domestic fittings to all Hajoca branches, including branches that had complied with the program. IDF 1206-13. As a result, Hajoca was unable to place any new domestic fittings orders with McWane between December 4, 2009, and April 13, 2010 (IDF 1219), and McWane withheld its rebates for the fourth quarter of 2009 (IDF 1224-27, 1230).[5]

4. Impact of McWane's Exclusive Dealing Policy on Star

Following McWane's announcement of the Full Support Program, Star saw a dramatic reduction in the number of requests for quotes. IDF 1381-82. Numerous distributors pulled their outstanding bid requests from Star. IDF 1382. Conversations with customers led Star to believe that McWane's policy made customers less willing to risk purchasing domestic fittings from Star.[6] IDF 1382-92; Bhargava, Tr. 2960, *in camera*. Star was rebuffed by some distributors even after offering a more generous rebate than McWane. IDF 1391. Star estimated that it would have secured [redacted] in sales of domestic fittings in 2010, and potentially as much as [redacted] in 2011, but for McWane's Full Support Program. IDF 1394, *in camera*. Star's actual sales in 2010 were approximately [redacted], less than half of the sales it estimated it would have garnered in the absence of McWane's program. IDF 1396, *in camera*. Star's revenue from domestic fittings declined to [redacted] in 2011, or roughly one-third of its estimated sales in the absence of McWane's program. IDF 1397, *in camera*. [redacted] IDF 1399, *in camera*.

Despite McWane's program, distributors did make some purchases from Star. Hajoca's Tulsa branch began purchasing

5 Although McWane cut off new orders, McWane allowed Hajoca branches, except Tulsa, to place orders to satisfy known commitments of existing contracts. IDF 1214.

6 A number of distributors testified they were reluctant or unwilling to purchase domestic fittings from Star because of McWane's Full Support Program; some also identified other factors that contributed to their decisions not to purchase from Star. *See* IDF 1252-55, 1271-75, 1307, 1341-42, 1359-62.

domestic fittings from Star soon after McWane's announcement of the Full Support Program, and by January 2010, had ordered more than [redacted] worth of Star domestic fittings. IDF 1230, *in camera*. Additionally, many distributors made purchases under the exceptions allowed by the Full Support Program. *See* IDF 1137, 1142, 1242, 1305. For example, HD Supply cancelled pending orders with Star after McWane announced its program, but retained orders for items McWane did not have available or for which a commitment had already been made before the announcement of the Full Support Program. IDF 1242. In all, Star sold to over 100 distributors from the time it entered the market through 2011. IDF 1141. Altogether, however, the sales made by Star were small compared to the overall size of the market. IDF 1396-99, 1042-43.

Star's sales levels had direct implications for its domestic fittings operations. Star had considered three possible manufacturing approaches for entering the market: building a foundry from "ground zero," buying an existing foundry, or contracting with existing domestic foundries to produce the desired fittings. IDF 1097. The cost of sourcing from independent foundries is higher because they are less specialized, which means they have less efficient equipment, run smaller batch sizes, and have higher labor costs, and because they charge a markup on each fitting, sometimes as much as [redacted]%. IDF 1410, 1411, *in camera*, 1412-13. Star believed its sales level was insufficient to justify running its own foundry. IDF 1400-01.

In the end, because it could not expand its sales more quickly, rather than acquiring a foundry, Star contracted with six foundries to produce raw castings, which Star then shipped to its Houston facility for finishing. IDF 1409. Shipping costs alone to Star's Houston finishing facility added [redacted]% to the cost of Star's domestic fittings. IDF 1411, *in camera*. Star estimated that the cost of producing fittings at its own domestic foundry would have been [redacted]% lower than the cost of contracting with independent foundries, and that it could have reduced its domestic fittings prices by [redacted]%. IDF 1419-20, *in camera*.

5. Sigma's Efforts to Enter the Domestic Fittings Market

In April 2009, at the same time as it was developing its exclusive dealing policy, McWane was also responding to a request from Sigma that McWane supply Sigma with "private label" domestic fittings. IDF 1425, 1429. McWane's Mr. Tatman recognized that if McWane did not sell to Sigma, McWane would retain the full margin for its domestic fittings sales, but also realized that by selling to Sigma it could "eliminate the probability" that Sigma would find another domestic fittings source. IDF 1431-39, 1442.

On June 5, McWane made an initial offer to sell domestic fittings to Sigma at 5% off McWane's published prices. IDF 1443. Sigma rejected that offer because it did not allow sufficient margin to cover its operating costs. IDF 1444-45. Sigma then informed McWane that it planned to develop its own domestic fittings capability. IDF 1509-10.

While negotiating with McWane, Sigma tasked a team of executives to investigate the possibility of entering the domestic fittings market using independent foundries. IDF 1446-47. The team held planning meetings that resulted in detailed action plans. IDF 1454. When Sigma rejected McWane's June 5 offer, Sigma's president stated in an update to the Board, "We now need to go all out and implement a [domestic] 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." IDF 1455. By June, Sigma's team had begun to take steps to implement a virtual model. They obtained patterns, arranged foundry site visits, placed orders for foam patterns and other equipment, and produced two large sample domestic fittings as trial runs at a foundry in Tennessee. IDF 1457-61. All told, Sigma spent between $50,000 and $75,000 investigating domestic production options. IDF 1449.

As of July 11, Sigma was still pursuing its plan to produce domestic fittings, but it was proceeding more "deliberately and thoughtfully" because it was finding the plan difficult to implement. IDF 1463. Sigma was also in a financially precarious

situation and had limited access to capital. IDF 1483, 1487, 1499. At that point, 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. IDF 1465.

In September, Sigma still had very few of the patterns it would need to make domestic fittings, did not have any contracts with any pattern shops to build the necessary patterns, and did not have any contracts with any domestic foundries to produce fittings. IDF 1470-73. Ultimately, Sigma decided against producing its own domestic fittings. IDF 1545. Mr. Pais of Sigma informed the Board that "the entire project was found to be too overwhelming and cumbersome" and would have required "a sizeable Capital Expenditure." IDF 1474.

6. McWane and Sigma Enter Into the Master Distribution Agreement

In late June or early July 2009, Mr. Rona of Sigma resumed discussions with McWane. IDF 1522. On July 29, McWane offered to sell McWane-branded domestic fittings to Sigma at a 20% discount off published multipliers, but required that McWane be Sigma's sole source of domestic fittings (other than for fittings that McWane did not produce or could not ship promptly). IDF 1529; CX1805 at 002. The offer also required Sigma to agree to sell the McWane fittings only to distributors that had an exclusive supply relationship with McWane. IDF 1529.

Negotiations continued through August and September. On September 17, McWane and Sigma signed the MDA. IDF 1537. Under the agreement, Sigma agreed to act as an authorized distributor of McWane's domestic fittings on the following key terms: (1) McWane would be Sigma's sole domestic fittings source, unless certain limited exceptions applied; (2) Sigma could resell McWane's fittings at any price, but McWane could cancel the agreement if Sigma's price was less than 98% of McWane's published pricing on a weighted average basis; (3) Sigma could resell only to customers that agreed to purchase McWane domestic fittings exclusively; and (4) there would be an initial term of one year, but either party could terminate the agreement with or without cause by giving 180 days' advance written notice.

CX1194 at 001-002, 007. McWane announced the MDA to customers in the same September 22, 2009 letter that announced the Full Support Program. CX0010.

Sigma's subsequent actions were consistent with the MDA. It ceased efforts to develop its own domestic manufacturing capability. IDF 1543-47. Sigma also priced domestic fittings as prescribed by the MDA and implemented McWane's exclusive dealing program. IDF 1548-53, 1566-74. Additionally, when McWane cut off the supply of domestic fittings to Hajoca, Sigma followed suit. *See* IDF 1568-70.

On February 17, 2010, McWane provided Sigma with 180 days' notice that McWane wished to terminate the MDA. IDF 1595. In all, the MDA was in effect from September 2009 to August 2010. IDF 1596.

IV. STANDARD OF REVIEW

The Commission reviews the ALJ's findings of facts and conclusions of law *de novo*, considering "such parts of the record as are cited or as may be necessary to resolve the issues presented." 16 C.F.R. § 3.54. The Commission may "exercise all the powers which it could have exercised if it had made the initial decision." *Id*. The *de novo* standard of review applies to both findings of fact and inferences drawn from those facts. *See Realcomp II, Ltd.*, No. 9320, 2009 FTC LEXIS 250 at *37 n.11 (Oct. 30, 2009), *aff'd, Realcomp II, Ltd. v. FTC*, 635 F.3d 815 (6th Cir. 2011).

V. MCWANE'S EXCLUSIVE DEALING POLICY AS MONOPOLY MAINTENANCE

Complaint Counsel alleges that McWane adopted an exclusionary distribution policy in order to maintain its monopoly in the domestic fittings market in violation of Section 5 of the FTC Act.[7] A claim of monopolization requires proof of "(1) the

7 Violations of the Sherman Act also constitute "unfair methods of competition" under Section 5 of the FTC Act. *See California Dental Ass'n v. FTC*, 526 U.S. 756, 762 & n.3 (1999); *FTC v. Motion Picture Adver. Serv. Co.*, 344 U.S. 392, 394-95 (1953). Accordingly, we rely on case law and other authority applying the Sherman Act for our analysis of the relevant claims.

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). As the Supreme Court underscored in *Spectrum Sports, Inc. v. McQuillan*, "[t]he law directs itself not against conduct which is competitive, even severely so, but against conduct which unfairly tends to destroy competition itself." 506 U.S. 447, 458 (1993). Accordingly, the Commission must first determine whether McWane has monopoly power in a relevant market, and, if it does, whether McWane acted to maintain its monopoly through anticompetitive conduct. *United States v. Microsoft*, 253 F.3d 34, 79 (D.C. Cir. 2001). As discussed below, we answer both questions in the affirmative and conclude that McWane unlawfully maintained its monopoly of the domestic fittings market.

A. MONOPOLY POWER

A monopolist is defined as a firm that can "profitably raise prices substantially above the competitive level." *Microsoft*, 253 F.3d at 51. Monopoly power can be shown directly, through evidence of the defendant's control over prices or its ability to exclude competition from the market, or indirectly, by examining market structure and a firm's market share. *See Grinnell Corp.*, 384 U.S. at 571. Because direct evidence of monopoly power is often unavailable, courts have traditionally inferred it from "a firm's possession of a dominant share of a relevant market that is protected by entry barriers." *Microsoft*, 253 F.3d at 51. We start by addressing the relevant market and then turn to whether McWane has monopoly power in that market.

1. Domestic Fittings Sold for Use in Projects with Domestic-Only Specifications Are a Relevant Market

A relevant product market consists of "products that have reasonable interchangeability for the purposes for which they are produced." *United States v. E. I. duPont de Nemours & Co.*, 351 U.S. 377, 404 (1956). Courts typically evaluate the reasonable interchangeability of use and the cross elasticity of demand in assessing a potential relevant market, focusing on "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).

We agree with the ALJ that there are two relevant product markets in this case. One is comprised of small and medium (*i.e.*, 24 inches and smaller) diameter ductile iron pipe fittings sold in the United States for use in open specification waterworks projects (the "fittings market"). *See* ID at 244, 252-53, 450. There are no reasonable substitutes for ductile iron pipe fittings. The closest substitute is made from polyvinyl chloride ("PVC"), but because PVC fittings lack the strength of ductile iron pipe fittings and thus are not suitable for high pressure applications, the two are not reasonably interchangeable. ID at 246-47. We also find that it is appropriate to group all ductile iron pipe fittings 24 inches and smaller in diameter into a single product market for the purpose of evaluating competitive effects. *See* ID at 244-46 (explaining "cluster" markets); *United States v. Philadelphia Nat'l Bank*, 374 U.S. 321, 356 (1963) (finding that a cluster of products and services comprising "commercial banking" was a relevant market); *In re ProMedica Health Sys., Inc.*, 2012 FTC LEXIS 58, at *48-55, *62-72 (Mar. 28, 2012) (describing conditions that make it appropriate to delineate cluster markets). Domestically-manufactured and imported fittings are both used in open specification jobs and are therefore both included in the fittings market. This relevant market is not in dispute.

We also find there is a separate relevant market for the supply of domestically-manufactured fittings for use in waterworks projects with domestic-only specifications (the "domestic fittings market"). This is the market that McWane contests.

Product markets are sometimes defined by considering whether a hypothetical monopolist could profitably target a particular subset of customers for price increases. Where existing buyers differ significantly in their likelihood of switching to other products in response to a small but significant and nontransitory increase in price, and a hypothetical monopolist can identify and price differently to targeted buyers that cannot defeat the price increase by substituting other products, there is a "price discrimination" market. In such a case, the hypothetical

monopolist would profitably impose a discriminatory price increase on sales to the targeted buyers, and those buyers would define the boundaries of the relevant market. *See* Dep't of Justice and Fed. Trade Comm'n, Horizontal Merger Guidelines § 4.1.4 (2010) ("Horizontal Merger Guidelines"); Phillip E. Areeda, Herbert Hovenkamp & John L. Solow, IIB *Antitrust Law* ¶ 534d.1, at 269 (3d ed. 2007) ("Successful price discrimination means that the disfavored geographic or product class is insulated from the favored class and, if the discrimination is of sufficient magnitude, should be counted as a separate relevant market.").

The supply of domestic fittings constitutes a price discrimination market. Certain waterworks projects require domestic-only fittings because of municipal, state, or federal law, or, sometimes, end-user preferences. IDF 347, 519; JX0001 at 002 (JSLF ¶ 13). For example, Pennsylvania and New Jersey both have "Buy American" laws governing fittings. IDF 348, 520-21. Certain federal government projects, Air Force bases, and municipalities also require domestic fittings. IDF 348, 519-23. Similarly, ARRA contained Buy American provisions requiring domestic fittings in the $6 billion worth of waterworks projects it funded. IDF 524-29. When a project requires domestic fittings, a distributor will not purchase imported fittings even though they have the same form and functionality. IDF 350, 549. Imported fittings therefore are not interchangeable with, or reasonable substitutes for, projects with domestic procurement specifications.

McWane capitalizes on this lack of interchangeability by charging higher prices for domestic fittings used in domestic-only waterworks projects. Answer ¶ 20; IDF 350-51. For instance, McWane's February 2008 price multipliers for domestic fittings sold into domestic-only specifications were substantially higher than its "blended" multipliers for domestically manufactured and imported fittings sold into open specifications, with the price differential ranging from 21.4% to 96%. IDF 1076. Indeed, due to the price differential between fittings sold into open and domestic-only specifications, McWane does not provide quotes for domestic fittings for open specification projects. IDF 548. Importantly, the price difference reflects McWane's ability to target particular customers based on project specifications, not a

difference in the cost of production, which is the same for all domestically manufactured fittings.

These targeted price differences confirm that domestic fittings for use in projects with domestic-only specifications are a separate product market. Job specifications readily identify customers susceptible to discriminatory pricing and the persistence of distinct price levels shows that customers cannot use arbitrage to avoid the higher prices. *See Geneva Pharms. v. Barr Labs Inc.*, 386 F.3d 485, 496-98 (2d Cir. 2004) (finding that branded and generic versions of a drug, though "therapeutically equivalent," were in separate antitrust markets when users of the branded drug exhibited inelastic demand that was unresponsive to the lower prices of generic versions). Additionally, because customers can turn only to domestic producers in this relevant product market, the relevant geographic market is the United States. ID at 252-53.

McWane raises several arguments to dispute a domestic fittings market. None is persuasive. As an initial matter, it claims that econometric evidence is necessary to establish a product market and argues that the absence of such evidence here undermines a conclusion that a separate domestic fittings market exists. That is simply incorrect. Econometric analysis can be a valuable tool for defining a market, but it is only one of several that may be used for that purpose. Courts routinely rely on qualitative economic evidence to define relevant markets. *See, e.g.*, *Brown Shoe Co. v. United States*, 370 U.S. 294, 325 (1962) (recognizing that "practical indicia" such as industry or public recognition and a product's unique attributes can be used to define a relevant market); *Spirit Airlines, Inc. v. Northwest Airlines, Inc.*, 431 F.3d 917, 934-35 (6th Cir. 2005) (relying on party documents and fact and expert testimony to determine the relevant product market); *United States v. H&R Block, Inc.*, 833 F. Supp. 2d 36, 50-71 (D.D.C. 2011) (finding digital do-it-yourself tax preparation software a relevant product market based mainly on defendant's documents, price disparities, and testimony from executives); *In re Polypore Int'l, Inc.*, 2010 FTC LEXIS 97, *31 & n.19 (Dec. 13, 2010) (relying on qualitative evidence to define relevant market), *aff'd*, 686 F.3d 1208, 1217-18 (11th Cir. 2012). As one treatise explains, "[i]n a world of imperfect price and quantity data from which to analyze elasticities, qualitative evidence of buyer's willingness to substitute one good or service

for another often provides the principal evidence of the boundaries of a relevant market."[8] ABA Section of Antitrust Law, *Mergers and Acquisitions* 55 (3d ed. 2008). In this case, there is ample economic evidence to support domestic fittings as a relevant market.

McWane also disputes the lack of interchangeability between domestic and imported fittings. It argues that waterworks projects with legally-imposed domestic fittings requirements represent only a small fraction of all specifications, pointing to the increase in sales of imported fittings over time. But observations about the size of the domestic fittings market shed no light on the ability of customers to switch between domestic and imported fittings for domestic-only projects. As the ALJ found, "the evidence overwhelming[ly] showed [Buy American] regulations did in fact limit substitution." ID at 250.

McWane also claims that customers can "flip" specifications from domestic-only to open. The relevant testimony, however, indicates that flipping typically only occurs when domestic fittings are unavailable, rather than as the result of competition between domestic and imported fittings. *See* CX2496 at 006 (Brakefield Dep. at 18-20). In fact, the sole example in the record of flipping was an instance in which domestic fittings were unavailable to complete the job. *Id.* Moreover, while sales of imported fittings may have increased, the share of domestic-only specifications has remained largely unchanged in recent years. *Compare* IDF 1026 (in 2003, Buy American provisions applied to 10%-20% of fittings shipped), *with* IDF 1029 (prior to the passage of ARRA in 2009, projects with domestic-only specifications accounted for 15%-20% of sales). This suggests that any growth in import sales likely came from the greater use of imports in open-specification jobs and not from a decline in domestic-only projects.

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8 The Commission's reliance on qualitative economic evidence is also well established. *See* Horizontal Merger Guidelines § 4.1.3 (noting that, in determining relevant markets, the antitrust agencies rely on "reasonably available and reliable evidence," including business documents, customer surveys, and past behavior); U.S. Dep't of Justice and Fed. Trade Comm'n, Commentary on the Horizontal Merger Guidelines 9 (2006) ("In the vast majority of cases, the Agencies largely rely on non-econometric evidence, obtained primarily from customers and from business documents.").

Finally, McWane argues that the Environmental Protection Agency's grant of waivers permitting the use of imported fittings on ARRA-funded projects--and Complaint Counsel's expert's failure to account for such waivers--precludes a finding that a domestic fittings market exists. But EPA-granted waivers were limited, and in any event had no impact on domestic-only requirements imposed by other federal, state, or municipal laws. IDF 531-33, 537. Notably, neither McWane nor Star sold any imported fittings for use in any ARRA-funded projects. IDF 538, 540. McWane even advised distributors that the cost-based exception to ARRA requirements was unlikely to apply to fittings sales. IDF 534. Sigma representatives testified that the quantities of imported fittings used on ARRA-funded waterworks projects were "few." IDF 539. Other suppliers, as well as distributors, also indicated they were unaware of any instances in which imported fittings were used for ARRA-funded projects. IDF 541-43, 544-46. Accordingly, McWane's protest that the potential for waivers offsets ARRA's Buy American requirements is unavailing.

2. McWane Possesses Monopoly Power in the Domestic Fittings Market

Having established that domestic fittings are a relevant market, we now consider whether McWane possessed monopoly power in that market. Both direct and indirect evidence show that it did.

We begin by looking at market structure. From late 2006 until late 2009 when Star entered the domestic fittings market, McWane was the only domestic manufacturer of fittings. IDF 476, 1040. McWane's share continued to be more than [redacted]% in 2010 and [redacted]% in 2011, after Star had entered the market. IDF 1042-43, *in camera*. These market shares far exceed the levels that courts typically require to support a *prima facie* showing of monopoly power. *See United States v. Dentsply Int'l, Inc.*, 399 F.3d 181, 188 (3d Cir. 2005) (holding that market share between 75% and 80% of sales is "more than adequate to establish a *prima facie* case of [monopoly] power"); *Colo. Interstate Gas Co. v. Natural Gas Pipeline Co. of Am.*, 885 F.2d 683, 694 n.18 (10th Cir. 1989) (noting that to establish "monopoly power, lower courts generally require a minimum market share of between 70%

and 80%"). Enduring high market-share figures provide particularly strong evidence of monopoly power, especially in a mature and stable industry such as this one. *See ZF Meritor LLC v. Eaton Corp.*, 696 F.3d 254, 285 (3d Cir. 2012) (recognizing competitors' "paltry penetration" in the market "over the years" as a sign of market power).

Moreover, there are substantial barriers to entry in the domestic fittings market. ID at 375-77; IDF 1050. A *de novo* entrant would need to build its own foundry or develop a supply chain of foundries to produce fittings, develop or purchase hundreds of patterns or moldings necessary to make a full line of fittings, have its products tested and certified to conform to AWWA standards and get on "approved" lists for engineers and municipalities, and develop a sales force and relationships with distributors. IDF 1044-48. As a result, a *de novo* entrant seeking to enter the fittings market would need approximately three to five years to do so. IDF 1049.

Even existing suppliers of imported fittings face significant barriers to enter the domestic fittings market. Although equipped with an existing sales team and relationships with customers, to enter this market a supplier of imported fittings would still need to build its own foundry or arrange for existing foundries to manufacture its fittings, obtain patterns for the 100-200 fittings necessary to enter with at least a partial line, and have its domestically-manufactured products tested and certified. IDF 1044-47, 1051-55, 1119-26, 1130-32. Additionally, as discussed more fully below, McWane's exclusive dealing policy raised a barrier to entry for even current suppliers of imported fittings, particularly those without a full line of fittings. *See Dentsply*, 399 F.3d at 189-90 (recognizing that the defendant's exclusionary conduct was a barrier to entry).

The record reflects the significance of these barriers. Although Star was able to and did enter the market, two other suppliers of imported fittings investigated entry, but were deterred from making the attempt. After considering the availability of domestic foundries, patterns, and other equipment, as well as its weak financial condition, Sigma concluded that it could not overcome the complexity of entering the domestic fittings market. Similarly, although Serampore Industries Private ("SIP"), a small

seller of imported fittings, possessed the financial capability of entering, the challenges to entering the market, including the unavailability of a single foundry capable of supplying its full needs, the high cost of developing patterns and drilling and machining capabilities, and McWane's exclusive dealing program, led SIP not to attempt it. IDF 1366, 1368, 1373, 1375-79.

McWane argues Star's entry proves that barriers to entry are low and contradicts a finding of monopoly power. But, as the Ninth Circuit has noted, "[t]he fact that entry has occurred does not necessarily preclude the existence of 'significant' entry barriers." *Rebel Oil Co. v. Atlantic Richfield Co.*, 51 F.3d 1421, 1440 (9th Cir. 1995). "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.*; *accord Allen-Myland v. Int'l Bus. Mach. Corp.*, 33 F.3d 194, 210 (3d Cir. 1994) (rejecting district court's inference that existence of competitors demonstrated ease of entry that would disprove market power); *Reazin v. Blue Cross & Blue Shield of Kansas, Inc.*, 899 F.2d 951, 971-72 (10th Cir. 1990) (upholding a finding of monopoly power because "no other entrant remotely approached [defendant's] domination of the market").

The evidence here demonstrates that Star's entry did not displace McWane's monopoly position in the domestic fittings market. Star's market share remained below [redacted]% in 2010 and 2011. IDF 1042-43, *in camera*. Moreover, Star's presence in the market failed to constrain McWane's pricing for domestic fittings. CX2199; IDF 1073-74, 1083, 1091-92. McWane's customers testified that, after the 2009 enactment of the ARRA, prices for domestic fittings increased and McWane refused to negotiate prices. IDF 1073. Even after Star's first domestic fittings sales in September 2009, McWane continued to sell its domestic fittings into domestic-only specifications at prices that earned significantly higher gross profits than for non-domestic fittings, which faced greater competition. IDF 1091. McWane also announced a price increase for domestic fittings in December 2009 that it applied in January 2010 (IDF 1083), which allowed McWane to earn even higher gross profits for domestic fittings in 2010 than in the prior year (IDF 1091-92).

Even the testimony of McWane's own expert, Dr. Normann, demonstrates that Star did not have a disciplining effect on McWane. He concluded that Star's presence in the domestic fittings market in several states did not produce lower prices. IDF 1090. Despite McWane's protests to the contrary, these facts establish its ability to control prices in the domestic fittings market and provides direct evidence of McWane's monopoly power.

B. EXCLUSIONARY CONDUCT

The next question is whether the challenged conduct—McWane's Full Support Program—was an unlawful exclusive dealing policy that enabled McWane to maintain its monopoly power in the domestic fittings market. "Unlawful maintenance of a monopoly is demonstrated by proof that a defendant has engaged in anti-competitive conduct that reasonably appears to be a significant contribution to maintaining monopoly power." *Dentsply*, 399 F.3d at 187; *Microsoft*, 253 F.3d at 79.

Distinguishing between exclusionary conduct and vigorous competition is not always easy. *Microsoft*, 253 F.3d at 58. Exclusive dealing arrangements are common and often procompetitive. *See Race Tires Am., Inc. v. Hoosier Racing Tire Corp.*, 614 F.3d 57, 76 (3d Cir. 2010) ("[I]n many circumstances, [exclusive dealing] may be highly efficient--to assure supply, price stability, outlets, investment, best efforts or the like--and pose no competitive threat at all."); *Stop & Shop Supermarket Co. v. Blue Cross & Blue Shield of R.I.*, 373 F.3d 57, 65 (1st Cir. 2004) (exclusive dealing agreements "can achieve legitimate economic benefits (reduced cost, stable long-term supply, predictable prices)"). For instance, exclusive dealing can, among other things, align distributor and manufacturer incentives and thus prevent free-rider problems, or lead a distributor to promote the product of its exclusive supplier more effectively, thereby increasing interbrand competition. *See Ryko Mfg. Co. v. Eden Servs.*, 823 F.2d 1215, 1234 n.17 (8th Cir. 1987); *Roland Mach. Co. v. Dresser Indus., Inc.*, 749 F.2d 380, 395 (7th Cir. 1984); *see also* Jonathan M. Jacobson, *Exclusive Dealing, Foreclosure & Consumer Harm*, 70 Antitrust L.J. 311, 357-58 (2002); Benjamin Klein & Kevin Murphy, *Exclusive Dealing Intensifies Competition for Distribution*, 75 Antitrust L.J. 433, 465-66

(2008). It can also result in lower prices because suppliers may be willing to reduce prices in exchange for higher sales volume. *See Stop & Shop Supermarket*, 373 F.3d at 62. Indeed, "competition to be an exclusive supplier may constitute 'a vital form of rivalry, and often the most powerful one, which the antitrust laws encourage rather than suppress.'" *Race Tires Am.*, 614 F.3d at 76 (quoting *Menasha Corp. v. News Am. Marketing In-Store, Inc.*, 354 F.3d 661, 663 (7th Cir. 2004)).

Despite these and other potential benefits, exclusive dealing can harm competition under certain circumstances. *See Jefferson Parish Hosp. Dist. No. 2 v. Hyde*, 466 U.S. 2, 45 (1984) (O'Connor, J., concurring) ("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 . . . ."); Jacobson, 70 Antitrust L.J. at 328 (explaining that courts have manifested concern when exclusive dealing has been used to foster market power). Exclusive dealing can be particularly troubling when imposed by a monopolist. *ZF Meritor*, 696 F.3d at 271; *Dentsply*, 399 F.3d at 187 ("Behavior that otherwise might comply with antitrust law may be impermissibly exclusionary when practiced by a monopolist.").

Most pertinent here, exclusive dealing can be harmful when it enables a firm to acquire or maintain monopoly power by impairing the ability of rivals to grow into effective competitors that might erode the firm's dominant position. *See Microsoft*, 253 F.3d at 70-71; *Interface Grp., Inc. v. Mass. Port Auth.*, 816 F.2d 9, 11 (1st Cir. 1987); *Barry Wright Corp. v. ITT Grinnell Corp.*, 724 F.2d 227 (1st Cir. 1983). The dominant firm's exclusive dealing arrangements may prevent new firms from achieving the scale necessary for them to become efficient competitors. *See* Dennis W. Carlton, *A General Analysis of Exclusionary Conduct and Refusal to Deal*, 68 Antitrust L.J. 659, 663, 655 n.15 (2001) (explaining that exclusive dealing may be harmful when it deprives rivals "of the necessary scale to achieve efficiencies, even though, absent the exclusivity," more than one firm "would . . . be large enough to achieve efficiency"). When a monopolist can impede potential rivals from becoming effective competitors, it can maintain monopoly prices and thereby harm consumers. *See* Herbert Hovenkamp, XI *Antitrust Law* ¶ 1802c, at 76-77 (3d ed. 2011); Richard A. Posner, *Antitrust Law* 229 (2d ed. 2001)

(noting that exclusive dealing may "increase the scale necessary for new entry, and . . . increase the time required for entry and hence the opportunity for monopoly pricing").

As one leading commentator has summarized, the preconditions for competitive harm are: (i) exclusive dealing or similar arrangements covering a significant portion of distribution; (ii) entry barriers or equivalent impediments making it difficult for rivals or potential rivals to obtain efficient distribution; and (iii) resulting prolongation of the dominant firm's ability to earn monopoly profits in the downstream market. *See* Hovenkamp, XI *Antitrust Law* ¶ 1802b, at 74-76. Exclusive dealing can be anticompetitive, therefore, if it facilitates the exercise of market power by either impairing a rival's ability to achieve the scale necessary to become efficient, or if it makes a rival less efficient by depriving it of "efficient access to the downstream market." *Id.*; Dennis W. Carlton & Ken Heyer, *Appropriate Antitrust Policy Towards Single-Firm Conduct: Extraction vs. Extension*, 22 Antitrust 50, 53 (2008).

We evaluate McWane's Full Support Program using this accepted theory of competitive harm. In assessing McWane's exclusive dealing arrangement, we examine both the anticompetitive and procompetitive effects of the conduct to determine whether, in light of McWane's monopoly power, its use of exclusive dealing prevented rivals from meaningfully competing and had a substantial anticompetitive effect on competition. This approach is consistent with recent court precedent on exclusive dealing. *See ZF Meritor*, 696 F.3d at 271-72; *Dentsply*, 399 F.3d at 187; *Microsoft*, 253 F.3d at 58-59. As discussed below, we conclude that McWane's Full Support Program was an unlawful exclusive dealing policy that contributed significantly to the maintenance of McWane's monopoly power in the domestic fittings market.

1. McWane's "Full Support Program" Is an Exclusive Dealing Policy

"An exclusive dealing arrangement is an agreement in which a buyer agrees to purchase certain goods or services only from a particular seller for a certain period of time." *ZF Meritor*, 696 F.3d at 270. McWane's Full Support Program is an exclusive

dealing policy by its terms, operation, and intent. McWane designed and implemented the program to deny Star and other potential competitors access to distributors and thereby impede their effective entry into the domestic fittings market in order to maintain its monopoly.

McWane's strategy and aim is clear from its internal business documents. Despite the fact that about 80% of demand can be met with 100 or fewer commonly used sizes and configurations of fittings, referred to as "A or B" fittings, distributors need access to a full line of domestic fittings to meet all of their customers' needs either through their own supply or with supply from others. IDF 306-08, 1252. As the only full-line supplier of domestic fittings, McWane knew very well that an exclusive dealing requirement would prevent distributors from purchasing from suppliers without full lines and took this into account when designing its Full Support Program. In a June 2009 presentation outlining options for McWane's response to Star's announced entry into the market, Mr. Tatman proposed a strategy to "Force Distribution to Pick their Horse." The proposal included a "Hard Approach – Full Line or No Line" and explained that the advantages of such a strategy included "[p]otentially rais[ing] the level of supply concern among contractors" and "Forc[ing] Star/Sigma to absorb the costs associated with having a more full line before they can secure major distribution." CX0076 at 009-010; *see also* CX0329 at 001 (advocating Full Line or No Line as preferred approach and best option against Star).

Later, while preparing for the rollout of the Full Support Program, McWane's National Sales Manager, Mr. Jansen, led an internal conference call with McWane's sales force during which he explained the new policy: "What are we going to do if a customer buys Star domestic? We are not going to sell them our domestic . . . . Once they use Star, they can't EVER buy domestic from us." IDF 1179. Mr. Tatman similarly noted in an e-mail that "we won't provide domestic product to distributors who are not fully supporting our domestic product lines." CX0113 at 001.

Following Star's first sales of domestic fittings, McWane publicly announced the program on September 22, 2009, in a letter to distributors:

> [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. . . . 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 fittings and accessory orders of Tyler Union or Clow Water products for up to 12 weeks.

CX0010. Despite the soft language of "may" and "or," McWane made sure distributors received the message that they would no longer be able to buy domestic fittings from McWane if they purchased domestic fittings from Star. *See* IDF 1180 (finding that McWane informed customers that if one branch of a distributor purchased domestic fittings from Star, all branches would be cut off). The only exceptions to this exclusivity policy were in situations where McWane domestic fittings were either unavailable within normal time frames, or purchased from a competitor along with pipe.[9] IDF 1173.

As McWane intended, most distributors interpreted the announced policy as a threat that McWane would terminate their ability to purchase any of McWane's domestic fittings if they purchased any domestic fittings from Star. *See* IDF 1184 (distributor Hajoca believed it would lose its rebates or be cut off from purchasing from McWane), 1187 (Groeniger viewed the policy as a threat that if it purchased domestic fittings from Star, McWane would not sell it any domestic fittings), 1188 (Illinois Meter believed it had been threatened with loss of access to McWane's domestic fittings if it bought from Star), 1190 (E.J. Prescott believed "If you bought one [domestic] fitting [from Star] in one of our 26 places, we're out, simple. . . . [McWane] said it's

9 To the extent that McWane's rebates were part of the policy, McWane's threat to terminate any rebates previously offered if a distributor purchased from Star served only to further advance the exclusive dealing requirement of the program. As a result, because McWane's program was plainly more than a rebate policy, the arguments McWane raises about above-cost pricing are inapposite. Our principal concern is with McWane's threats to terminate its supply to distributors who purchased rival domestic fittings.

all or nothing."), 1192 (CI Thornburg interpreted the letter as a threat); IDF 1300 (U.S. Pipe was told that if it purchased from Star, "don't come back to McWane"); *but cf.* Thees, Tr. 3109-11 (Ferguson believed there may have been room to negotiate the Full Support Program's requirements and that its status as a large buyer would offer protection; ultimately, however, Ferguson chose not to purchase domestic fittings from Star unless McWane did not have the domestic fittings available (IDF 1262)). McWane acknowledged in an internal presentation that the message had been received by distributors: "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." IDF 1183.

And McWane's threat to terminate distributors who did not comply with its Full Support Program was not hollow. When Hajoca's Tulsa branch purchased Star domestic fittings, McWane cut off domestic fitting sales to all Hajoca branches, including those that had not purchased from Star. IDF 1208-13 (McWane refused to supply Hajoca's Lansdale branch even after Hajoca offered to pay higher prices). In an e-mail to customers of Hajoca's Lansdale, Pennsylvania branch, McWane stated, "We don't like the situation either but feel we can't support someone who is helping our competition build a line against us." IDF 1207. Consistent with McWane's policy, and in fact for a period longer than the 12 weeks specified in McWane's September 2009 letter, Hajoca was unable to place new domestic fittings orders with McWane. IDF 1219. McWane also withheld Hajoca's rebates for the fourth quarter of 2009. IDF 1224-27. It was only in April 2010, after the FTC commenced its investigation, that McWane and Hajoca negotiated an agreement allowing Hajoca to resume buying domestic fittings from McWane. Even under that agreement, however, Hajoca's Tulsa branch continued to be precluded from accessing McWane domestic fittings. IDF 1220-23.

In sum, the Full Support Program effectively required distributors to purchase domestic fittings only from McWane, under a real threat of losing access to McWane's full line of

domestic fittings. Accordingly, we find that McWane's Full Support Program was an exclusive dealing policy.

2. McWane's Full Support Program Foreclosed Star's Access to Distributors for Domestic Fittings and Harmed Competition

A finding of exclusive dealing alone is insufficient to establish liability. There must be evidence that competition, not merely a competitor, has been harmed. *Dentsply*, 399 F.3d at 187. The conduct, in other words, "must harm the competitive *process* and thereby harm consumers." *Microsoft*, 253 F.3d at 58. Accordingly, the central question is whether McWane's exclusive dealing policy raised "the cost of obtaining efficient distribution" for its rivals and thereby impaired "the competitive effectiveness" of its rivals with "resulting harm to competition." Carlton, 68 Antitrust L.J. at 665 n.15. Importantly, to be unlawful, the conduct need not have foreclosed all competition from the market; rather, it must have impeded a substantial number of rivals or severely restricted the scope of the market. *Dentsply*, 399 F.3d at 191.

With few exceptions, McWane's program forced its distributors to carry McWane domestic fittings exclusively. McWane thus deprived its rivals, mainly Star, of distribution sufficient to achieve efficient scale, thereby raising costs and slowing or preventing effective entry. The result harmed competition by increasing barriers to entry and allowing McWane to maintain its monopoly position, which prevented meaningful price competition and deprived consumers of the ability to choose among the products, terms of sale, and services of varying suppliers of domestic fittings.

a. Foreclosure of Access to Distributors

A domestic fittings entrant is unable to compete effectively without access to distributors. The benefits that distributors provide to fittings suppliers include offering better sales coverage (IDF 400, 402-03, 408-09); more local influence and knowledge of projects in their market area (IDF 400, 408-09, 412); carrying local inventory (IDF 400, 402-06); aggregating small orders and shipments to capitalize on scale efficiencies (IDF 405); and

carrying credit risk (IDF 400, 402, 407, 411). For a fittings supplier to replicate these distributor functions would impose an "astronomical" cost on the supplier that would be prohibitively expensive. IDF 402. The benefits accruing from distributors make them the preferred and most efficient sales channel for domestic fittings manufacturers. Not surprisingly, McWane views distributors as "critical to [its] success," as does Star. IDF 401-02. No evidence supports the existence of viable alternate distribution channels, including direct sales to end users. IDF 381. Indeed, virtually all fittings sales are made through distributors. JSLF ¶ 14, IDF 367 (99% of McWane's sales of fittings are through distributors), IDF 373-74 (similarly, Sigma and Star sell almost all of their fittings to distributors).

McWane's Full Support Program foreclosed Star and other potential entrants from accessing a substantial share of distributors. Following announcement of the program, the country's two largest waterworks distributors, HD Supply, with a roughly 28% to 35% share of distribution (IDF 378), and Ferguson, with about 25% of distribution (IDF 379), prohibited their branches from purchasing domestic fittings from Star unless the purchases fell into one of the exceptions specified in the Full Support Program. One day after learning about the program, HD Supply's management sent a memo to its district, branch, and operations managers describing McWane's policy and stating that "we need to adhere to this mandate and purchase all of our American made fittings through Union-Tyler [McWane] or Sigma . . . [to] ensure that we have a full line of product . . . as well as continued compliance with the Federal [ARRA Buy American] requirements." IDF 1238-41. HD Supply even cancelled pending orders for domestic fittings it had with Star. IDF 1242. Although a Ferguson executive testified that his company "was planning on purchasing all its needs from McWane" regardless of the Full Support Program because Star lacked a complete line of domestic fittings (Thees, Tr. 3109; *see also* IDF 1266, 1272), the record suggests that the Full Support Program nonetheless cost Star some Ferguson business. A Ferguson Vice President called district managers after McWane's policy was announced to ensure that it did not buy from Star, and at least one job Ferguson initially awarded to Star was cancelled. IDF 1260-61, 1263.

Similarly, when WinWholesale, the nation's third-largest waterworks distributor, received notice of the Full Support Program, it listed Star's vendor status internally as "Not Approved," which barred its local companies from buying from Star under any circumstances without board approval. IDF 236, 1331-32, 1334-37. WinWholesale, however, did allow local companies to make purchases from Star that fell within the exceptions allowed by the Full Support Program, and, as a result, some WinWholesale local companies made a handful of purchases from Star. *See* IDF 1338, 1343.

Other large distributors likewise refused to purchase from Star because of the Full Support Program, sometimes even though Star offered lower prices. For instance, despite a commitment from Star to offer lower prices than McWane, U.S. Pipe instructed its purchasing manager not to purchase domestic fittings from Star unless McWane could not provide the needed size. IDF 1295, 1299, 1301-02. As a result, except for minor purchases falling within the exceptions to McWane's exclusive dealing policy, U.S. Pipe did not purchase domestic fittings from Star until September 2010. IDF 1309-11. Similarly, Star offered TDG distributors a more generous rebate program on domestic fittings than McWane, but Star believed they likewise rejected Star's offer because of the Full Support Program. IDF 1391. Groeniger, which had given Star business on two sizeable domestic-only projects prior to McWane's announcement of the Full Support Program, was reluctant to make further purchases of domestic fittings from Star because it needed access to McWane's domestic fittings and feared retaliation. IDF 1313-18; IDF 1329-30 (testifying that, but for McWane's policy, Groeniger would have given Star 50% of its domestic fittings business in 2010). The Full Support Program also deterred Illinois Meter from purchasing domestic fittings from Star because of the need to have access to McWane's full line. Sheley, Tr. 3413, 3417-18; IDF 1357-58, 1362-64.[10]

10 Complaint Counsel estimates that McWane's policy foreclosed approximately [redacted]% of distribution, emphasizing that this is a far higher percentage than what courts have typically viewed as creating a potential competitive problem. CCAnsB at 17 (citing, *inter alia*, IDF 357, *in camera*); *Microsoft*, 253 F.3d at 70 (noting that a monopolist's use of exclusive contracts may in certain circumstances "give rise to a § 2 violation even though the contracts foreclose less than the roughly 40% to 50% share usually required in order to establish a § 1 violation"); Hovenkamp, XI *Antitrust Law* ¶ 1821c.1, at

In the face of this substantial evidence, McWane argues its program could not have foreclosed access to distributors because it did not require distributors to commit to purchasing McWane's fittings exclusively for a lengthy period of time. McWane's argument ignores the reality of a marketplace where distributors need access to a full line of domestic fittings to service their customers. "An express exclusivity requirement . . . is not necessary, because we look past the terms of the contract to ascertain the relationship between the parties and the effect of the agreement 'in the real world.' Thus, *de facto* exclusive dealing claims are cognizable under the antitrust laws." *ZF Meritor*, 696 F.3d at 270; *Minnesota Mining & Mfg.*, 35 F. Supp. 2d. 1138, 1144 (D. Minn. 1999) (holding that the proper focus of an exclusive dealing arrangement is not its duration, but its "practical effect"). Even arrangements that are terminable at will can be anticompetitive. *Dentsply*, 399 F.3d at 194 (noting that "in spite of the legal ease with which the relationship can be terminated," affected dealers may "have a strong economic incentive to continue carrying [the supplier's product]").

In fact, McWane's Full Support Program required exclusive dealing for as long as McWane desired. The overwhelming evidence shows the practical effect of McWane's program was to make it economically infeasible for distributors to drop McWane's full line of domestic fittings and switch to Star. This reality made McWane's exclusive dealing program as effective and enduring as a long-term contract. *See Lorain Journal Co. v. United States*, 342 U.S. 143, 149-50 (1951) (holding that unilateral conduct of indefinite duration by a monopolist with a "practically indispensable" service "forced numerous [customers] to refrain from" dealing with a rival).

McWane also disputes the connection between its Full Support Program and Star's lagging sales, pointing to other concerns distributors had about Star's supply of domestic fittings. But the Full Support Program need not have been the sole reason for distributors' reluctance to purchase domestic fittings from

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191 (foreclosure above 50% is "routinely condemned"). We need not adopt Complaint Counsel's estimate, however, to conclude that foreclosure here was both substantial and problematic. As the *Dentsply* court concluded, "the reality . . . is that the firm that ties up the key dealers rules the market." 399 F.3d at 190.

Star. The relevant question is whether McWane's policy contributed significantly to that result. *See Microsoft*, 253 F.3d at 78-80; *Conwood Co. v. U.S. Tobacco Co.*, 290 F.3d 768, 791 (6th Cir. 2002) (explaining that defendant's conduct "need not be the sole proximate cause" of lost sales that caused injury). The evidence amply shows that the Full Support Program substantially contributed to distributors' "reluctance to purchase from Star." ID at 410; *see also ZF Meritor*, 696 F.3d at 266, 285-86 (focusing on foreclosure created by exclusive dealing despite acknowledging that plaintiff could have competed more effectively).

b. Adverse Impact on Competition

McWane's exclusive dealing program created a strong economic incentive for distributors to reject Star's products, artificially diminishing Star's competitive prospects in the domestic fittings market. Beginning in Spring 2009, Star considered purchasing its own domestic foundry. IDF 1402. By September or October, it had identified a specific foundry and entered into negotiations to purchase it. IDF 1404. Star estimated it would cost [redacted] to acquire the facility and had the financial ability to make the purchase. IDF 1405-06, *in camera*. However, McWane's announcement of its exclusive dealing policy in September and its impact on Star's sales prompted Star to rethink its strategy of acquiring a domestic foundry. IDF 1407-08.

Before McWane's September announcement, Star had received requests for quotes for domestic fittings worth approximately $10 million. IDF 1395. As discussed above, almost immediately following the announcement, distributors, including HD Supply, Ferguson, and WinWholesale, withdrew their requests for quotes or orders and informed Star they were no longer interested in purchasing domestic fittings from Star. IDF 1381-82. Based in part on the withdrawn quotes, Star estimated it would have had [redacted] in sales of domestic fittings in 2010, rising to [redacted] in 2011, if McWane had not implemented the Full Support Program. IDF 1394-95, *in camera*. At trial, Star testified that more refined estimates showed that it needed between [redacted] of domestic fittings sales to justify purchasing its own foundry. IDF 1400, *in camera*;

Bhargava, Tr. 2962-63, *in camera*. Star's actual sales of domestic fittings, [redacted] in 2010, were insufficient for Star to justify operating a foundry of its own. IDF 1396, *in camera*, 1401.

Consequently, rather than acquiring its own foundry, Star contracted with six foundries to produce raw castings, which Star then shipped to its Houston facility for finishing. This route was more costly and less efficient than a foundry owned and operated by Star would have been because using independent foundries means less specialized and 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. IDF 1409-10. Independent foundries also have higher labor costs and add their own markup. IDF 1412-13. Shipping costs alone from the foundries to Houston for finishing added an additional [redacted]% to the cost of Star's domestic fittings. IDF 1411, *in camera*. Star estimated that the cost of producing domestic fittings at its own foundry would have been [redacted]% lower than the cost of contracting with independent foundries, and that it could have reduced its domestic fittings prices by [redacted]%. IDF 1419-20, *in camera*. Moreover, because some customers were reluctant to rely on a supplier without its own foundry, IDF 1254, 1272, by denying Star the scale necessary to operate its own foundry, McWane further cemented its monopoly.

McWane anticipated and intended this result.[11] Mr. Tatman could not have been more clear: "We need to make sure that they don't reach any critical mass that will allow them to continue to invest and receive a profitable return." CX0074 at 001; s*ee also* IDF 1155 (quoting CX0067 at 002) (in a "brainstorming document," "Mr. Tatman observed that 'any competitor' seeking to enter the domestic fittings market could face 'significant

11 While our aim is to ascertain the effect of McWane's exclusive dealing policy, evidence of McWane's intent is relevant "to the extent it helps us understand the likely effect of [McWane's] conduct." *Microsoft*, 253 F.3d at 59; *Chicago Bd. of Trade v. United States*, 246 U.S. 231, 238 (1918) ("knowledge of intent may help the court interpret facts and predict consequences").

blocking issues' if they are not a 'full line' domestic supplier"); CX0076 at 009 (explaining that a "Force Distribution to Pick their Horse" strategic response to entry would "Force[] Star/Sigma to absorb the costs associated with having a more full line before they can secure major distribution"). Impairing its rivals' ability to threaten McWane's monopoly was the Full Support Program's core objective.

And Star was not the only firm affected by McWane's exclusive dealing policy. Fittings importer SIP also evaluated whether to enter the domestic fittings market in 2009. IDF 1365-80. SIP believed that because of McWane's policy, it would have difficulty acquiring distributor customers if it entered with less than a full line. IDF 1377. Although McWane's Full Support Program was not the only reason SIP decided not to enter, it was a significant reason. IDF 1380 ("That was the straw that broke the camel's back.") (quoting CX2522, *in camera* (Agarwal, Dep. at 67-68)).

In his dissent, Commissioner Wright asks us to apply a new, heightened standard of proof for exclusive dealing cases and concludes under that standard that Complaint Counsel failed to prove McWane's exclusive dealing policy harmed competition.[12] Although Commissioner Wright assumes that McWane is a monopolist for his analysis and agrees with the majority decision in various respects, including that "[t]here is ample record evidence demonstrating that the Full Support Program harmed McWane's rival Star," he claims "Complaint Counsel fails totally to establish, as it must under the antitrust laws, that McWane's conduct harmed *competition*."[13] Dissent at 4-5. We respectfully

12 Although harm to competition is certainly necessary for a claim of monopolization, Commissioner Wright would apply a standard of evidentiary proof for this element that is far beyond that called for by applicable Section 2 law. *See generally ZF Meritor*, 696 F.3d at 286; *Dentsply*, 399 F.3d at 191; *Microsoft*, 253 F.3d at 70-71. For instance, he insists that Complaint Counsel was required to calculate the specific level of sales Star lost as result of the Full Support Program. Tellingly, Commissioner Wright offers no legal support for this heightened standard.

13 We note that while the aim of the antitrust laws is to protect competition, not competitors, there *is* harm to competition when a monopolist's only rival is precluded from becoming an effective competitor. *See Spirit Airlines*, 431 F.3d

disagree. In our view, the evidence that McWane's exclusive dealing policy significantly impaired the access of McWane's only rival, Star, to the main channel of distribution, thereby increasing its costs and keeping it below the critical level necessary to pose a real competitive threat, is plainly sufficient to meet the standard of harm to competition set forth in the prevailing case law.

Moreover, there are significant factual oversights in his analysis even applying his proposed heightened standard. For instance, Commissioner Wright argues there is no evidence supporting Complaint Counsel's contention that Star needed its own foundry to compete effectively in the market. But the evidence shows that costs decline substantially when a market participant is able to operate its own foundry.[14] By preventing Star from securing enough sales volume to support its own foundry, McWane's exclusive dealing program increased Star's costs and denied it the ability to compete effectively. We also disagree with Commissioner Wright's assertion that the notion that Star was operating below "minimum efficient scale" "strains credulity" when one takes into account Star's entry and growth in the market. Dissent at 32. Complaint Counsel argues persuasively that McWane was charging a monopoly price, which means that even a less efficient firm could enter and grow market share. The key question is whether the exclusionary conduct kept rivals from developing into real competitive threats; here we find that it did. *See Dentsply*, 399 F.3d at 190-91 (finding competitive harm when defendant's excluded rivals failed to achieve "the critical level necessary for any rival to pose a real [competitive] threat"); *Microsoft*, 253 F.3d at 70-71 (stating that defendant's exclusionary conduct kept [competitor's product] "below the

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at 951 ("[I]n a concentrated market with very high barriers to entry, competition will not exist without competitors.").

14 Commissioner Wright points to Sigma's virtual manufacturing model as evidence that owning a foundry is not essential to achieving efficiencies. Dissent at 31-32. However, this comparison is inapt. We are concerned with the effect of McWane's conduct on Star's ability to do business in the market for domestically-manufactured fittings. The fact that Sigma uses a virtual manufacturing model for its imported fittings business sheds little light on that question.

critical level necessary for [competitor's product] or any other rival to pose a real threat to Microsoft's monopoly").

Commissioner Wright also argues that our foreclosure analysis is "defective" on the ground that "[i]t makes little sense to conclude that Star was foreclosed from McWane's sales to distributors that would have taken place with or without the Full Support Program." Dissent at 38. He insists that to prevail, Complaint Counsel was required to show that but for the Full Support Program, a significant volume of sales would have actually shifted to Star. Commissioner Wright appears to assume, however, that the sales a monopolist like McWane has tied up with its distributors are not contestable and that a second meaningful alternative in the market will have no impact on price or other forms of competition, regardless of which supplier customers may ultimately choose. This assumption overlooks record evidence that McWane's main customers immediately sought an alternative when given the option, placing millions of dollars' worth of requests for proposal with Star in the few months after it announced entry and before McWane imposed the Full Support Program.

In addition, contrary to Commissioner Wright's assertion, there is evidence that McWane's exclusionary conduct had an impact on price. McWane itself recognized that if Star entered, prices in the domestic market would likely fall just like in the imported market. IDF 1148-49, 1151-53. McWane understood it had a choice -- it could try to maintain its dominant market share either by lowering prices to compete against Star (CX0465 at 004 (noting that McWane could maintain its "near 100% share" by dropping prices)), or it could adopt an exclusive dealing policy that would prevent its rival from achieving the scale necessary to become a more significant competitor (CX0067 at 002 (noting that rivals without a full domestic line would be susceptible to "significant blocking issues")). By adopting the program, McWane was able to ensure that prices and gross profits for domestic fittings remained high. In fact, following Star's entry, McWane's financials reveal that, while its production costs for domestic fittings remained flat for 2009 and 2010, McWane raised domestic fittings prices and increased its gross profits during that same time. IDF 1091-93, *in camera*. Moreover, McWane was able to impose those higher prices for domestic

fittings in both states where it had a 100% market share and those where it faced direct competition from Star. IDF 1090.

In short, Commissioner Wright fails to adequately consider that foreclosure delaying a rival's effectiveness and growth in the market results in consumer harm and that there is considerable evidence to support a reasonable inference that the Full Support Program had that very result.

By foreclosing Star's access to distributors, McWane's exclusive dealing program increased Star's costs and denied it the ability to compete effectively. Courts have not hesitated to find antitrust liability when exclusive dealing contributes significantly to maintaining a monopoly through such effects. *See Dentsply*, 399 F.3d at 190-91 (finding competitive harm when defendant's excluded rivals failed to achieve "the critical level necessary for any rival to pose a real [competitive] threat"); *Microsoft*, 253 F.3d at 70-71 (stating that defendant's exclusionary conduct kept [competitor's product] "below the critical level necessary for [competitor's product] or any other rival to pose a real threat to Microsoft's monopoly"); *cf. ZF Meritor*, 696 F.3d at 289 (finding antitrust injury when the defendant's conduct denied rivals the market share they needed to "remain viable").

McWane's exclusive dealing policy also had another adverse impact on competition: it denied its customers the ability to make a meaningful choice regarding domestic fittings suppliers that the evidence shows many of them sought. *See ZF Meritor*, 696 F.3d at 285 (noting that a monopolist may cause harm to competition when it "use[s] its power to break the competitive mechanism and deprive customers of the ability to make a meaningful choice"); *Dentsply*, 399 F.3d at 194 (holding that the defendant's exclusive dealing policy had the anticompetitive effect of limiting the choice of products available to end users); *see also Race Tires*, 614 F.3d at 77-78 (recognizing the important role "coercion" plays in the Section 2 context). Although fittings are commodity products, there is evidence of competition among suppliers for service and other terms. *See* IDF 1584 (noting that some distributors preferred Sigma over McWane because of certain servicing benefits, including faster delivery); IDF 1586 (ACIPCO preferred Sigma over McWane because Sigma offered additional specialty services, such as coatings, linings, and tapes); IDF 1588

(Groeniger preferred buying from Sigma because it preferred Sigma's service to that offered by McWane and Star). As the Third Circuit noted in *Dentsply*, "[w]hile the [customers] might prefer to sell the [products] of multiple manufacturers, if faced with an all or nothing choice they may accede to the dominant firm's wish for exclusive dealing." 399 F.3d at 194 (internal quotations omitted).

Distributor decisions to reject Star following implementation of the Full Support Program, sometimes even when Star offered lower prices, show that McWane's policy and position as a supplier of necessary products effectively eliminated distributors' choices regarding their source of domestic fittings supply and prevented them from using Star to extract better prices or services from McWane. IDF 1395 (finding that, after announcement of the Full Support Program, Star lost $10 million in request for quotes from, among others, HD Supply, Ferguson, Mainline, WinWater, and other customers); IDF 1295, 1299, 1301-02 (finding that U.S. Pipe rejected Star despite Star's offer of lower prices than McWane). The absence of exclusivity in the more competitive imported fittings market highlights the coercive element of McWane's policy. *See* IDF 392 (noting that distributors typically purchase imported fittings from at least two different suppliers).

c. McWane's Rebuttal

McWane disagrees that its policy impaired Star's ability to compete in the domestic fittings market. It contends first that Star's sales to 130 distributors enabling Star to obtain [redacted]% market share in 2010 and more than [redacted]% market share in 2011 demonstrate successful entry into the domestic fittings market, thereby precluding a finding of liability as a matter of law. IDF 357, *in camera*. We rejected this same argument when we denied McWane motion for summary decision. Under Section 2, "it is not necessary that all competition be removed from the market. The 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; *accord ZF Meritor*, 696 F.3d at 265, 283-84 (exclusive dealing violated Section 2 even though monopolist allowed customers to purchase up to 20% of product from rival). Moreover, growth and market share alone

is not the relevant benchmark. The appropriate comparison is growth that would have occurred absent the Full Support Program. Here, as we have discussed, McWane's exclusive dealing policy ensured that Star's sales remained limited and enabled McWane to maintain its monopoly position. As we noted previously, even McWane's expert agreed that Star's entry did not affect McWane's prices for domestic fittings. IDF 1090. Indeed, soon after Star entered the market, McWane announced and implemented price increases for domestic fittings. IDF 1083.

Further, McWane's repeated claim that Star sold to 130 distributors is meaningless without context or a showing as to the size of Star's sales. As the ALJ explained, "[i]n 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. IDF 1142. The number of customers, without more information on the nature and extent of their purchases, is not entitled to substantial weight." ID at 409. Here, the record shows that distributors primarily bought domestic fittings from Star under the exceptions to the Full Support Program, *i.e.*, when McWane was unable to offer specific fittings in timely fashion or as part of a bundled order, even when they would not otherwise purchase from Star for fear of losing access to McWane's domestic fittings. *See* IDF 1237, 1242, 1257 (HD Supply); 1299, 1305, 1309 (U.S. Pipe); 1328-29 (Groeniger).

McWane also argues that, even if Star was excluded, there was no harm to competition because "the ALJ found that Star's reliance on jobber foundries made it a less efficient, higher cost supplier, and thus that McWane's domestic fittings prices were lower[.]" RAppB at 29. We disagree. McWane's argument conveniently overlooks the role its exclusive dealing policy played in limiting Star's sales and the resulting impact the policy had on Star's scale of operations and reliance on third-party "jobber" foundries. As discussed at length above, McWane designed its exclusive dealing policy precisely to slow its rivals' growth. *See* CX0076 at 009 (noting that the program "[f]orces Star/Sigma to absorb the costs associated with having a more full line before they can secure major distribution"). And there is ample evidence that McWane's program was effective in denying

Star access to customers and thus impeding its ability to compete effectively.

Moreover, McWane is incorrect to the extent it suggests it is immune from liability merely because Star was a less efficient competitor. The fundamental concern with monopoly maintenance is that dominant firms may adopt policies that prevent the development of effective competition. As the D.C. Circuit held in *Microsoft*, it is "inimical to the purpose of the Sherman Act to allow monopolists free reign to squash" emerging competitors before they have the opportunity to become capable rivals that could effectively challenge the monopolist. *Microsoft*, 253 F.3d at 79; *see also* Andrew I. Gavil, *Exclusionary Distribution Strategies by Dominant Firms: Striking a Better Balance*, 72 Antitrust L.J. 3, 59-60 (2004) (while "the exclusion of the less efficient firm might not have harmed competition at that precise moment because the rival had yet to reach its potential, . . . Section 2's horizon should not be so clipped if it is to function as an adequate deterrent to strategic behavior that impairs long-run competition").

3. McWane's Procompetitive Justifications for the Full Support Program

Complaint Counsel has demonstrated harm to competition here, shifting the burden to McWane to show that the challenged conduct "promotes a sufficiently pro-competitive objective." *Dentsply*, 399 F.3d at 196. Cognizable justifications are typically those that reduce cost, increase output or improve product quality, service, or innovation. *See FTC v. Indiana Fed'n of Dentists*, 476 U.S. 447, 459 (procompetitive justifications include "creation of efficiencies in the operation of a market or the provision of goods and services"); *Broadcast Music, Inc. v. Columbia Broadcasting Sys., Inc.*, 441 U.S. 1, 19-20 (1979) (courts should consider whether the challenged practice is likely to "increase economic efficiency and render markets more, rather than less, competitive") (internal quotations omitted); *Data Gen. Corp. v. Grumman Sys. Support Corp.*, 36 F.3d 1147-1183 (1st Cir. 1994) ("In general, a business justification is valid if it relates directly or indirectly to consumer welfare.").

McWane offers two justifications for its conduct. It argues first that it engaged in exclusive dealing to preserve sales in order to generate sufficient volume to operate its last domestic foundry. While preserving sales volume to continue to operate a foundry may have been a significant business objective, it is not a cognizable procompetitive justification for antitrust purposes. *See Microsoft Corp.*, 253 F.3d at 71-72 (explaining that the desire to increase sales "is not an unlawful end, but neither is it a procompetitive justification"). As the ALJ recognized, McWane's sales goal provides benefits for McWane, but "Respondent has proffered no explanation as to how its Full Support Program benefits consumers." ID at 415.

Significantly, the measures that McWane took to preserve its sales volume were not the type of steps, such as a price reduction, that typically promote consumer welfare by increasing overall market output. Indeed, McWane considered the impact of lowering its domestic fittings pricing "to defend [its] near 100% share position," but ultimately determined that lowering pricing would hurt margins. CX0465 at 004. Instead, the sales gained for production by McWane's exclusive-dealing arrangement were sales taken from Star by virtue of the increased costs imposed by the Full Support Program. That is, McWane's sales did not result from lower prices, improved service or quality, or other consumer benefits; instead, McWane's sales stemmed from anticompetitive reductions in Star's output. Sales so gained are not cognizable as procompetitive justifications. *See* Horizontal Merger Guidelines § 10 ("Cognizable efficiencies . . . do not arise from anticompetitive reductions in output or service."); c*f. NCAA v. Bd. of Regents*, 468 U.S. 85, 116-17 (1984) (holding that a defendant could not justify curbing access to a more-desired product to induce consumers to purchase larger amounts of a less-desired product); *In re Polygram Holding, Inc.*, 136 F.T.C. 310, 345-46 (2003) ("[C]ognizability . . . allows the deciding tribunal to reject proffered justifications that, as a matter of law, are incompatible with the goal of antitrust law to further competition."), *aff'd*, 416 F.3d 29 (D.C. Cir. 2005).

Furthermore, contemporaneous evidence belies McWane's contention that its exclusive dealing policies were motivated by a desire to gain volume in order to preserve operations at McWane's domestic foundry. Although that justification shows

up in testimony from McWane witnesses, McWane's contemporaneous planning documents from 2009 demonstrate that the objectives were almost exclusively to maintain domestic prices and profitability, deny Star critical mass, and prevent Star from becoming an effective competitor. *See* IDF 1149 (quoting CX0074 at 001) ("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."), 1151 (citing CX 0102 at 002 (2010 budget describing "biggest risk factor" as the "[e]rosion of domestic pricing if Star emerges as a legitimate competitor")), 1158 (citing CX0076 at 009) (explaining that a disadvantage of not adopting exclusive dealing was that it would allow Star to "drive profitability out of our business"), 1150 (quoting CX0074 at 001) ("I agree that at this stage the chance for profitable cohabitation with Star owning a [piece] of the Domestic market is slim . . . 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.").

McWane also argues that the Full Support Program prevents customers from cherry-picking the highest selling items from Star and persuades them to support McWane's full line of domestic fittings. Here too McWane fails to identify the benefit to consumers.[15]

In support of McWane's claim, its expert, Dr. Normann, explains that a full-line manufacturer incurs the costs of producing all fitting types and is able to bear these costs because it captures the benefit of scale economies arising from production of the most common fittings. According to Dr. Normann, a manufacturer that produces only the common fittings could avoid the cost of producing a full line and consequently could sell the common fittings at lower prices. If distributors were able to source from multiple manufacturers, he reasons, they would buy the common fittings from the limited supplier (at lower prices) and turn to the

15 Although preventing dealer or competitor free riding on manufacturer-supplied investments is commonly proffered as a procompetitive justification for exclusive dealing, there is no showing that is the case here. Indeed, the absence of evidence of exclusive dealing arrangements for sales of imported fittings belies such an argument.

full-line supplier for less common products only, which could lead to the collapse of the full-line seller. *See* RX712A at 056.

This argument is unpersuasive. If a limited supplier undersells a full-line supplier for more common products, there is no reason in principle why the full-line supplier could not compete for that business by lowering its price for those products and increasing its price for the less common products. McWane offers no reason why supply would not be forthcoming to meet demand at a higher price, and we cannot conclude that consumers are necessarily worse off because less common fittings are sold for higher prices, when simultaneously, more common fittings are sold at lower prices. Even if selective entry by the full-line supplier's rivals led to the collapse of the full-line seller, that itself would not constitute a harm to the market (as opposed to harm to a single firm). Courts have long rejected claims that "because of the special characteristics of a particular industry, monopolistic arrangements will better promote trade and commerce than competition," *Nat'l Soc'y of Prof'l Eng'rs v. United States*, 435 U.S. 679, 689 (1978), concluding instead that "[t]he Sherman Act reflects a legislative judgment that ultimately competition" will produce the best results. *Id*. at 695-96 (also noting that "the Rule of Reason does not support a defense based on the assumption that competition itself is unreasonable"). McWane's claim is not consonant with this core judgment of the Sherman Act, and it is inconsistent with the basic objectives of Section 2.[16]

VI. THE MASTER DISTRIBUTION AGREEMENT AS A RESTRAINT OF TRADE

We now turn to the charge that McWane and Sigma unreasonably restrained trade in the domestic fittings market in violation of Section 5 of the FTC Act by entering into the MDA. According to Complaint Counsel, McWane saw that Sigma was preparing to enter the domestic fittings market and sought to

16 As noted above, the Commission dismisses Count 7 of the Complaint, alleging attempted monopolization based on McWane's exclusive dealing requirements. In view of our conclusion that McWane unlawfully monopolized the domestic fittings market through the same conduct, it is unnecessary to ask whether McWane attempted to monopolize the market. Accordingly, we do not reach this issue, and do not adopt the ALJ's analysis. *See Spectrum Sports*, 506 U.S. at 451-53, 460-61.

eliminate the risk of competition by inducing Sigma to become an exclusive distributor of McWane's domestic fittings.

Complaint Counsel's claim, based on Section 1 of the Sherman Act, requires that there be a contract, combination, or conspiracy among two or more entities that unreasonably restrains trade. *Realcomp II, Ltd. v. FTC*, 635 F.3d 815, 824 (6th Cir. 2011). Here, there is no question that there was an agreement. The dispute is over the agreement's lawfulness. Complaint Counsel asserts two theories of liability. Their main contention is that, without the MDA, Sigma would have entered the market independently and competed against McWane. In Complaint Counsel's view, the MDA amounted to an agreement that Sigma would cede the domestic fittings market to McWane. Complaint ¶¶ 47-55, 67. Complaint Counsel argues in the alternative that the MDA was an unreasonable vertical restraint of trade. We find there is no violation under either theory.

A. THE MDA WAS NOT A MARKET ALLOCATION AGREEMENT

Under Section 1 of the Sherman Act, an agreement among competitors to allocate markets is *per se* illegal. *See 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 (1972). Likewise, naked agreements "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); *see also Engine Specialties, Inc. v. Bombardier, Ltd.*, 605 F.2d 1, 9-11 (1st Cir. 1979) (finding a market allocation agreement between potential competitors *per se* unlawful). Complaint Counsel's Section 1 theory is premised on Sigma being a potential competitor in the domestic fittings market. Accordingly, we must first determine if, but for the MDA, Sigma was sufficiently likely to enter the domestic fittings market to be considered a potential competitor of McWane.

In evaluating this question, we look to whether Sigma had "the necessary desire, intent, and capability to enter the market." *Bombardier*, 605 F.2d at 9. The ultimate issue is whether Sigma's entry was reasonably probable in the absence of the MDA. *See* Fed. Trade Comm'n & Dep't of Justice, Antitrust Guidelines for

Collaborations Among Competitors § 1.1 n.6 (2000) ("A firm is treated as a potential competitor if there is evidence that entry by that firm is reasonably probable in the absence of the relevant agreement.") ("Competitor Collaboration Guidelines"); *cf. Yamaha Motor Co. v. FTC*, 657 F.2d 971, 977 (8th Cir. 1981) (evaluating, in a Clayton Act Section 7 case, whether, absent the joint venture, the merging party "probably" would have entered). We agree with the ALJ that Sigma's entry was not reasonably probable.

As explained above, Sigma began investigating two potential avenues for entry into the domestic fittings market following the passage of the ARRA in February 2009: (1) purchasing domestic fittings from McWane; and (2) producing domestic fittings by contracting with independent domestic foundries (a "virtual manufacturing" model). Rona, Tr. 1630; Pais, Tr. 1752; IDF 1423-24. In April, Sigma approached McWane about obtaining private label fittings but was dissatisfied with McWane's initial offer, which was insufficient to cover Sigma's operating costs. IDF 1425, 1443-45. After rejecting McWane's first offer, Sigma President and CEO Mr. Pais wrote: "We now need to go all out and implement a SDP [Sigma Domestic Production] plan – replicating SIGMA's 'virtual manufacturing' model . . . just as we do thru a collection of facilities overseas." IDF 1455. Before long, however, Sigma approached McWane to resume discussions about a possible distribution arrangement. IDF 1522. Ultimately, Sigma decided to forgo independent entry and chose instead to purchase domestic fittings from McWane pursuant to the MDA.

Complaint Counsel points to troubling evidence showing that McWane believed Sigma was likely to enter the domestic fittings market independently, and that McWane entered the MDA in order to eliminate that possibility. For example, an internal McWane memorandum, dated May 26, 2009, concludes that McWane's decision to sell domestic fittings to Sigma "probably comes down to . . . [h]ow legitimate of a risk is there with a competitor successfully introducing a Domestic product line?" CX0067 at 002, 004. In addition, Mr. Tatman and Mr. McCullough referred to the MDA as an "insurance policy" against potential Sigma entry. CX2353 at 004; CX1184 at 001. The evidence also indicates that McWane believed selling domestic fittings to Sigma would "help drive some additional level of price

stability." CX 0465 at 002, 010. Yet other evidence shows that McWane harbored doubts as to Sigma's capabilities. For example, McWane's Vice President and General Manager, Mr. Tatman, sent an internal email to both of his bosses, Mr. McCullough and Mr. Walton, on August 18, 2009, explaining that he 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." CX1184 at 001; Tatman, Tr. 771-72, 783-85.

In fact, Sigma did take various preliminary steps to explore the viability of its virtual manufacturing plan. This included assembling a team of executives responsible for evaluating entry. The team considered domestic foundries' costs and capabilities, as well as the time it would take for Sigma to start production. IDF 1447. They investigated all aspects of the necessary processing steps and concluded that Sigma would need to offer approximately 730 different types of domestic fittings in order to be an effective competitor. IDF 1468.

As described by Mr. Pais, however, the plan never went beyond "the early stages." Pais, Tr. 1761-62. As of mid-2009, Sigma had "[n]o contracts with any foundries," only a couple of patterns borrowed from Sigma's Mexico supplier, no core boxes, no machining facilities, and no contract to complete the coating, painting, or lining. Pais, Tr. 2173-74. All of these are essential prerequisites for the production of fittings. IDF 1046-47. In August, Sigma informed its customer, U.S. Pipe, that Sigma had "not made any concrete plans to either invest in all the required tooling or not invest at all." IDF 1467. By the end of the summer, Sigma had a domestic foundry produce a couple of sample fittings, but the foundry was not prepared to do the machining, painting, or cement lining. Pais, Tr. 1803; IDF 1461, 1465. As of September, Sigma only had a small number of the needed patterns, and it did not have contracts with any pattern shops or domestic foundries. IDF 1470-72; Rona, Tr. 1672, 1674-76.

As a whole, Sigma's actions relating to the virtual manufacturing plan were merely exploratory and preliminary and certainly not those of a "reasonably probable" entrant. It invested

no more than $50,000 to $75,000 toward the effort, a nominal sum when compared to Sigma's estimate that it would need $5 to $10 million to enter the domestic fittings market. IDF 1449, 1479-80.

Importantly, Sigma found itself facing significant financial challenges just as it was pursuing the idea of entering the domestic fittings market. Sigma's financial resources had been greatly strained by the economic downturn in 2008. At the end of 2008, Sigma had suffered a loss of [redacted], had only [redacted] in cash, and was over [redacted] in debt. IDF 1482, 1490-91, *in camera*; Pais, Tr. 2190, *in camera*. Sigma began 2009 with a large portion of its debt unsecured and subject to high interest rates, and it remained in a financially "precarious" position throughout the year. IDF 1483, 1489, 1493-94; ID at 426. In May 2009, Sigma's internal midterm review revealed that Sigma's financial situation was "bleak." IDF 1484; CX0214 at 002; Pais, Tr. 2163-64. By June, after the outlook continued to worsen, conditions reached a point where Mr. Pais presented Sigma's Board of Directors with an "SOS" plan to save Sigma. IDF 1496. With sales down [redacted], and despite laying off employees and making substantial cuts, Sigma ended 2009 breaching some of its bank covenants. IDF 1485, *in camera*, 1486-88.

Not surprisingly given Sigma's financial condition, its lenders imposed very low capital spending limits on the company in 2009. IDF 1499. During Sigma's July 2009 Board meeting, the Frontenac Group, a private equity firm with a 60 percent ownership interest in Sigma, opined that Sigma did not have the capability to invest in domestic fittings and declared that Frontenac would not finance Sigma's domestic production plan. IDF 1500-01. Against this backdrop, Sigma's ability to make an investment of $5 to $10 million to enter the domestic fittings market independently seems questionable at best.

Complaint Counsel nonetheless argues that all of this is outweighed by an e-mail from Walter Florence of Frontenac to Mr. Pais and other Sigma executives on July 27, twelve days after the July Board meeting, outlining proposals for various upcoming banking group meetings. In the context of discussing how Sigma could best pitch ideas to potential lenders, the e-mail states:

"Investors and rollover shareholders are prepared to invest up to $7.5m in equity . . . to fund domestic sourcing initiative and to fund the Strategic business additions which will enhance credit quality and help Sigma grow and build equity value." CX0099 at 007. According to Complaint Counsel, this e-mail demonstrates that Sigma would have been able to obtain financial backing to expand into domestic fittings.

We find the cited statement much more ambiguous, particularly when considered in light of the position taken by Frontenac at the Board meeting less than two weeks prior and the other substantial evidence of Sigma's financial struggles. Indeed, Mr. Pais's July 28 response to Mr. Florence is in line with all of the other evidence of Sigma's difficult financial situation. In his reply, Mr. Pais revealed a "setback" that the company had "just unearthed last evening, with a significant *unfavorable* variation in [Sigma's] EBITDA projections – of as much as even $2M – from the CORE business for 09 and possibly 2010, as compared to those projections presented @ the BOD meeting in Boston." CX0099 at 004 (emphasis in the original). As described by Mr. Pais, "heading into this bank meeting, [Sigma was] actually in an even worse position than [initially] believed." Pais, Tr. 2181.

In sum, the evidence shows that Sigma took only the most preliminary acts to enter the market on its own and that it lacked the financial means necessary to get its virtual manufacturing underway. By September 2009, Sigma's President and CEO recognized that it could not overcome the complexity of entering the domestic fittings market. Pais, Tr. 1801-04. Finding "no other option" for serving the domestic fittings market, Sigma turned to McWane. Pais, Tr. 1800-01. Accordingly, we do not find there was a reasonable probability that Sigma would have been McWane's competitor in the domestic fittings market.[17] *See*

17 Citing *Microsoft*, Complaint Counsel contends that, even if Sigma does not qualify as a potential competitor, the actions taken by McWane to eliminate the possibility of competition from a "nascent" entrant should nevertheless serve as *prima facie* evidence of anticompetitive conduct. *See Microsoft*, 253 F.3d at 79. In appropriate cases we will condemn anticompetitive activity, whether in the form of unreasonable restraints of trade or monopolization, that targets potential competition, as set forth in the Competitor Collaboration Guidelines at § 1.1 n.6 (2000), *Transource Int'l*, 725 F.2d at 280, and *Bombardier*, 605 F.2d at 9-11, or nascent competition, as set forth in *Microsoft*, 253 F.3d at 53-

Transource Int'l, 725 F.2d at 280 (finding that Transource lacked the financial ability to enter the market and had previous failures in manufacturing for a similar line of business); *Conergy AG v. MEMC Elec. Materials, Inc.*, 651 F. Supp. 2d 51, 57-58 (S.D.N.Y. 2009) (considering, on a motion to dismiss, plaintiff's background and experience in the industry, its affirmative acts to enter, its financial capabilities, and the contracts in place). It therefore follows that the MDA is not an unlawful horizontal agreement.

B. THE MDA WAS NOT AN UNREASONABLE VERTICAL RESTRAINT OF TRADE

Having concluded that Sigma was not a potential competitor of McWane, we now consider whether certain provisions in the MDA amounted to an unreasonable vertical restraint under the rule of reason. *See Leegin Creative Leather Prods. v. PSKS, Inc.*, 551 U.S. 877, 898 (2007) (holding that vertical restraints are analyzed under the rule of reason); *Transource Int'l*, 725 F.2d at 280 (analyzing the alleged restraint under the rule of reason after concluding that the relationship between the two firms was vertical rather than horizontal). Courts typically accord less scrutiny to vertical restraints than to horizontal restraints. *See Leegin*, 551 U.S. at 888 (noting that recent precedent recognizes the difference in economic effect between horizontal and vertical agreements); *Arizona v. Maricopa County Med. Soc'y*, 457 U.S. 332, 348 n.18 (1982) (noting that "horizontal restraints are generally less defensible than vertical restraints"). In assessing the lawfulness of a vertical restraint, we look to the "the restraint's history, nature, and effect," recognizing that a manufacturer with market power might use the restraint to facilitate collusion with its competitors or exclude new entrants or smaller rivals. *See Leegin*, 551 U.S. at 885-86, 893-94.

Complaint Counsel challenges three aspects of the MDA: (1) the fact that the MDA anointed McWane as Sigma's sole source of domestic supply and precluded Sigma from producing its own domestic fittings; (2) that it prescribed the minimum price at which Sigma could sell domestic fittings in competition with

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54, 79. We find the facts here to be distinguishable from the nascent competition at issue in *Microsoft.*

McWane; and (3) that it required Sigma to adhere to McWane's Full Support Program.

The ALJ centered his rule of reason analysis and finding of liability on the MDA's sole source and pricing provisions. He found that these terms were unnecessary for McWane to sell domestic fittings to Sigma and concluded that the availability of reasonable, less restrictive alternatives and the absence of procompetitive justifications rendered the MDA an unreasonable restraint of trade. ID at 433. We disagree with the ALJ's reasoning.

To the extent that the Initial Decision purports to find a violation because the terms were unnecessary or because McWane could have structured the MDA less restrictively, the analysis is flawed. The rule of reason first requires a basis for finding conduct anticompetitive. Only after there has been such a finding do courts consider whether there are less restrictive alternatives. *See Care Heating & Cooling, Inc. v. Am. Standard, Inc.*, 427 F.3d 1008, 1012 (6th Cir. 2005) (explaining that, under Section 1 rule of reason burden-shifting analysis, plaintiff bears the initial burden of showing the challenged restraint caused anticompetitive harm; the burden then shifts back to defendant to provide procompetitive justifications for the conduct, which, if met, allows plaintiff to provide evidence that any legitimate objectives can be achieved in a less restrictive manner); *Tanaka v. Univ. of S. Cal.*, 252 F.3d 1059, 1063 (9th Cir. 2001) (same); *see also* Hovenkamp, XI *Antitrust Law* ¶ 1913c, at 376 ("[A] showing of possible less restrictive alternatives is part of the 'burden shifting' procedure that goes on in a rule of reason case and is required only if the preceding inquiries warrant it . . . . That is, the availability of a purported less restrictive alternative does not make a challenged practice effectively illegal per se.").

The initial question, therefore, is whether the MDA, in place less than a year, caused anticompetitive harm. We begin with the sole source requirement, which prohibited Sigma from producing its own domestic fittings and barred Sigma from purchasing from Star. In light of our finding that Sigma was not a probable entrant in the domestic fittings market, we conclude that the prohibition against Sigma producing domestic fittings was unlikely to have had an anticompetitive effect.

We reach the same conclusion with respect to the MDA's pricing provisions. Although McWane had monopoly power in the domestic fittings market, Sigma was only one of many McWane distributors and it had a limited market presence in that market. IDF 1597. Indeed, there is no evidence in the record that the price restraint placed on Sigma had or was likely to have market-wide effects.

Finally, the MDA also prohibited Sigma from selling McWane's domestic fittings to any customers who bought from Star. To the extent there was any anticompetitive consequence resulting from this provision, we have already condemned McWane's conduct in connection with the Full Support Program in our discussion of Count 6, and there is no evidence that this provision materially added to the adverse competitive effects of the Full Support Program.

We therefore conclude that Complaint Counsel failed to establish that the MDA had or was likely to have anticompetitive effects in the domestic fittings market, apart from those already condemned. Accordingly, we reverse the ALJ's holding of liability on Count 4.[18]

VII. THE ALLEGED AGREEMENT TO CURTAIL PROJECT PRICING

Complaint Counsel alleges a conspiracy, initiated by McWane, to stabilize and raise fittings prices through two allegedly unlawful agreements. According to Complaint Counsel, in early 2008 McWane agreed with Star and Sigma to curtail project pricing, the major form of discounting in the industry, and

18 We also dismiss Count 5, which alleges that by enlisting the assistance of Sigma in enforcing McWane's exclusive dealing program against Star, McWane and Sigma conspired to monopolize the domestic fittings market. We find this count subsumed by our resolution of Counts 4 and 6. *See* Phillip E. Areeda & Herbert Hovenkamp, IIIB *Antitrust Law* ¶ 809, at 463-67 (3d ed. 2008) (noting the redundancy between a claim of conspiracy to monopolize and Section 1 claim); s*ee also Int'l Distrib. Centers v. Walsh Trucking Co.*, 812 F.2d 786, 795-96 (2d Cir. 1987) (holding that establishing a conspiracy to monopolize claim requires largely the same proof as an unreasonable restraint of trade claim under Section 1).

later to raise its list prices in return for participation by Star and Sigma in the DIFRA information exchange.

On appeal, Complaint Counsel focuses on the first of the claimed agreements—the agreement to curtail project pricing. They point to a variety of circumstantial evidence from which they infer a price conspiracy, orchestrated by McWane through price signaling and other communications with Sigma and Star, designed to curtail project pricing and stabilize prices. Complaint Counsel contends the ALJ erred in a number of important respects, including that he: "failed to make reasonable inferences . . . and instead demanded direct proof of an agreement before any inference could be made," CCRB at 2; "improperly ignored evidence that Sigma and Star participated in the price-fixing conspiracy," CCAppB at 9; and failed to evaluate the evidence as a whole," instead "dissect[ing] each piece of the evidentiary puzzle, asking whether it alone made collusion more likely than not." *Id*. at 11.

McWane defends the ALJ's conclusion that "'[t]he totality of the evidence, given due weight and viewed as a whole, fails to demonstrate that [it], together with Sigma and Star, had an agreement'" or "'engaged in parallel conduct by curtailing Project Pricing'" and thus was "not consistent with the alleged conspiracy.'" RAnsB at 3 (quoting ID at 317-18, 350). In particular, McWane argues there were numerous project pricing episodes in 2008. Distinguishing between an unlawful agreement and independent action or conscious parallelism is often difficult, especially in contexts involving oligopolists. *See*, *e.g.*, *In re Flat Glass Antitrust Litig.*, 385 F.3d 350, 356-61 (3d Cir. 2009).

The Commission has not reached a majority as to liability on Count 1. Chairwoman Ramirez and Commissioner Brill find, by a preponderance of the evidence, that McWane, Sigma, and Star engaged in concerted action in violation of the law. Commissioners Ohlhausen and Wright, on the other hand, find the evidence insufficient to establish a conspiracy. In the absence of a majority decision, we dismiss Count 1 in the public interest.[19]

19 Where no majority decision is reached on a claim or cause of action, the Commission may exercise its discretion to dismiss it. *See In re Ticor Title Ins.*

VIII. THE DIFRA INFORMATION EXCHANGE

Finally, Complaint Counsel also alleges that McWane conspired with Star and Sigma to exchange competitively sensitive sales information through DIFRA. They argue that this information enabled each of them "to determine and to monitor its own market share and, indirectly, the output levels of its rivals," thereby facilitating price collusion in a market already susceptible to pricing coordination, with no countervailing procompetitive justification. Complaint ¶¶ 35-36.

On appeal, Complaint Counsel points to evidence indicating that McWane, Sigma, and Star expected the DIFRA information exchange to allow them to better detect cheating and to stabilize prices and argues that the ALJ erred by "requiring direct evidence of actual price effects and ignoring evidence that the principal tendency of DIFRA was to facilitate collusion." CCAppB at 44. Specifically, Complaint Counsel argues that "the DIFRA exchange allowed each participant to monitor its own market share, and to deduce from monthly changes in that share, its rivals' relative price levels." *Id*. at 45. Emphasizing that the information exchanged was historical, aggregated data, McWane defends the ALJ's determination that "the evidence fails to prove that the DIFRA tons-shipped data reporting system has the nature and tendency to facilitate price coordination." ID at 362.

The Commission has not reached a majority as to liability on Count 2. Chairwoman Ramirez and Commissioner Brill find, by a preponderance of the evidence, that the DIFRA information exchange constituted an unlawful facilitating practice under a rule of reason analysis. Commissioners Ohlhausen and Wright, on the other hand, find the evidence insufficient to establish a violation of the rule of reason. Lacking a majority position, we dismiss Count 2 in the public interest.

IX. REMEDY

The Commission has considerable discretion in fashioning an appropriate remedial order, so long as the relief bears a reasonable

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Co., 112 F.T.C. 344, 442 n.13 (1989); *In re Am. Cyanamid*, 72 F.T.C. 623, 690 (1967).

relationship to the act or practice found unlawful. *See FTC v. Ruberoid Co*, 343 U.S. 470, 473 (1952); *Rubbermaid, Inc. v. FTC*, 575 F.2d 1169, 1174 (6th Cir. 1978). Having determined that McWane sought to maintain its monopoly power in the domestic fittings market through an unlawful exclusive dealing policy, we issue the attached order, which prohibits McWane from requiring exclusivity from its customers.

McWane objects to the remedy as moot, arguing that its exclusive dealing policy ended over two years ago and that the ALJ did not find any ongoing impact or threat of recurrence. In particular, McWane asserts that it modified its Full Support Program by January 2010, eliminating the provision stating that distributors risked losing shipments for up to 12 weeks if they did not support the program. It also notes that ARRA, which provided the initial impetus for the policy, is no longer in force. Under these circumstances, McWane argues, injunctive relief is unwarranted. We disagree.

First, it is well-established that the Commission may issue a cease and desist order even when a respondent no longer engages in the illegal conduct if there is sufficient danger of recurrence. *See W.M.R. Watch Case Corp. v. FTC*, 343 F.2d 302, 304 (D.C. Cir. 1965); *see also In re The Coca-Cola Co.*, 117 F.T.C. 795, 1994 FTC LEXIS 327, at *199 (1994) ("Voluntary cessation of unlawful activity is not a basis for halting a law enforcement action."). Thus, even assuming that McWane's Full Support Program ended over two years ago, that in itself does not bar a remedial order in this case.

More importantly, we are not persuaded that McWane has in fact ended its exclusive dealing policy. McWane has not publicly withdrawn the policy or notified distributors of any changes. *See* Tatman, Tr. 707-09 (asserting that the program was modified in January 2010, but that he never sent a letter to his customers to that effect). Whatever McWane may have decided internally, it failed to communicate a withdrawal of its policy to its distributors, and there is testimony from distributors who regard the exclusive dealing requirement as still in effect. *See* Thees, Tr. 3118 (Ferguson) (testifying that as far as he is aware, McWane never rescinded the policy or indicated that it was no longer in force); Morton, Tr. 2908-09, 2911 (U.S. Pipe) (testifying that no

one from McWane communicated that the policy had been withdrawn or revised); Pitts, Tr. 3364-65 (Hajoca) (testifying that as far as he is aware, McWane never withdrew its policy); Sheley, Tr. 3419 (Illinois Meter) (stating that, as a result of McWane's policy, Illinois Meter still does not purchase domestic fittings from Star); Webb, Tr. 2770 (HD Supply) (testifying that an exclusive dealing policy remains in place). As the court explained in *Rubbermaid*, "The crucial question . . . is to what degree one can be certain that the same or related practices will not recur." 575 F.2d at 1172. Here, the record contains no public communication of a withdrawal and reflects distributor concern that the exclusive dealing policy has continued, which poses an even greater danger than a risk of recurrence.

Third, the fact that ARRA is no longer in effect is irrelevant. *See Rubbermaid*, 575 F.2d at 1171-73 (rejecting defendant's mootness claim based on repeal of legislation and discontinuance of the practice at issue). While ARRA may have provided the initial impetus for Star's entry into the domestic fittings market, other "Buy American" laws and buyer preferences remain, and McWane continues to have monopoly power in that market. Executives at the highest level of McWane's organization developed and implemented an exclusive dealing policy to maintain monopoly prices, and all but one of those executives remain at McWane. *See* IDF 20-38, 1145-92. Without an order, there is no reason to believe that McWane would not again attempt to protect its monopoly power in the domestic fittings market with exclusive dealing or other arrangements that have similar effects. *See Rubbermaid*, 575 F.2d at 1172 ("The Commission may be properly concerned not only with the open and formal implementation of agreements exactly like those entered into in the past, but also with the possibility that past unlawful conduct will be perpetuated in some more subtle form in the future.")

Finally, McWane argues that injunctive relief is only appropriate where the plaintiff shows there is an imminent threat of injury that is concrete and specific. The authority McWane relies on for this proposition, however, is inapposite. It speaks to Article III standing requirements and standards for injunctive relief in cases brought by private plaintiffs, rather than to the

Commission's remedial authority in exercise of its statutory law enforcement responsibilities.[20]

It is McWane that has the "formidable burden of showing that it is absolutely clear [its] allegedly wrongful behavior could not reasonably be expected to recur." *Friends of the Earth v. Laidlaw Envtl. Servs., Inc.*, 528 U.S. 167, 190 (1999); *accord Rubbermaid*, 575 F.2d at 1173 ("A company bears a heavy burden in showing that past conduct will not be repeated."). As the ALJ correctly concluded, "Respondent has not met that burden here." ID at 447.

Accordingly, we issue the attached cease and desist order to address McWane's exclusionary conduct. The order prohibits McWane from: (1) implementing or enforcing any condition, policy, or practice requiring exclusivity with a customer; (2) implementing or enforcing any retroactive rebate program that would effectively demand exclusivity; (3) "[d]iscriminating against, penalizing or otherwise retaliating" against any customer that purchases a competitor's domestic fittings or that "otherwise refuses to enter into or continue any condition [or] agreement" requiring exclusivity; and (4) "enforcing any condition, requirement, policy, agreement, contract or understanding that is inconsistent with the terms of [the] Order." Order, ¶¶ II.A.-D. The order is designed to bring an end to McWane's unlawful conduct, rectify its past violation, and ensure it does not recur. It is necessary and appropriate to remedy McWane's past and continuing competitive harm.

X. CONCLUSION

For the foregoing reasons, the Commission concludes that McWane violated Section 5 of the FTC Act, 15 U.S.C. § 45, by adopting an unlawful exclusive dealing policy to maintain its monopoly power in the domestic fittings market. Consequently,

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20 In *Winter v. NRDC*, 555 U.S. 7, 22 (2008), for instance, the Court clarified that a private party seeking a preliminary injunction must show the likelihood of irreparable injury rather than just the possibility. Similarly, in *Summers v. Earth Island Inst.*, 555 U.S. 488, 493 (2009), and *Los Angeles v. Lyons*, 461 U.S. 95, 101-10 (1983), the Court addressed the requirements for Article III standing and equitable relief applicable to private plaintiffs. These cases do not apply to the Commission.

we issue a Final Order to remedy McWane's violation and prevent its recurrence.

FINAL ORDER

The Commission has heard this matter upon the appeals of Respondent and Complaint Counsel from the Initial Decision, and upon briefs and oral argument in support thereof and in opposition thereto. For the reasons stated in the accompanying Opinion of the Commission, the Commission has determined to dismiss Counts 1, 2, 4, 5, and 7 of the Complaint in this proceeding and issue an order to cease and desist in disposition of Count 6. The Initial Decision dismissed Count 3; that ruling was neither appealed nor placed on the Commission's docket for review, and the dismissal of Count 3 consequently became the Commission's final decision. 16 C.F.R. § 3.51(a). Accordingly,

IT IS ORDERED that Counts 1, 2, 4, 5, and 7 of the Complaint issued in this proceeding be, and hereby are, dismissed.

IT IS FURTHER ORDERED that the following Order to cease and desist be, and it hereby is, entered:

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. "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.

D. "Customer" means any person that purchases any DIPF from Respondent.

E. "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.

F. "Domestic DIPF" means DIPF that is manufactured in the United States of America.

G. "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.

H. "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.

I. "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.

J. "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.

K. "Retroactive Incentive" means any flat or lump-sum payment of monies or any other item(s) of pecuniary value to a customer based upon the 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. This definition excludes discounts or providing other item of pecuniary value to a customer based upon sales or purchases of Domestic DIPF beyond a specified threshold.

1. By way of example, Respondent may offer or provide a discount of X% on all sales 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 if sales exceed Y units.

L. "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. 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 engaged 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 a 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 this Order.

Provided, however, that nothing in Paragraphs II 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 that Respondent needs to match in order to win contested business.

Provided, further, that nothing in Paragraph II.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.

III.

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 III.A and III.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 understand 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.

IV.

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 III.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.

V.

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.

VI.

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.

VII.

IT IS FURTHER ORDERED that this Order shall terminate twenty (20) years from the date it becomes final.

By the Commission.

Dissenting Statement of Commissioner Joshua D. Wright

Introduction[1]

I dissent from the Commission's holding that McWane unlawfully monopolized the Domestic Fittings market.[2] In my view, Complaint Counsel has not met its burden to show by a preponderance of the evidence that McWane's Full Support Program harmed competition in the Domestic Fittings market.[3]

Antitrust law has evolved dramatically over the past several decades to incorporate established economic learning.[4] One of the most important developments at the Supreme Court was the Court's recognition that "Congress designed the Sherman Act as a 'consumer welfare prescription.'"[5] The federal antitrust laws,

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1 References to the record are made using the following citation forms and abbreviations:

CC Answering Brief – Complaint Counsel's Answering Brief filed July 2, 2013
Commission Opinion
Complaint – Complaint filed January 4, 2012
CX# – Complaint Counsel Exhibit
IDF – Numbered Findings of Fact in ALJ's Initial Decision
McWane Brief – Respondent McWane, Inc.'s Appeal Brief filed May 31, 2013
Name of Witness, Tr. – Transcript of Trial before the ALJ
Oral Argument Tr. – Transcript of Oral Argument before the Commission August 22, 2013
RX# – Respondent Exhibits
[redacted] **– In Camera Material**

2 I concur with the Commission's decision to reverse the Initial Decision on Counts 4 and 5 and join the Commission's Opinion with respect to those Counts. I also concur with the Commission's decision to dismiss Counts 1 and 2 in the public interest and join the Commission's Opinion with respect to those Counts. I concur with the Commission's decision to dismiss Count 7 but I do so for separate reasons explained below.

3 Though I do not discuss whether Complaint Counsel established that there is a separate relevant market for domestic fittings, I do not join that portion of the Commission's Opinion.

4 Leah Brannon & Douglas H. Ginsburg, *Antitrust Decisions of the U.S. Supreme Court 1967 to 2007*, 3 COMPETITION POL'Y INT'L 1 (2007).

5 Reiter v. Sonotone Corp., 442 U.S. 330, 343 (1979) (quoting R. BORK, THE ANTITRUST PARADOX 66 (1978)).

including the Sherman Act, the Clayton Act, and the Federal Trade Commission Act, have proved enormously flexible in this regard. Perhaps the greatest shift in antitrust jurisprudence since the bad old days has occurred in the area of vertical restraints, the subject of the Supreme Court's decision in *GTE Sylvania* in 1977, which changed the focus of antitrust from achieving a hodgepodge of economic, social, and political goals, to a legal regime concerned entirely with the "market impact" of business conduct.[6] With regard to vertical restraints, it is well-accepted that the economic learning accumulated since *GTE Sylvania* has taught that such restraints, a category that includes vertical territorial restrictions, resale price maintenance, exclusive dealing, loyalty discounts, tying, and other related business practices, rarely harm competition and often benefit consumers by increasing demand and/or creating a more efficient distribution channel.[7]

Complaint Counsel has asked the Commission to conclude that McWane's Full Support Program – a vertical restraint – violates Section 2 of the Sherman Act, and the Commission has

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6 Cont'l TV, Inc. v. GTE Sylvania, Inc., 433 U.S. 36, 51-52 (1977); *see also* William E. Kovacic & Carl Shapiro, *Antitrust Policy: A Century of Economic and Legal Thinking*, 14 J. ECON. PERSP. 43, 53 (2000) (describing *GTE Sylvania* as the "pivotal event" in the evolution of antitrust doctrine because the Court "emphasized that the analysis of economic effects provided the proper basis for evaluating conduct under the antitrust laws"). In *GTE Sylvania*, the Court also declared interbrand competition "the primary concern of antitrust law." 433 U.S. at 52 n.19.

7 James C. Cooper et al., *Vertical Antitrust Policy as a Problem of Inference*, 23 INT'L J. INDUS. ORG. 639, 658 (2005) (stating that although "some studies find evidence consistent with both pro- and anticompetitive effects . . . virtually no studies claim to have identified instances where vertical practices were likely to have harmed competition"); Francine Lafontaine & Margaret Slade, *Exclusive Contracts and Vertical Restraints: Empirical Evidence and Public Policy in* HANDBOOK OF ANTITRUST ECONOMICS 391 (Paolo Buccirossi ed., 2008) ("[I]t appears that when manufacturers choose to impose restraints, not only do they make themselves better off but they also typically allow consumers to benefit from higher quality products and better service provision"); Daniel O'Brien, *The Antitrust Treatment of Vertical Restraints: Beyond the Possibility Theorems in* THE PROS AND CONS OF VERTICAL RESTRAINTS 40, 72-73 (2008) ("[W]ith few exceptions, the literature does not support the view that [vertical restraints] are used for anticompetitive reasons" and vertical restraints "are unlikely to be anticompetitive in most cases").

acquiesced by so holding. This appeal comes to the Commission after a full trial on the merits, which yielded a 464-page opinion from the Administrative Law Judge. The posture of this case is not a motion to dismiss or a motion for summary judgment. The standard of review the Commission is to apply is *de novo*.[8] Accordingly, the Commission's task on appeal is not to determine whether Complaint Counsel asserts a plausible theory of competitive harm or whether there is *some* evidence in the record that tends to show the Respondent was seeking impermissibly to maintain a monopoly position. Rather, the Commission's task is to look at all the evidence in the record and to decide whether Complaint Counsel has carried its burden to prove that McWane's conduct harmed competition. That is, whether the evidence in the record matches and is sufficient to support Complaint Counsel's theory of harm.

At the most basic level, Complaint Counsel's task is to prove that McWane's conduct caused harm to competition.[9] This is a simpler task than typical merger analysis, which requires Complaint Counsel to offer and the Commission to evaluate a *prediction* about *future consequences*. That forward-looking exercise requires a prediction and subsequent comparison of two different futures: one with and one without the allegedly unlawful merger. Here, the Commission is faced with evaluating allegedly anticompetitive conduct that has already taken place. Indeed, the Commission's task is to assess whether the Full Support Program – conduct that first began in 2009 – harmed competition. Precisely because the market has already experienced McWane's allegedly anticompetitive conduct, the Commission has access to a source of critical evidence not usually available in the typical scenario. Specifically, the Commission is able to test Complaint Counsel's theory of competitive harm against evidence of actual market impact.

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8 16 C.F.R. § 3.54 (2013).

9 Rambus v. FTC, 522 F.3d 456, 466-67 (D.C. Cir. 2008) (conduct cannot cause an anticompetitive outcome unless plaintiff can show that outcome would not have occurred but for the challenged conduct); United States v. Microsoft, 253 F.3d 34, 79 (D.C. Cir. 2001) (en banc) (per curiam) (plaintiff must show that defendant's conduct made a "significant contribution" to an anticompetitive outcome).

There is ample record evidence demonstrating that the Full Support Program harmed McWane's rival Star. But, in my view, Complaint Counsel fails totally to establish, as it must under the antitrust laws, that McWane's conduct harmed *competition*. Complaint Counsel could have taken either or both of two general approaches to demonstrate McWane's conduct harmed competition: direct or indirect evidence of anticompetitive effect. Complaint Counsel makes no effort to establish harm to competition directly, such as by demonstrating that McWane's conduct had a deleterious effect upon price or output in the Domestic Fittings market.[10] Instead, Complaint Counsel and the Commission rely upon indirect evidence including market share estimates and imprecise estimates regarding how much the Full Support Program "foreclosed" Star from access to distributors. This evidence is only indirectly relevant to establishing the Full Support Program harmed competition in the Domestic Fittings market because it requires a number of inferences to be drawn and assumptions to be made to establish such a connection. Indeed, the most probative indirect evidence in the record – evidence of Star's successful entry in the Domestic Fittings market and its growing market share – undermines Complaint Counsel's theory of harm. If the challenged conduct that occurred in 2009 and 2010 harmed competition, Complaint Counsel ought to be able to prove it with evidence that *consumers of domestic pipe fittings are worse off as a result of McWane's conduct*. The record is clear that there is no such proof.

The well-established economic learning setting forth the limited theoretical conditions under which a firm can use vertical restraints to monopolize a market, and the state of empirical economic literature demonstrating that such restraints rarely harm competition make clear that although vertical restraints such as the Full Support Program certainly can harm competition under

10 Such direct evidence of an impact upon price or output might be, for example, a comparison of actual prices and industry output during the relevant time period against an estimate of the prices and output that would have occurred during the relevant time period had McWane not engaged in the challenged conduct. If price was higher or output was lower and the difference could be properly attributed to McWane's conduct rather than to other contemporaneous changes in the market, then this evidence would constitute direct evidence that McWane's conduct harmed competition.

some circumstances, those circumstances are the exception to the general rule that vertical restraints are a normal part of the competitive process and benefit consumers. The Commission should be skeptical of attempts to establish competitive harm in vertical cases solely through the use of indirect evidence and inferences of competitive injury.[11] That skepticism should be heightened in cases, such as this one, involving allegations of anticompetitive conduct that has been occurring in the marketplace for some time, which ought to enable the Commission to ascertain its competitive footprint. Given the dearth of record evidence demonstrating that McWane's conduct has had an adverse effect on competition, I do not believe Complaint Counsel has carried its substantial burden.[12] Accordingly, I respectfully dissent from the Commission's holding that McWane unlawfully monopolized the Domestic Fittings market.

I. Count 6: Unlawful Monopolization

Section 2 of the Sherman Act prohibits acts to "monopolize."[13] The Supreme Court has explained that "[t]he offense of monopoly under § 2 of the Sherman Act has two elements: (1) the possession of monopoly power in the relevant market and (2) the willful acquisition or maintenance of that power as distinguished from growth or development as a consequence of a superior product, business acumen, or historic accident." *United States v. Grinnell*, 384 U.S. 563, 570-71 (1966). I dissent from the Commission's decision because in my view Complaint Counsel has failed to establish the second

11 *See* Timothy J. Muris, *The FTC and the Law of Monopolization*, 67 ANTITRUST L.J. 693, 723 (2000) (emphasizing that allowing evidence of harm to a competitor to suffice in monopolization cases "would make it too easy to infer injury to competition from the fact of injury to competitors").

12 Because Complaint Counsel has not carried its *prima facie* burden of establishing anticompetitive effect, I do not consider whether Respondent has asserted a non-pretextual procompetitive justification for the Full Support Program.

13 15 U.S.C. § 2 (2012).

element of a monopolization claim: that McWane's conduct was exclusionary.[14]

A. **The Law of Exclusionary Conduct**

To reach the conclusion that unilateral conduct is exclusionary and therefore a potential violation of Section 2 of the Sherman Act, a trier of fact must undertake the difficult task of separating *bona fide* anticompetitive conduct from competition on the merits. In the words of the D.C. Circuit, "[w]hether any particular act of a monopolist is exclusionary, rather than merely a form of vigorous competition, can be difficult to discern: the means of illicit exclusion, like the means of legitimate competition, are myriad." *Microsoft*, 253 F.3d at 58. Though this exercise is often fact-intensive, courts have laid out some helpful guidelines. Judge Bork observed that exclusionary or predatory conduct "involves aggression against business rivals through the use of business practices that would not be considered profit maximizing except for the expectation that (1) actual rivals will be driven from the market, or the entry of potential rivals blocked or delayed, so that the predator will gain or retain a market share sufficient to command monopoly profits, or (2) rivals will be chastened sufficiently to abandon competitive behavior the predator finds threatening to its realization of monopoly profits." *Neumann v. Reinforced Earth Co.*, 786 F.2d 424, 427 (D.C. Cir. 1986).

The D.C. Circuit in *Microsoft* set forth the general burden-shifting procedure a court should undertake in deciding whether conduct is exclusionary under the meaning of Section 2:

> First, to be condemned as exclusionary, a monopolist's act must have an 'anticompetitive effect.' That is, it must

14 The Commission has also decided that Complaint Counsel established the first element of the offense: that McWane has monopoly power in the Domestic Fittings market. Because both elements must be established for Complaint Counsel to succeed on appeal and it has not, in my view, established the second element, I need not decide whether Complaint Counsel has proven that McWane has monopoly power in a relevant market. For purposes of my Dissenting Statement, I assume but do not decide that McWane has monopoly power in the Domestic Fittings market. Nevertheless, I decline to join the Commission's decision that McWane has monopoly power in the Domestic Fittings market.

> harm the competitive *process* and thereby harm consumers. In contrast, harm to one or more *competitors* will not suffice. The Sherman Act directs itself not against conduct which is competitive, even severely so, but against conduct which unfairly tends to destroy competition itself . . .
>
> Second, the plaintiff, on whom the burden of proof of course rests must demonstrate that the monopolist's conduct indeed has the requisite anticompetitive effect. In a case brought by . . . the Government, it must demonstrate that the monopolist's conduct harmed competition, not just a competitor.
>
> Third, if a plaintiff successfully establishes a *prima facie* case under § 2 by demonstrating anticompetitive effect, then the monopolist may proffer a 'procompetitive justification' for its conduct. If the monopolist asserts a procompetitive justification — a nonpretextual claim that its conduct is indeed a form of competition on the merits because it involves, for example, greater efficiency or enhanced consumer appeal — then the burden shifts back to the plaintiff to rebut that claim.
>
> Fourth, if the monopolist's pro-competitive justification stands unrebutted, then the plaintiff must demonstrate that the anticompetitive harm of the conduct outweighs the procompetitive benefit . . .
>
> Finally, in considering whether the monopolist's conduct on balance harms competition and is therefore condemned as exclusionary for purposes of § 2, our focus is upon the effect of that conduct, not upon the intent behind it. 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.

Microsoft, 253 F.3d at 58-59. The point of contention between my position and that of the Commission is whether Complaint Counsel can proceed beyond the second step, that is whether, assuming McWane is a monopolist, the Full Support Program has anticompetitive effect. In my view, Complaint Counsel has failed

to carry its burden to show that the Full Support Program has had anticompetitive effect.

B. **Exclusive Dealing as a Form of Exclusionary Conduct**

Economic theory shows that exclusive dealing, like most vertical restraints, can harm competition under certain circumstances but can also result in procompetitive efficiencies that benefit consumers. Modern economic theory teaches that exclusive contracts can harm competition when a monopolist uses exclusivity provisions in contracts with suppliers or distributors to raise the cost its rival faces in buying supply or contracting with distributors. Absent these contracts, the rival (or entrant) could cover its fixed costs by attracting a large enough mass of suppliers or distributors.

Economists have developed theories under the moniker of "raising rivals' costs" to articulate the conditions under which it is theoretically possible for a monopolist to use exclusive dealing to harm competition. *See* Thomas G. Krattenmaker & Steven C. Salop, *Anticompetitive Exclusion: Raising Rivals' Costs to Achieve Power over Price*, 96 YALE L.J. 209 (1986); Steven C. Salop & David T. Scheffman, *Raising Rivals' Costs*, 73 AM. ECON. REV. 267 (1983). The critical issue is "[w]hether the exclusionary rights arrangement will so limit remaining supply available to rivals that it will lead them to bid up the price of that supply, thereby increasing their costs to the point that the purchaser obtains power over price." Krattenmaker & Salop, 96 YALE L.J. at 259. These economic models make clear that exclusive dealing cannot result in the acquisition or maintenance of market power and harm competition unless the contracts foreclose a rival from access to a critical input necessary to achieve minimum efficient scale (MES).[15] In other words, a

15 Minimum efficient scale is "the size plant that can produce the smallest amount of output such that long-run costs are minimized." DENNIS W. CARLTON & JEFFREY M. PERLOFF, MODERN INDUSTRIAL ORGANIZATION 783 (4th ed., 2004). The concept of "raising rivals' costs" underlying modern anticompetitive theories of exclusion generally requires input foreclosure sufficient to deprive a rival from achieving minimum efficient scale. *See* Krattenmaker & Salop, 96 YALE L.J. at 247 ("[E]xcluded rivals no longer produce at minimum cost if the exclusionary rights agreement compels them to substitute less efficient inputs."); Benjamin Klein, *Exclusive Dealing as*

coherent theory of exclusion involving exclusive dealing contracts requires an analytical link between the contracts and the MES of production.[16]

The "foreclosure rate" contemplated by the economic paradigm of raising rivals' costs can provide this analytical link in the absence of direct evidence that the exclusive dealing contracts have caused the maintenance or acquisition of market power and have resulted in higher prices and reduced output. Whereas earlier and now discredited formulations of foreclosure raised the concern that exclusive dealing contracts between an input supplier and a buyer foreclosed rival buyers from access to that input seller, Krattenmaker & Salop, 96 Yale L.J. at 231-32, the modern economics of raising rivals' costs recognizes that determining a rate of foreclosure is not the end of the economic analysis, but rather is a starting point for a broader inquiry into whether the contracts raise a rival supplier's costs sufficiently to impact the competitive process.[17]

C. Exclusive Dealing and the Antitrust Statutes

Complaint Counsel has alleged and the Commission has concluded that McWane's Full Support Program is illegal exclusionary conduct because it is a form of exclusive dealing. Complaint ¶ 57; CC Answering Brief at 14-15; Commission Opinion at 22-29. Though the Full Support Program is not part of an agreement between McWane and any of its distributors, Complaint Counsel argued and the Commission concluded that the Full Support Program operated like an exclusive dealing

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Competition for Distribution "On the Merits," 12 GEO. MASON L. REV. 119, 122-28 (2003) ("[I]f exclusive contracts foreclose a sufficient share of distribution to rivals for a significant time so that what remains to serve competitors cannot support a manufacturer of minimum efficient scale, the exclusive will force existing competitors and potential new entrants to operate at a cost disadvantage. The exclusives then may have the effect of driving out and/or preventing entry of manufacturing competitors until sufficient distribution becomes available.").

16 Klein, *supra* note 15, at 126 ("Th[is] economic analysis . . . implies that the critical market share foreclosure rate should depend upon the [MES] of production.").

17 Krattenmaker & Salop, *supra* note 15, at 275.

arrangement. CC Answering Brief at 14-15; Commission Opinion at 20-22. Though I agree with Complaint Counsel and the Commission that the Full Support Program presents the same antitrust issues as would a case involving an explicit exclusivity arrangement, I disagree with their conclusion that the Full Support Program caused harm to competition. To understand why I disagree, it is worthwhile first to consider the evolution of the legal treatment of exclusive dealing claims under the antitrust laws.

Historically, exclusive dealing arrangements have been attacked under multiple provisions of the antitrust laws: Section 1 of the Sherman Act, which prohibits contracts, combinations, and conspiracies in restraint of trade, [18] Section 2 of the Sherman Act, which prohibits unlawful monopolization,[19] and Section 3 of the Clayton Act, which prohibits exclusive sales arrangements where the effect may be to substantially lessen competition or tend to create a monopoly.[20] Prior to the passage of the Clayton Act in 1914, exclusive dealing arrangements were typically upheld both under the common law and in cases brought under the Sherman Act, which was passed in 1890.[21] After the Clayton Act was passed, however, plaintiffs began to use Section 3 of that statute to prosecute exclusive dealing arrangements, and courts began to interpret the Sherman Act more broadly to prohibit certain exclusive dealing arrangements.[22] The three statutory provisions

18 15 U.S.C. § 1 (2012).

19 15 U.S.C. § 2 (2012).

20 15 U.S.C. § 14 (2012). Exclusive dealing arrangements can also be prosecuted by the Commission as an unfair method of competition under Section 5 of the FTC Act. 15 U.S.C. § 45(a).

21 PHILLIP E. AREEDA & HERBERT H. HOVENKAMP, ANTITRUST LAW ¶ 1800c (3d ed. 2011) (citing Mogul Steamship Co. v. McGregor, Gow & Co., [1892] A.C. 25, 66 Law Times 1 (1892); Whitwell v. Continental Tobacco Co., 125 F. 454 (8th Cir. 1903) (approving tobacco company's granting of rebates to dealers who did not sell competing brands)) [hereinafter *AREEDA*].

22 Jonathan M. Jacobson, *Exclusive Dealing, "Foreclosure," and Consumer Harm*, 70 ANTITRUST L.J. 311, 317 (2002) ("Passage of the Clayton Act did in fact result, almost immediately, in more and successful challenges to exclusive dealing arrangements."); United States v. Am. Can Co., 230 F. 859, 875 (D.

have different requirements, which led courts to apply different standards depending upon the statutory provision under which the plaintiff pursued its claim. For example, Section 1 requires concerted action between two separate entities, whereas Section 2 does not. Section 2, on the other hand, requires some analysis of monopoly and monopoly power, whereas Section 1 and Section 3 focus instead on "market power." Finally, Section 3 requires a "sales" arrangement whereas neither of the other two statutory provisions includes such a requirement.[23]

Today, though the statutory provision under which the claim is pursued makes some difference depending upon the circumstances, the law of exclusive dealing under the three provisions has largely converged in recent years. One commentator has opined that "[t]he focus today is whether exclusive dealing is unreasonably anticompetitive. Which statute is used as the basis for challenge no longer really matters."[24]

In any event, though the statute under which a plaintiff pursues its claim can have some effect on whether its claim is successful, a plaintiff must *always* establish that the exclusive dealing arrangement harms competition as understood under the familiar antitrust rule of reason.[25]

Md. 1916) (holding an exclusive dealing arrangement unlawful under the Sherman Act).

23 *See* AREEDA, *supra* note 21, ¶ 1800c.

24 Jacobson, *supra* note 22, at 327 (describing the collapse of any distinction between jurisprudence under Section 1 of the Sherman Act and Section 3 of the Clayton Act); *see also* Microsoft, 253 F.3d at 70 ("The basic prudential concerns relevant to §§ 1 and 2 are admittedly the same: exclusive contracts are commonplace—particularly in the field of distribution—in our competitive, market economy, and imposing upon a firm with market power the risk of an antitrust suit every time it enters into such a contract, no matter how small the effect, would create an unacceptable and unjustified burden upon any such firm. At the same time, however, we agree with plaintiffs that a monopolist's use of exclusive contracts, in certain circumstances, may give rise to a § 2 violation even though the contracts foreclose less than the roughly 40% or 50% share usually required in order to establish a § 1 violation.").

25 Jacobson, *supra* note 22, at 323 (more recent exclusive dealing cases have "reduced the focus on foreclosure and placed greater emphasis on the need to prove market power and actual consumer harm."); *cf.* Brooke Group Ltd. v.

D. The Law of Exclusive Dealing and Anticompetitive Effect

As with many business practices once routinely condemned by courts, antitrust law has become more hospitable toward exclusive dealing arrangements – less likely to hold them to be anticompetitive – as time has passed.[26] The Supreme Court first held certain exclusive dealing arrangements to be unlawful under Section 3 of the Clayton Act in 1922 in *Standard Fashion Co. v. Magrane-Houston Co.*, 258 U.S. 346 (1922) and *United Shoe Machinery Corp. v. United States*, 258 U.S. 451 (1922). In the 1949 *Standard Stations* case, the Supreme Court introduced quantitative "foreclosure" analysis into the law of exclusive dealing. *Standard Oil Co. (Cal) v. United States*, 337 U.S. 293 (1949). A rival is said to be "foreclosed" from access to a distributor if the distributor has committed to deal with a specific supplier exclusively. The Court held that all that was necessary for there to be a violation of Section 3 of the Clayton Act was "proof that competition has been foreclosed in a substantial share of the line of commerce affected." *Id.* at 314. What constitutes a "substantial share" of the line of commerce occupied courts' attention for much of the last half of the twentieth century.

The last time the Court squarely considered an exclusive dealing claim was in 1961 in *Tampa Electric* in which it upheld a 20-year exclusive arrangement that the Court determined foreclosed only a very small percentage of the market. There the Court essentially repeated the same standard, announcing that "the competition foreclosed by the contract must be found to constitute a substantial share of the relevant market." *Tampa Electric Co. v. Nashville Coal Co.*, 365 U.S. 320, 328 (1961). Providing some guidance to lower courts, the Court stated that "[t]o determine substantiality in a given case, it 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

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Brown & Williamson Tobacco Corp., 509 U.S. 209, 224-25 (1993) (injury to a competitor is "of no moment to the antitrust laws if competition is not injured . . . . Even an act of pure malice by one business competitor against another does not, without more, state a claim under the federal antitrust laws.").

26 Jacobson, *supra* note 22, at 323-325.

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. It follows that a mere showing that the contract itself involves a substantial number of dollars is ordinarily of little consequence." *Id.* at 329. In *Tampa Electric* the Court therefore made clear that some "measure" of foreclosure is not the "be all end all" of exclusive dealing jurisprudence and that the probative value of any foreclosure measurement must be interpreted in the context of its relationship to the likely market impact of the restraint at issue.

The Commission itself ushered in the modern era of exclusive dealing analysis in 1982 by holding explicitly that exclusive dealing arrangements are governed by the rule of reason and not subject to a special rule that weighs some measure of foreclosure above all other factors. In *Beltone*, recognizing a trend that courts had been "employ[ing] a fuller rule-of-reason analysis" in exclusive dealing cases, we held that that exclusive dealing ought to be governed by the same legal standard – the rule of reason – the Supreme Court had applied to all nonprice vertical restraints five years earlier in *GTE Sylvania*: "A proper analysis of exclusive dealing arrangements should take into account market definition, the amount of foreclosure in the relevant markets, the duration of the contracts, the extent to which entry is deterred, and the reasonable justifications, if any for the exclusivity." *In re Beltone Electronics Corp.*, 100 F.T.C. 68, 204 (1982).

We went on to observe that, "in weighing the potentially diverse effects of a distributional restriction, it should be recognized that the process is not conducive to fine line drawing. Given the limited state of knowledge (especially empirical information) we now have about the actual effects of these practices on competition, *it seems desirable to require reasonably clear evidence of probable overall competitive harm before condemning their use in a particular case*." *Id*. at 209 (emphasis supplied). We observed explicitly that foreclosure is "only one of several variables to be weighed in the rule-of-reason analysis applied to all nonprice vertical restraints." *Id.* at 204. The empirical knowledge accumulated about the competitive impact of exclusive dealing and related practices in the thirty-two years since *Beltone* suggests the practices can but generally do not harm

competition,[27] a development that underscores the appropriateness of the Commission's conclusion that clear evidence of anticompetitive effect should be required before condemning any particular business arrangement.

After *Beltone*, the modern approach is to analyze exclusive dealing under the rule of reason, considering a host of factors, of which foreclosure is only one. A modern statement of the general rule is offered by Judge Posner:

> First [the plaintiff] must prove that [the challenged restraint] is likely to keep at least one significant competitor of the defendant from doing business in a relevant market. If there is no exclusion of a significant competitor, the agreement cannot possibly harm competition. Second, [the plaintiff] must prove that the probable (not certain) effect of the exclusion will be to raise prices above (and therefore reduce output below) the competitive level, or otherwise injure competition; he must show in other words that the anticompetitive effects (if any) of the exclusion outweigh any benefits to competition from it.

Roland Machinery Co. v. Dresser Indus., 749 F.2d 380, 394 (7th Cir. 1984). This statement of the law illustrates that exclusion of a competitor is necessary but not sufficient for liability: an exclusive dealing plaintiff must also establish harm to competition. In this sense, modern antitrust law has merged with modern economic theory: substantial foreclosure is necessary but not sufficient for plausible successful exclusion and is also required by the law.[28] The fundamental question as to whether a particular example of exclusive dealing is lawful has merged with the fundamental economic inquiry: does the arrangement harm competition?

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27 *See supra* note 7.

28 Klein, *supra* note 15, at 125 ("[a]ntitrust law is consistent with economic analysis, in that an exclusive must cover a substantial share of the market for liability").

The best and most straightforward way to establish harm to competition is, of course, direct evidence that the exclusive dealing arrangement caused prices to rise and output to fall relative to a but-for world in which the defendant did not employ exclusive dealing contracts. The procedural posture and the facts unique to a given case are undoubtedly relevant to whether such direct evidence will exist. A plaintiff is given much more leeway on a motion to dismiss or a motion for summary judgment.[29] For example, at the motion to dismiss phase, the plaintiff cannot be expected to have evidence that price rose or output fell as a result of the defendant's exclusive dealing arrangements. The plaintiff need only allege a set of facts that would allow a court to conclude that anticompetitive effects are the plausible result of the defendant's exclusive dealing arrangements.[30] Indeed, the procedural posture in *Roland Machinery* was a motion for a preliminary injunction against the defendant's exclusive dealing arrangements, which presumably is why Judge Posner was concerned about the "probable (not certain) effect of the exclusion." *Roland Machinery*, 749 F.2d at 394. When considering an exclusive dealing arrangement that occurred in the past and examining a record developed after lengthy discovery and a trial on the merits, a plaintiff has had ample opportunities to develop direct evidence of anticompetitive effects. Similarly, the Commission and the Department of Justice recognize the value of direct evidence when it is available, such as when examining mergers that have already taken place, as opposed to the normal merger review process that requires predictions about the future, "[e]vidence of observed post-merger price increases or other changes adverse to customers is given *substantial weight*." U.S. DEP'T OF JUSTICE & FED. TRADE COMM'N, HORIZONTAL MERGER GUIDELINES § 2.1.1 (2010), *available at* http://www.justice.gov/atr/public/guidelines/hmg-2010.pdf (emphasis supplied).

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29 *See* Bennett v. Spear, 520 U.S 154, 167-68 (1997) ("[W]hile a plaintiff must set forth by affidavit or other evidence specific facts to survive a motion for summary judgment, and must ultimately support any contested facts with evidence adduced at trial, at the pleading stage, general factual allegations of injury resulting from the defendant's conduct may suffice, for on a motion to dismiss we presume that general allegations embrace those specific facts that are necessary to support the claim") (internal citations omitted).

30 Bell Atl. Corp. v. Twombly, 550 U.S. 544, 556 (2007).

Though direct evidence of anticompetitive effects is the most persuasive type of evidence in an antitrust case,[31] courts in exclusive dealing cases have held that a plaintiff may prove its case indirectly by considering various observable market factors that allow a court to infer whether anticompetitive effect is likely to have occurred in the market at issue. One of these factors is an estimate of the significance of market foreclosure caused by the exclusive dealing arrangement, but the law is clear that market foreclosure is but one of several factors.[32] *See e.g., Ryko Mfg. Co. v. Eden Services*, 823 F.2d 1215 (8th Cir. 1987) ("[W]here, as here, the foreclosure rate is neither substantial nor even apparent, the plaintiff must demonstrate that other factors in the market exacerbate the detrimental effect of the challenged restraints"); *Beltone*, 100 F.T.C. at 204 (foreclosure is "only one of several variables to be weighed in the rule-of-reason analysis now applied to all nonprice vertical restraints."); *cf. Microsoft*, 253 F.3d at 69 ("the requirement of a significant degree of foreclosure serves a useful screening function").

Other factors are the duration and terminability of the exclusive dealing arrangement. As one court explained, "the short duration and easy terminability of [certain] agreements negate substantially their potential to foreclose competition." *Omega Envtl., Inc. v. Gilbarco, Inc.*, 127 F.3d 1157, 1163 (9th Cir. 1997); *see also W. Parcel Express v. United Parcel Serv. Of Am., Inc.*, 190 F.3d 974, 976 (9th Cir. 1999) (holding that "termination provisions that allowed a customer to terminate the contract for any reason with very little notice" were relevant to upholding agreements). Many courts have held that exclusive dealing

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31 *See* FTC v. Indiana Fed'n of Dentists, 476 U.S 447, 460-61 (1987) ("Since the purpose of the inquiries into market definition and market power is to determine whether an arrangement has the potential for genuine adverse effects on competition, proof of actual detrimental effect, such as a reduction of output, can obviate the need for an inquiry into market power, which is but a surrogate for detrimental effects.") (internal citations omitted).

32 This is because it can be difficult to separate foreclosure that is caused by the exclusive dealing arrangement – the foreclosure the antitrust laws are concerned with – from the consequences of actual competition. *See* Barry Wright Corp. v. ITT Grinnell Corp., 724 F.2d 227, 236 (1st Cir. 1983) (Breyer, J.) ("[V]irtually every contract to buy 'forecloses' or 'excludes' alternative sellers from some portion of the market, namely the portion consisting of what was bought").

contracts of one year or less are presumptively legal. *See e.g.*, *Roland Machinery*; *Concord Boat Corp. v. Brunswick Corp.*, 207 F.3d 1039, 1059 (8th Cir. 2000); *Omega*; *U.S. Healthcare, Inc. v. Healthsource, Inc.*, 986 F.2d 589, 596 (1st Cir. 1993); *CDC Techs., Inc. v. IDEXX Lab., Inc.*, 186 F.3d 74 (2d Cir. 1999); *Thompson Everett, Inc. v. Nat'l Cable Adver.*, 57 F.3d 1317, 1325 (4th Cir. 1995). Still, just as the inquiry does not begin and end once a court has adopted some measure of market foreclosure, some courts have observed that short duration and easy terminability do not preclude liability for exclusive dealing in all cases. *See United States v. Dentsply Int'l*, 399 F.3d 181, 193 (3rd Cir. 2005) ("Although the parties to the sales transactions consider the exclusionary arrangements to be agreements, they are technically only a series of independent sales. Dentsply sells teeth to the dealers on an individual transaction basis and essentially the arrangement is 'at-will.' Nevertheless, the economic elements involved—the large share of the market held by Dentsply and its conduct excluding competing manufacturers—realistically make the arrangements here as effective as those in written contracts").

Some courts have emphasized that exclusive dealing arrangements are less concerning to antitrust courts when the exclusivity is required of end-users rather than of distributor intermediaries. *See Omega*, 127 F.3d at 1162-63 ("[E]xclusive dealing arrangements imposed on distributors rather than end-users are generally less cause for anticompetitive concern. If competitors can reach the ultimate consumers of the product by employing existing or potential alternative channels of distribution, it is unclear whether such restrictions foreclose from competition *any* part of the relevant market."); *Ryko*, 823 F.2d at 1235 (plaintiff faces higher burden of proving harm to competition "[w]here the exclusive dealing restraint operates at the distributor level, rather than at the consumer level"). Still, other courts have correctly observed that the relevant question is whether the exclusive dealing arrangement prevents a rival from competing for distribution sufficient to reach MES, which can occur through exclusivity commitments made by distributors if distributors are a significant gateway to end-users. *See ZF Meritor LLC v. Eaton Corp.*, 696 F.3d 254, 287 (3d Cir. 2012) ("[T]he mere existence of potential alternative avenues of distribution, without an assessment of their overall significance to the market, is insufficient to demonstrate that Plaintiffs'

opportunities to compete were not foreclosed") (internal citations omitted).

A final category of indirect evidence is evidence regarding the ease of entry into the industry purporting to be monopolized through exclusive dealing arrangements. Courts are clear that when entry is easy or when there is evidence of actual entry while the exclusive dealing is in force, anticompetitive effect is unlikely to occur. *See Omega*, 127 F.3d at 1164; *AREEDA*, *supra* note 21, ¶ 422e3 ("Entry while alleged exclusionary conduct is underway may suggest both that entry is easy and that the defendant's conduct is not really predatory at all"); *cf. Allen-Myland, Inc. v. IBM Corp.*, 33 F.3d 194, 209 (3d Cir. 1994) ("[T]he ease or difficulty with which competitors enter the market is an important factor in determining whether the defendant has true market power – the power to raise prices").

E. McWane's Full Support Program

What separates the pre-*GTE Sylvania* law and economics of the antitrust analysis of exclusive dealing arrangements from the modern era is that to succeed on a claim that exclusive dealing violates the antitrust laws, a plaintiff *must* demonstrate that the conduct harmed competition and not just disadvantaged a competitor.[33] Accordingly, to present a cognizable theory of harm, Complaint Counsel has the burden of showing that McWane's Full Support Program actually harmed the competitive process, not just that the program made it more difficult for Star to gain distribution.

Complaint Counsel's theory of harm is that "McWane's Exclusive Dealing Policy harmed competition by foreclosing a substantial share of the 'critical' distribution channel, thereby impeding entry. More specifically, McWane's Policy *prevented rivals from gaining a sufficient scale to constrain McWane's exercise of monopoly power*." CC Answering Brief at 14

33 *See* Brown Shoe Co. v. United States, 370 U.S. 294, 320 (1962) (antitrust laws concerned with the "protection of *competition*, not *competitors*"); Brunswick Corp. v. Pueblo Bowl-O-Mat, Inc., 429 U.S. 477 (1977) (holding plaintiff competitor lacked standing to pursue antitrust claim that harmed it as a competitor but did not harm competition).

(emphasis supplied). This theory of harm tracks the modern economic understanding of how exclusive dealing might harm competition. Accordingly, Complaint Counsel has articulated a coherent theory of economic harm: McWane's exclusive dealing policy raised Star's distribution costs, which prevented Star from achieving MES, which enabled McWane to maintain power over price, preventing consumers from enjoying the benefit of unfettered competition between McWane and Star.

To match this theory of harm to the facts in the record, Complaint Counsel must show that (1) McWane engaged in an exclusive dealing policy; (2) the policy raised Star's distribution costs and prevented it from achieving MES; and (3) the policy enabled McWane to maintain its power over price resulting in consumer harm. Complaint Counsel views its burden differently: "[i]n exclusive dealing cases, a *prima facie* case of competitive harm is established by demonstrating: (1) a significant degree of market foreclosure; and (2) the impairment of one or more significant rivals' ability to compete." CC Answering Brief at 16 (citing *ZF Meritor* 696 F.3d at 271; *Dentsply* at 399 F.3d at 188-90, 194-96; *Microsoft*, 253 F.3d at 69). For additional support, Complaint Counsel also cites our prior decision in this case: "[T]he question here is whether McWane's conduct foreclosed a substantial portion of the effective channels of distribution, and whether the conduct had a significant effect in preserving McWane's monopoly." *In re McWane, Inc.*, 2012 FTC Lexis 155, at *63 (Sept. 14, 2012).[34] The Commission articulates a similar though more economically coherent standard: "we examine both the anticompetitive and procompetitive effects of the conduct to determine whether, in light of McWane's monopoly power, its use of exclusive dealing prevented rivals from meaningfully competing and had a substantial anticompetitive effect on competition." Commission Opinion at 20.

Complaint Counsel's statement of the law is, at best, question begging, and, at worst, misleading. As explained, foreclosure is an imprecise tool used by a court to assess whether harm to

34 I did not participate in the earlier decision as it predated my term as Commissioner.

competition can occur or is likely to occur in a given case; it is but one of several factors relevant to the same question.[35] Like market definition, the purpose of which is to screen for whether a business arrangement can plausibly result in "genuine adverse effects on competition," *Indiana Fed'n of Dentists*, 476 U.S. at 460-61, foreclosure is but a proxy for the real question of whether the arrangement harms competition.[36] How to calculate a foreclosure percentage and what that foreclosure percentage means will invariably depend upon the facts peculiar to each case. And in calculating a foreclosure percentage a tribunal must always be cognizant of the fact that foreclosure is valuable only insofar as it helps the tribunal understand whether the exclusive dealing policy is one that harms the competitive process and causes the firm implementing the policy to acquire or maintain monopoly power. Simply calculating a foreclosure percentage and declaring the percentage significant is insufficient to establish anticompetitive effect, both under existing antitrust jurisprudence and under Complaint Counsel's theory of the case.[37]

1. The Full Support Program as Exclusive Dealing

In September 2009, McWane sent a letter to its distributors stating that "McWane will adopt a program whereby our domestic

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35 *See e.g.*, Ryko, 823 F.2d at 1233; Barry Wright, 724 F.2d at 236; Beltone, 100 F.T.C. 68.

36 The Supreme Court recognized this fact when it first adopted foreclosure analysis as part of exclusive dealing jurisprudence in *Standard Stations*: "The issue before us, therefore, is whether the requirement of showing that the effect of the agreements 'may be substantially to lessen competition' may be met simply by proof that a substantial portion of commerce is affected or whether it must also be demonstrated that competitive activity has actually diminished or probably will diminish." *Standard Stations*, 337 U.S. at 299.

37 The Commission's assertion that I "would apply a standard of evidentiary proof . . . that is far beyond that called for by applicable Section 2 law . . . [and that I] offer[] no legal support for this heightened standard" is simply incorrect. Commission Opinion at n.12. The case law is clear that an antitrust plaintiff must show harm to competition in an exclusive dealing case and that "significant foreclosure" is only a proxy for harm to competition, and only one factor a tribunal is to consider in assessing harm to competition. Indeed, this point is made clear by the Commission's own precedent in *Beltone*, a case the Commission does not cite a single time in its opinion. *Beltone*, 100 F.T.C. at 204, 209.

fittings and accessories will be available to customers who elect to fully support McWane branded products . . . Customers who elect not to support this program may forgo participation in any unpaid rebates for domestic fittings and accessories." CX0010. In discussions with distributors, McWane explained that "if a customer buys Star domestic . . . the customer will no longer have access to" McWane's domestic fittings. IDF 1179; *see also* IDF 1183 (quoting CX0119 at 002, 004) ("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."). McWane's letter on its face allows distributors to buy from non-McWane sources under certain circumstances: "Exceptions are where [McWane] 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[r]'s ductile iron pipe." CX0010.

Refusing to deal with a distributor if it also distributes the products of your competitor is a tell-tale sign of an exclusive dealing arrangement. And whether the Full Support Program is a "complete" exclusive dealing arrangement is beside the point. The relevant question from an analytical standpoint is whether the Full Support Program has exclusionary potential, which, in my view, it undoubtedly does. *ZF Meritor*, 696 F.3d at 283 ("[J]ust as 'total foreclosure is not required for an exclusive dealing arrangement to be unlawful, nor is complete exclusivity required with each customer.").[38] Of course, the relevant question on appeal after trial is whether the exclusionary potential resulted in actual exclusion and anticompetitive effects.

2. Minimum Efficient Scale

The second component of Complaint Counsel's theory of harm is that the Full Support Program raised Star's distribution costs and prevented it from achieving MES. If the Full Support Program did not prevent Star from achieving MES, then its

38 McWane argues that the Full Support Program was not an exclusive dealing arrangement because some distributors dealt with Star and distributors that did deal with McWane were not contractually obligated to do so. McWane Brief at 29. The Commission, in my view, correctly rejects McWane's argument. Commission Opinion at 20-22.

distribution costs could not have increased sufficiently to harm competition in the domestic fittings industry. Thus, a necessary predicate for evaluating whether the Full Support Program raised Star's distribution costs and prevented it from achieving MES is establishing what MES is in the domestic fittings industry.

The primary finding of fact that relates to MES is Star's own estimate that it would need between [redacted] in annual fittings sales to justify purchasing its own foundry. IDF 1400, *in camera*. Complaint Counsel claims that "[b]ut for the [Full Support Program], the deterred distributors would have offered Star sufficient sales opportunities for it to achieve economies of scale" and that "[s]imple arithmetic confirms the anticompetitive exclusion." CC Answering Brief at 19. Here, Complaint Counsel points to the amount of sales Star made in 2010 and 2011, [redacted], and to the additional amount of sales, [redacted], Star would need to justify purchasing a domestic foundry. CC Answering Brief at 19 (citing IDF 1143, *in camera*). The Commission accepts Complaint Counsel's argument wholesale. Commission Opinion at 25 ("Star testified . . . that it needed between [redacted] of domestic fittings sales to justify purchasing its own foundry. IDF 1400, *in camera*; Bhargava, Tr. 2962-63, *in camera*. Star's actual sales of domestic fittings, [redacted] in 2010, were insufficient for Star to justify operating a foundry of its own. IDF 1396, *in camera*, 1401.").

The unstated but implicit assertion in the argument made by Complaint Counsel and accepted by the Commission is that MES in the domestic fittings industry is achieved only when a supplier is able to operate its own foundry. And the basis for that assertion is *Star's own estimate about what a foundry would cost and nothing else*. *See* Oral Argument Tr. 82:2-83:2 ("COMPLAINT COUNSEL: In this case, the minimum efficient scale would be Star having its own foundry, which would allow Star -- Star was using jobber foundries instead, and that was less efficient. If it could have had its own foundries, it could have brought its costs down, and it could have -- and, again, there are numbers in the record. COMMISSIONER WRIGHT: Is there evidence in the record to establish that minimum efficient scale is equivalent to a foundry? COMPLAINT COUNSEL: No, I don't think -- I think that was Star's view of what minimum efficient scale was. I don't

think they phrased it that way, but I think that's the closest thing in the record. COMMISSIONER WRIGHT: And there is a difference between saying they would be more efficient if they had a foundry and deprivation from achieving minimum efficient scale, which is the underlying basis of [the Commission's] theory. I'm wondering if there is anything you can point me to in the record that would help me distinguish between the two. COMPLAINT COUNSEL: I can't think of anything. I mean, Star's testimony was this is what we thought we needed, but no, I can't -- there is not, for example, any comments that spoke to what minimum efficient scale would be."). Such evidence is, as Complaint Counsel recognized, insufficient to establish MES. It is also inadequate, even accepting *arguendo* Complaint Counsel's assertion that Star's own estimate of the cost of a foundry is probative of its efficiency relative to other available sourcing options, to establish that any increase in Star's distribution costs was of sufficient magnitude to impact competitive conditions in the domestic fittings industry.

Complaint Counsel's expert, Dr. Laurence Schumann, explained the economics of exclusive dealing arrangements and how a firm with market power can use exclusive dealing to harm competition by preventing a rival from achieving MES. CX2260-A, ¶120-132. Dr. Schumann's testimony does not endeavor to define MES in the domestic fittings industry, however. He points to evidence that there are economies of scale in producing fittings, ¶163-164, and argues that economies of scale matter in the fittings industry, n.177 ("Greater production levels make the use of the most efficient equipment more economical; accordingly, as the scale of production grows, costs decline through the adoption of more efficient production equipment (Interview with Charles Frazier, May 25, 2012)."). Nor is there any evidence in the record from an industry expert regarding whether MES – as the term is understood in modern economics – is scale sufficient to justify the purchase of a foundry and whether Star's estimate of the amount of sales sufficient to justify the purchase of a foundry is indeed accurate.

In fact, evidence in the record supports the conclusion that owning and operating an independent foundry is not necessary to achieving MES in the fittings industry. Sigma's entire business model is based upon *not* owning production facilities. Sigma's

"virtual manufacturing" model is to purchase fittings produced by independent foundries in China, Mexico, and India and to rely on its own employees for technical know-how and quality control. IDF 56-57. Sigma's business model of sourcing production to independent foundries has enabled it to become the second-leading supplier of fittings sold in the United States with a share of , almost twice as large a share as Star, which owns and operates foundries abroad. IDF 356, *in camera*, 111. Complaint Counsel has made no effort to reconcile the fact that Sigma was able to enter and achieve scale in the fittings industry without owning a foundry with its argument that MES in the *domestic* fittings industry requires owning a foundry.

Not surprisingly given Sigma's success with its virtual manufacturing model, there is evidence in the record that Star was able to enter, compete, and *grow its business* without operating its own foundry. IDF 1041, 1042, *in camera*, 1143, *in camera*, 1144 (noting that Star's share grew from in its first year as a domestic supplier to more than in its second year, and was on pace to continue its growth into its third year). In other words, for Complaint Counsel's view of MES to make sense on the facts that exist in the record, Star would have to be operating below MES, becoming less efficient over time as McWane's Full Support Program further raised the costs of distribution, and yet remaining in the market and growing its business. Such a position strains credulity.

In my view, Complaint Counsel has simply failed to introduce sufficient evidence to compel the conclusion that MES in the domestic fittings industry is the scale necessary to justify the purchase of a foundry.[39] As preventing a rival from achieving MES is a key element in the case – both articulated by the economic theory of using exclusive dealing to raise rivals' costs and by Complaint Counsel itself – failing to prove this point is fatal to Complaint Counsel's case. Without putting forth some credible evidence regarding MES in the domestic fittings industry, Complaint Counsel cannot logically establish the harm to

39 Nor, as explained below, has Complaint Counsel made any other attempt to establish through evidence or analysis the level of foreclosure that would be sufficient to create an impact on prices and output in the relevant market.

competition that the antitrust laws require a plaintiff to establish. This is because one thing that is necessary but not sufficient to distinguish mere harm to a competitor from harm to a competitor that also results in harm to competition is that the harm to a competitor prevents that competitor from achieving MES.

3. Harm to Competition

a. Foreclosure Analysis

Complaint Counsel argues that the Full Support Program harmed competition because the program "foreclosed a substantial share of the domestic fittings market," which prevented Star from being able to compete effectively, *i.e.*, achieve MES. CC Answering Brief at 16-23. The Commission largely accepts Complaint Counsel's argument, deciding that Star and other competitors were foreclosed from access to distributors and that this foreclosure impacted their ability to compete. Commission Opinion at 22-25.[40] As discussed, foreclosure in modern exclusive dealing analysis is not itself the end of any complete analysis but rather a starting point for understanding whether the exclusive arrangements at issue are capable of harming competition. What is strikingly absent from Complaint Counsel's argument, and the Commission's Opinion, is any evidence establishing the requisite analytical link between what the Commission describes as "foreclosure" and harm to competition. A measure of foreclosure caused by McWane's Full Support Program is relevant to the inquiry under Section 2 only insofar as there is evidence linking the identified foreclosure percentage to McWane's maintenance of its monopoly power.[41]

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40 In accepting this argument, the Commission finds that "[a] domestic fittings entrant is unable to compete effectively without access to distributors." Commission Opinion at 22 (citing IDF 400-09, 411-12, JSLF ¶ 14, IDF 367, IDF 373-74, IDF 381). I agree with the Commission's conclusion that in the domestic fittings industry, distributors are a key distribution channel and that a supplier cannot compete effectively without having some access to distributors.

41 *See* Krattenmaker & Salop *supra* note 15, at 259 (the key issue is "[w]hether the exclusionary rights arrangement will so limit remaining supply available to rivals that it will lead them to bid up the price of that supply, thereby increasing their costs to the point that the purchaser obtains power over price.").

Complaint Counsel argues that foreclosure is "calculated by determining the percentage of the downstream market subject to the challenged policy." CC Answering Brief at 16. Using this measure, Complaint Counsel says that because "McWane sold [redacted] of all Domestic Fittings in 2010, [and] roughly 99% of those sales were through Distributors, and all Distributors were subject to McWane's Exclusive Dealing Policy . . . [the] foreclosure percentage [is] [redacted]" CC Answering Brief at 17 (citing IDF357, *in camera*; CCPF475).

The Commission does not settle on a specific foreclosure percentage, preferring instead to point to the market shares of all the distributors that could potentially have been foreclosed by the Full Support Program, adding them up, and intimating that such a percentage is significant. "McWane's Full Support Program foreclosed Star and other potential entrants from accessing a substantial share of distributors. Following announcement of the program, the country's two largest waterworks distributors, HD Supply, with a roughly 28% to 35% share of distribution (IDF 378), and Ferguson, with about 25% of distribution (IDF 379), prohibited their branches from purchasing domestic fittings from Star unless the purchases fell into one of the exceptions specified in the Full Support Program." Commission Opinion at 23. In addition to HD Supply and Ferguson, the Commission points to other distributors such as U.S. Pipe, Groeninger, and WinWholesale and finds that they would have made more purchases from Star had McWane not started the Full Support Program. Commission Opinion at 23-24.

Complaint Counsel and the Commission's foreclosure analysis is incomplete and offers little illumination regarding the competitive effect of the Full Support Program. Most fundamentally, neither Complaint Counsel nor the Commission provides an analytical link between Complaint Counsel's foreclosure analysis and competitive harm.[42] As discussed, one

42 The Commission is correct that "[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." Commission Opinion at 29 (citing Dentsply, 399 F.3d at 191; *accord* ZF Meritor, 696 F.3d at 265, 283-84). But the mere fact that the foreclosure rate need not be 100% to violate the law does not obviate the need to connect the identified foreclosure rate with the defendant's ability to maintain monopoly power.

obvious such link entirely absent in the record is direct evidence that the Full Support Program actually increased prices and reduced output relative to what they would have been had Star entered and McWane not implemented the Full Support Program – that is, evidence consistent with Complaint Counsel's theory and Complaint Counsel and the Commission's assertion that the level of foreclosure was sufficient to cause competitive harm over the time it was in effect. Neither Complaint Counsel nor the Commission makes any attempt to reconcile the absence of actual evidence of anticompetitive effects with the high foreclosure rates they claim are at issue.[43] Because foreclosure rates are relevant

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43 The Commission points to certain categories of evidence it considers direct. First, the Commission points out that "McWane itself recognized that if Star entered, prices in the domestic market would likely fall just like in the imported market." Commission Opinion at 27 (citing IDF 1148-49, 1151-53). McWane's own prediction about a "likely" price effect in the future is simply not evidence of what actually happened to prices once Star did enter, evidence the Commission could have acquired and introduced into the record in this case. Second, the Commission points to the fact that "soon after Star entered the market, McWane announced and implemented price increases for domestic fittings." Commission Opinion at 29 (citing IDF 1083). Notwithstanding that there is no evidence suggesting that McWane's announced price increase led to an actual increase in prices, the Commission again misunderstands Complaint Counsel's task in this case. Showing a change in prices or output that corresponds with the timing of some event, say, a firm's entry into a market, is necessary but not sufficient to show that challenged conduct was exclusionary. Complaint Counsel's burden is to show that McWane's conduct *caused* any price effect. That McWane announced a price increase after Star's entry does not satisfy Complaint Counsel's burden. Indeed, Complaint Counsel has made no effort to show that the price increase announced by McWane occurred as a result of the Full Support Program. This is likely because there is ample evidence in the record to suggest that the price increase announced by McWane in 2010 was caused by a host of other factors. There is evidence that McWane's costs were increasing at the time it announced the price increase, which would also explain the fact that it announced a price increase for *all* McWane fittings at the same time it announced a price increase for domestic fittings. IDF 1083-85. Further, the price increase was announced in December 2010, likely within the timeframe for ARRA-funded projects during which demand for domestic fittings increased. It is basic economics that an increase in demand increases prices as well, holding all else constant. Further, there is additional evidence in the record to suggest demand was high in 2010. As the Commission has pointed out, Star's revenue in 2011 was lower than in 2010 despite Star having twice as high a market share in 2011. IDF 1397. One plausible explanation for such facts would be a decrease in demand for domestic fittings in 2011 relative to 2010. This would also be consistent with the fact that ARRA-funded projects were to be under contract or under

only as a proxy for better understanding competitive effects, this failure undermines the Commission's heavy reliance upon inferences drawn from foreclosure rates. By concluding that Complaint Counsel need only demonstrate that Star was foreclosed from some unspecified amount of distributors as a result of the Full Support Program, without linking that foreclosure to the preservation of McWane's monopoly power, the Commission in effect holds that harm to a competitor without more is sufficient to establish a violation of Section 2.[44]

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construction by February 2010. IDF 525-27. Of course, a host of other factors could explain McWane's announcement to increase prices in 2010. The record, including the expert reports, simply does not provide enough evidence to make a reliable conclusion about the cause of the announcement. Accordingly, the simple fact that McWane announced a price increase after Star's entry sheds almost no light on whether the Full Support Program was exclusionary.

44 The Commission's argument that there is harm to competition because McWane's conduct reduced "choice" fares no better. Commission Opinion at 28 ("McWane's exclusive dealing policy also had another adverse impact on competition: it denied its customers the ability to make a meaningful choice"). There are two problems with the Commission's reliance on a loss of consumer choice as evidence of harm to competition. First, the Commission cites no precedent to support the proposition that a loss of consumer choice, without any *other* evidence of harm to competition, such as an adverse effect upon price or output, is sufficient to establish the harm to competition required under the antitrust laws. *Cf.* Brantley v. NBC Universal, Inc., 675 F.3d 1192, 1202 (9th Cir. 2012) ("[A]llegations that an agreement has the effect of reducing consumers' choices or increasing prices to consumers does not sufficiently allege an injury to competition."); *AREEDA*, *supra* note 21, ¶1703 f5 ("To the extent that [a defendant's interference with customers' free will] is relevant to antitrust law, interference has already been covered by diminished product variety resulting from substantial foreclosure or by elevated prices depressing production and use"). Second, the Commission's analysis of consumer choice ignores the fact that pipe fittings are commodity products. The two cases the Commission cites to support its position, *Dentsply* and *ZF Meritor*, both involve markets with differentiated products (artificial teeth and heavy duty truck transmissions). Here, there is no evidence that end-users placed different values on pipe fittings made by different suppliers. To the extent choice is valuable to consumers in a commodity industry, it is because choice begets price competition between suppliers. And if a reduction in consumer choice also results in a reduction in price competition, then one would expect to see some price effect accompanying the loss of choice, and no such price effect can be gleaned from the record.

In addition, there are numerous reasons to doubt that the foreclosure claimed by Complaint Counsel and observed by the Commission is measured accurately, or is probative of anticompetitive effects. In other words, the measure is defective for the purpose asserted by Complaint Counsel and the Commission. Under Complaint Counsel's theory of harm – that but for the Full Support Program, distributors would have made enough purchases from Star for Star to achieve MES and threaten McWane's monopoly position – the appropriate measure of foreclosure is not the sum of the market shares of distributors that are "subject" in some way to the Full Support Program, but the dollar value of purchases distributors would have made from Star *but for* the Full Support Program.[45] It makes little sense to conclude that Star was foreclosed from McWane's sales to distributors that would have taken place with or without the Full Support Program, or that McWane's restricting a rival's access to such sales in any way disadvantages the rival by reducing the rival's access to distribution.

Indeed, there is evidence in the record that certain distributors would not have made any purchases from Star even if McWane had not introduced the Full Support Program. A Ferguson executive testified that Ferguson "was planning on purchasing all its needs from [McWane]" regardless of the Full Support Program because Star would not be able to provide Ferguson with a full line of fittings. Thees, Tr. 3108-09; *see also* IDF 1266, 1272. The Commission recognizes this evidence, but concludes "the record suggests that the Full Support Program nonetheless cost Star *some* Ferguson business." Commission Opinion at 23 (emphasis supplied) ("A Ferguson Vice President called district managers after McWane's policy was announced to ensure that it did not buy from Star, and at least one job Ferguson initially awarded to Star was cancelled (IDF 1260-61, 1263)."). Of course, the record does not answer the most relevant question: how much Ferguson business did the Full Support Program cost Star?

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45 *See* Krattenmaker & Salop, *supra* note 15, at 259 (defining the net foreclosure rate as "the percentage of the suppliers' capacity that was available to rivals before the exclusionary rights agreement was adopted but that is no longer available as a result of the agreement").

There is also evidence in the record that WinWholesale's decision not to purchase from Star was unrelated to the Full Support Program. IDF 1342 (Star is not on WinWholesale's approved list of vendors because "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)"). There is evidence that another distributor, Illinois Meter, "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].")))." IDF 1359. Further, there is evidence in the record that some distributors' decisions not to purchase from Star were a result of their perceptions of the quality of Star's products and services, not because of the Full Support Program. *See* IDF 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)"); IDF 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)").[46]

46 The Commission asserts that my argument is based upon the assumptions that "the sales a monopolist like McWane has tied up with its distributors are not contestable and that a second meaningful alternative in the market will have no impact on price or other forms of competition, regardless of which supplier customers may ultimately choose." Commission Opinion at 27. I make no such assumptions. The relevant question for purposes of exclusive dealing law is whether the Full Support Program harmed consumers of domestic pipe fittings. The evidence shows that McWane would have won many contests to make deals with distributors *even without the Full Support Program*. If, absent the Full Support Program, Star would have competed for sales to certain distributors and have lost those sales to McWane, then the Full Support Program could not have foreclosed those lost sales. This conclusion is not based on any assumption regarding the impact a second supplier would have on price, output, or quality in the Domestic Fittings market. Star's entry may well have had a positive impact on these economic factors, though there is no direct

Complaint Counsel and the Commission's foreclosure analysis is also defective for another reason: they fail even to attempt to quantify the percentage of domestic fittings that were not subject to the Full Support Program. There is no dispute that the Full Support Program itself contained two exceptions: "where [McWane] 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[r]'s ductile iron pipe." CX0010. Complaint Counsel concedes that there is no credible argument that Star's fittings that fall into these categories are foreclosed from access to distributors through the Full Support Program. Oral Argument Tr. 84:2-84:4 ("COMPLAINT COUNSEL: If fittings were sold under an exception to the policy, no, I don't think they should be counted as foreclose[ed]."). Even though fittings that qualify as exceptions do not belong in the foreclosure analysis, Complaint Counsel failed to quantify the percentage of excepted fittings. The Commission also recognized that the exceptions existed, but asserted with minimal support in the record that the effect of the exceptions was "minor." Commission Opinion at 23.[47] There is no dispute that Star made at least some sales pursuant to the exceptions to the Full Support Program. IDF 1137; 1242; 1309. Of course, the relevant question, which cannot be gleaned from the record is: how much?

The Commission recognizes these issues but brushes them to the side in holding that the foreclosure is substantial in this case.[48]

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evidence the record demonstrating such an impact. Regardless, the key inquiry is whether McWane unlawfully excluded Star, not whether two suppliers are better than one, an issue that is of limited relevance to the underlying inquiry.

47 For support the Commission points to the testimony of a single distributor that claimed its purchases from Star through the exceptions to the Full Support Program were "minor." IDF 1309-11 (citing Morton, Tr. 2915-2916). The testimony of one distributor (U.S. Pipe) (out of more than 100) is not enough to establish that the sum total of purchases from distributors through the exceptions to the Full Support Program is indeed minor as it relates to assessing foreclosure.

48 The Commission argues that I "insist[] that Complaint Counsel was required to calculate the specific level of sales Star lost as a result of the Full Support Program." Commission Opinion at n.12. This is a mischaracterization of my position. I discuss the factual defects with Complaint Counsel and the Commission's foreclosure analysis to illustrate that the foreclosure percentage

In so holding, the Commission ignores the fact that it is Complaint Counsel's burden to establish that the Full Support Program harms competition. Complaint Counsel has chosen to establish harm to competition solely by relying upon foreclosure percentages and indirect evidence. But the evidence in the record demonstrates that the percentages put forward by Complaint Counsel are simply inaccurate. There are exceptions to the Full Support Program – McWane allows distributors to buy from Star if certain conditions are met – but there is no evidence in the record regarding whether the exceptions comprise a significant amount of the Domestic Fittings Market. Further, there is evidence in the record that some distributors that chose to buy from McWane (or chose not to buy from Star) would have done so even without the Full Support Program. Star cannot possibly have been foreclosed from these distributors. The Commission's conclusion that foreclosure was significant enough to impact competitive conditions in the domestic fittings industry relies primarily upon inferences from sales McWane's Full Support Program allegedly foreclosed from Star. Complaint Counsel's failure to quantify sales Star made under the Full Support Program's exceptions and to deduct distributor purchases from McWane that would have occurred with or without the Full Support Program make it impossible accurately to assess the foreclosure rate, much less to determine whether the foreclosure was significant enough to compel the conclusion that the Full Support Program harmed competition.

b. Other Indirect Evidence

Of course, as explained above, the foreclosure rate is not the only type of indirect evidence relevant to assessing whether an exclusive dealing arrangement has anticompetitive effects. However, the other forms of indirect evidence do not overcome the absence of direct evidence or the deficiencies that plague Complaint Counsel's evidence of foreclosure and the Commission's conclusions derived therefrom.

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put forward by each is unreliably high, and, most importantly, we have *no idea how large the error is*. It is Complaint Counsel's burden to establish that the foreclosure at issue is significant, and in my view, there is substantial evidence showing that Complaint Counsel has vastly overestimated its claimed foreclosure percentages.

One relevant consideration is the length and terminability of the exclusive dealing arrangements. *Omega*, 127 F.3d at 394 (short duration and easy terminability limit the possibility of anticompetitive effects). Here, the Full Support Program was not an agreement between McWane and its distributors. Distributors were never contractually obligated to make *any* purchases from McWane; they could choose to purchase from Star or another supplier at any time. Though not dispositive – it is possible for a dominant firm to exclude competitors through non-contractual mechanisms that result in distributor exclusivity – this point certainly counsels against a holding that the Full Support Program resulted in anticompetitive effect.

Another issue is whether exclusivity is imposed upon an intermediary or a final consumer. Though some courts have held that exclusivity requirements are more concerning when imposed on the end user rather than on an intermediary, *see Omega*, 127 F.3d at 1162-63, other courts have held that exclusivity requirements imposed on intermediaries can have anticompetitive effects when the intermediary is a significant channel of distribution. *ZF Meritor*, 696 F.3d at 287. Here, in my view, Complaint Counsel has satisfied its burden to establish that in the domestic pipe fittings industry, distributors are a significant channel of distribution. *See* Commission Opinion at 22. Accordingly, I give little weight to the fact that the Full Support Program applied to distributors and not to end users.

A final but important category of indirect evidence is evidence relating to entry.[49] As explained, the case law demonstrates that evidence of entry and expansion by a purportedly excluded rival counsels against a decision that an exclusive dealing arrangement harmed competition. *See Omega*, 127 F.3d at 1164 ("Nor did plaintiffs produce credible evidence to support their contention that Gilbarco's policy actually deterred entry into this market.

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49 Statement of Commissioner J. Thomas Rosch, Concurring in Part and Dissenting in Part In the Matter of McWane, Inc. and Star Pipe Products, Ltd., and the Matter of Sigma Corporation, FTC File No. 1010080 (Jan. 4, 2012), *available at* http://www.ftc.gov/sites/default/files/documents/public_statements/statement-commissioner-rosch-concurring-part-and-dissenting-part-matter-mcwane-inc.and-star-pipe-products-ltd.matter-sigma-corporation/120104sigmastatement.pdf.

The actual entry and expansion of Schlumberger in 1991, through the purchase of a small dispenser manufacturer, Southwest, demonstrate the contrary. The record shows that . . . by trial Schlumberger had 'something over ... 100 distributors' . . . . And, although the parties contest the extent of the increase, it is undisputed that Schlumberger's market share has increased since its entry by at least one third (from approximately 6% to 8%), while industry output in the retail dispenser market has expanded substantially. This undisputed evidence precludes a finding that exclusive dealing is an entry barrier of any significance."). Here there is undisputed evidence that Star was able successfully to enter the domestic fittings industry and to succeed in expanding its business once it did enter. IDF 1042, *in camera* (Star's market share in its first full year in the Domestic Fittings market was); IDF 1043, *in camera* (Star's market share in its second full year in the domestic fittings market doubled to . The record shows that Star made sales to more than 100 distributors. IDF 1141 (citing Normann Tr. 5042-43, *in camera*).[50]

Further, the fact that McWane did not enforce the Full Support Program after Star's first year in the domestic market[51] provides an opportunity to examine the impact of the Program. The evidence shows that Star's growth rate was *identical* before and after McWane stopped enforcing the Full Support Program. Neither Complaint Counsel nor the Commission attempts to explain how growth that is equal with and without the Full Support Program is consistent with Complaint Counsel's theory of harm that the Program raised Star's costs of distribution and

50 I agree with the ALJ's finding that simply counting the number of distributors Star was able to contract with can be misleading because such a count could include distributors that made only a small number of purchases from Star. IDF 1142. Indeed, the measure of Star's market share over the relevant period is a more relevant piece of information. However, the number of distributors Star was able to deal with is not irrelevant. It illustrates that Star was able to find a significant number of trading partners notwithstanding the Full Support Program. Nevertheless, the key issue is whether Star was able to compete with McWane for enough distributors that, if they agreed to distribute Star's fittings, would enable Star to operate at MES.

51 IDF 1219 (McWane did not enforce the Full Support Program against any distributor after April 13, 2010).

impaired competition.[52] The most plausible inference to draw from these particular facts is that the Full Support Program had almost no impact on Star's ability to enter and grow its business, which, under the case law, strongly counsels against holding that McWane's conduct was exclusionary. Further, evidence of Star's successful entry is especially probative because it requires minimal interpretation. Unlike foreclosure, which can be measured in different ways and is subject to different interpretations, a firm's entry is an observable fact that contravenes the precise point – exclusion – Complaint Counsel is seeking to establish.

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In my view, Complaint Counsel has failed to carry its burden to demonstrate that the Full Support Program resulted in cognizable harm to competition and this would doom its case even if it had established that MES in the domestic fittings industry was operating a foundry. Harm to competition can be shown with direct evidence that market prices were impacted by the alleged exclusionary conduct. Such evidence is favored both by courts in evaluating restraints of trade[53] and by the agencies in deciding whether to challenge a consummated merger.[54] The record is devoid of direct evidence of competitive harm.

Harm to competition can also be established by indirect evidence, which is the route Complaint Counsel chose to go in this case and the evidence the Commission relied upon in affirming the ALJ's decision that McWane's conduct was exclusionary. My view of the indirect evidence of harm to competition is that it is very weak and does not and cannot satisfy

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52 Complaint Counsel argues that the Full Support Program is still in effect because McWane has not "withdrawn" it and that "it continues to prevent [distributors] from purchasing from Star today." CC Answering Brief at 14. This fails to consider evidence that distributors began to ignore the Full Support Program after they learned of the FTC's investigation into McWane's conduct. IDF 1311 (US Pipe not concerned in September 2010 about McWane enforcing the Full Support Program because of FTC investigation).

53 *See* Indiana Fed'n of Dentists, 476 U.S. at 460-61.

54 U.S. DEP'T OF JUSTICE & FED. TRADE COMM'N, HORIZONTAL MERGER GUIDELINES § 2.1.1 (2010), *available at* http://www.justice.gov/atr/public/guidelines/hmg-2010.pdf.

Complaint Counsel's burden. As I have explained, the foreclosure analysis put forward by Complaint Counsel and accepted by the Commission is unpersuasive because the analysis does not properly account for the fact that some distributors would have bought from McWane regardless of the Full Support Program, and that Star could not possibly have been foreclosed from selling fittings that were excepted from the Full Support Program.

The other indirect evidence of competitive harm points in multiple directions. On the one hand, distributors are a key distribution channel, which counsels against following the case law that says exclusive dealing requirements applied to intermediaries are less concerning than exclusive dealing requirements applied to end users. On the other hand, no distributor *agreed* to distribute McWane's fittings exclusively and for a lengthy period of time. Distributors were not contractually forbidden from dealing with Star, which is how Star was able to enter and acquire more than of the market by its second full year in the domestic business. IDF 357, *in camera*.

In my view, the indirect evidence in the record does not point to the conclusion that the Full Support Program resulted in harm to competition. With such a record, Complaint Counsel would need to proffer some direct evidence that McWane's conduct raised price and reduced output in the domestic fittings industry relative to the price and output levels that would have occurred with Star's entry and without the Full Support Program. The Commission has stated in the past that it must tread lightly when condemning an exclusive dealing arrangement, requiring "reasonably clear evidence of probable overall competitive harm." *Beltone*, 100 F.T.C. at 209. Unfortunately for Complaint Counsel and the Commission, there is no such clear evidence in the record.[55]

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55 Because I conclude Complaint Counsel has not shown the requisite anticompetitive effect, the burden should not shift to McWane to proffer a procompetitive justification for the Full Support Program. *See* Microsoft, 253 F.3d at 59. The Commission rejects McWane's proffered justifications that the Full Support Program was necessary to ensure sales volume and to prevent Star from "cherry picking" sales of the most popular fittings by forcing distributors to accept McWane's full line. Commission Opinion at 29-30. Though I make no decision or conclusion regarding McWane's proffered justifications, I must

II. Count 7 – Attempted Monopolization

Count 7 of the Complaint charges McWane with attempted monopolization of the Domestic Fittings market and relies on the same conduct – the Full Support Program – as part of its claim. The Commission deemed it unnecessary to make a decision on Count 7 in light of its decision to hold McWane liable for actual monopolization under Count 6. Commission Opinion at n.16 ("In view of our conclusion that McWane unlawfully monopolized the domestic fittings market through the same conduct, it is unnecessary to ask whether McWane attempted to monopolize the market. Accordingly, we do not reach this issue and do not adopt the ALJ's analysis."). Though I agree with the Commission's conclusion that a decision on Count 7 is unnecessary in light of its decision on Count 6, because I dissent from the Commission's decision that McWane monopolized the Domestic Fittings market, I must write separately to explain why I agree with the Commission's conclusion that Count 7 ought to be dismissed.

Attempted monopolization, like ordinary monopolization, sounds under Section 2 of the Sherman Act. 15 U.S.C. § 2. "[T]o

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dispute the Commission's apparent rejection that full-line forcing or block-booking contracts can result in cognizable efficiencies, even if the contracts reduce the full-line supplier's costs or prevent its exit from the marketplace altogether. Commission Opinion at 32 ("If a limited supplier undersells a full-line supplier for more common products, there is no reason in principle why the full-line supplier could not compete for that business by lowering its price for those products and increasing its price for the less common products . . . . Even if selective entry by the full-line supplier's rivals led to the collapse of the full-line seller, that itself would not constitute a harm to the market (as opposed to harm to a single firm)."). Economists have shown that a multi-product monopolist can use full-line forcing or block-booking contracts to prevent buyers from engaging in precisely the sort of "cream-skimming" the Commission describes and thus facilitate efficient distribution. *See* Roy W. Kenney & Benjamin Klein, *The Economics of Block Booking*, 26 J. L. & ECON. 497 (1983); Bruce H. Kobayashi, *Does Economics Provide a Reliable Guide to Regulating Commodity Bundling by Firms? A Survey of the Economic Literature*, 1 J. COMP. L. & ECON. 707 (2005). Consistent with the economics literature exploring the competitive implications of full-line forcing contracts, recent empirical tests confirm the practice can result in increased efficiency and consumer welfare. *See, e.g.*, Katherine Ho, Justin Ho, & Julie Holland Mortimer, *The Use of Full-Line Forcing Contracts in the Video Rental Industry*, 102 AM. ECON. REV. 686 (2012); Katherine Ho, Justin Ho, & Julie Holland Mortimer, *Analyzing the Welfare Impacts of Full-line Forcing Contracts*, 60 J. INDUS. ECON. 468 (2012).

demonstrate attempted monopolization a plaintiff must prove (1) that the defendant has engaged in predatory or anticompetitive conduct with (2) a specific intent to monopolize and (3) a dangerous probability of achieving monopoly power." *Spectrum Sports, Inc. v. McQuillan*, 506 U.S. 447, 456 (1993). The ability to prosecute attempted monopolization "provides . . . a mechanism for the control of unilateral behavior by firms *not guilty of monopolization itself*." PHILLIP E. AREEDA & HERBERT HOVENKAMP, FUNDAMENTALS OF ANTITRUST LAW § 8.02 (4th ed. 2013) (emphasis supplied).

Both completed monopolization and attempted monopolization require that the defendant engage in exclusionary conduct. *See, e.g., Am. Tobacco Co. v. United States*, 328 U.S. 781, 785 (1946) ("The phrase 'attempt to monopolize' means the employment of methods, means and practices which would, if successful, accomplish monopolization, and which, though falling short, nevertheless approach so close as to create a dangerous probability of it"). Because I have concluded that Complaint Counsel failed to satisfy its burden of proving that McWane engaged in exclusionary conduct required for a finding of completed monopolization, it follows that McWane cannot be found liable for attempted monopolization by engaging in the same conduct.

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Though Complaint Counsel's failure to establish that the Full Support Program was exclusionary precludes it from succeeding on its attempted monopolization claim, the claim itself is somewhat unusual and worthy of additional reflection. Typically, a plaintiff pursues an attempt claim because the defendant lacks the monopoly power required to prove ordinary monopolization under Section 2. Because my view is that Complaint Counsel has failed to prove McWane's conduct was exclusionary, this case presents the rare circumstance of an attempt claim involving a firm that already has monopoly power – a conclusion I assume but do not decide – engaging in conduct that *could have* but did not result in unlawful monopoly maintenance. Such a claim might be called "failed monopoly maintenance."

As a logical matter, such a claim is conceivable. However, there is little settled law on whether a firm with monopoly power can be held liable for attempting to maintain a monopoly position in the same market. At least one court has determined such liability is consistent with the text of Section 2. *See, e.g.*, *In re Mushroom Direct Purchaser Litigation*, 514 F. Supp. 2d 683, 701 (E.D. Pa. 2007) (concluding that "[b]ecause plaintiffs allege[d] that defendants tried to reduce opportunities for new entry into the market, . . . defendants [could] be liable for attempted monopolization even if defendants possessed a monopoly in [the relevant market]"). A better approach in my view, however, is to force a plaintiff to choose between a monopoly maintenance claim and an attempted monopolization claim. I see no benefit in using the offense of attempted monopolization to prosecute conduct that might be viewed as exclusionary *ex ante* but turned out not to be *ex post* once the evidence has been examined. *See* AREEDA, *supra* note 21, ¶806a ("exclusionary conduct by a monopolist within its own market, whether successful or not, is best treated as an aspect of the full monopolization offense."). One decision, since vacated, shares this view: "Section 2 of the Sherman Act does not create a cause of action for an attempt to maintain a monopoly." *LePage's Inc. v. 3M*, 277 F.3d 365, 385 (3d Cir. 2002), *vacated on other grounds*, 324 F.3d 121 (3d Cir. 2003) (en banc). In doing so, the court stated any such "claim would be covered by the 'willful maintenance' part of the monopolization offense and would have been encompassed adequately by the monopolization count." *Id.*

Complaint

IN THE MATTER OF

ACCRETIVE HEALTH, INC.

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

Docket No. C-4432; File No. 122 3077
Complaint, February 5, 2014 – Decision, February 5, 2014

This consent order addresses Accretive Health, Inc.'s handling of sensitive health and personal information, including patient names, dates of birth, billing information, diagnostic information, and Social Security numbers. The complaint alleges that Accretive Health unfairly failed to provide reasonable and appropriate security for consumers' personal information it collected and maintained by engaging in a number of practices that, taken together, unreasonably and unnecessarily exposed consumers' personal data to unauthorized access. The complaint further alleges that these failures contributed to a July 2011 incident in Minneapolis, Minnesota in which an Accretive Health laptop containing over 600 files with over 20 million pieces of information related to 23,000 patients was left in the locked passenger compartment of the employee's car and stolen. The consent order requires Accretive Health to establish and maintain, or continue to 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.

Participants

For the *Commission*: *Katherine Armstrong, Colin Hector, Peter Lamberton, Allison Lefrak David Lincicum,* and *Michael White.*

For the *Respondent*: *Andrew Clubok, Nina Frant,* and *Marimichael Skubel, Kirkland & Ellis, LLP*.

COMPLAINT

The Federal Trade Commission ("Commission"), having reason to believe that Accretive Health, Inc. has violated the provisions of the Federal Trade Commission Act ("FTC Act"), and it appearing to the Commission that the proceeding is in the public interest, alleges:

1. Respondent Accretive Health, Inc. ("Accretive Health" or "Respondent") is a Delaware corporation with its principal executive office located at 401 North Michigan Avenue, Suite 2700, Chicago, Illinois.

2. The acts or practices of Accretive Health 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.

ACCRETIVE HEALTH'S BUSINESS ACTIVITIES

3. Accretive Health enters into service agreements with hospital systems around the country to provide services related to the hospital systems' "revenue cycle" operations. Revenue cycle includes registration, transcription, coding and medical documentation, billing, denial management, strategic pricing, and collection of past due accounts. In exchange for these services, hospital systems pay Accretive Health both fixed fees and incentive payments based on a percentage of the monetary benefit from increased revenues.

4. Accretive Health provides services through technology, operating methodology, and by placing some revenue cycle managers into the hospital system's existing processes to augment its revenue cycle operations. Accretive Health employees work at hospital facilities to assist with these services.

RESPONDENT'S SECURITY PRACTICES

5. As part of its service to client hospitals, Accretive Health collects, maintains, and has access to information about hospitals' patients, including personal information. This information may include patient names, dates of birth, billing information, diagnostic information, and Social Security numbers.

6. Until at least July 2011, Accretive failed to provide reasonable and appropriate security for consumers' personal information it collected and maintained by engaging in a number of practices that, taken together, unreasonably and unnecessarily exposed consumers' personal data to unauthorized access. Among other things, Accretive Health created unnecessary risks of unauthorized access or theft of personal information by:

a. Transporting laptops containing personal information in a manner that made them vulnerable to theft or other misappropriation;

b. Failing to adequately restrict access to, or copying of, personal information based on an employee's need for information;

c. Failing to ensure that employees removed information from their computers for which they no longer had a business need; and

d. Using consumers' personal information in training sessions with employees and failing to ensure that the information was removed from employees' computers following the training.

7. Accretive Health's failures to provide reasonable and appropriate security for consumers' personal information resulted in a July 2011 incident in Minneapolis, Minnesota in which an Accretive Health laptop containing over 600 files with over 20 million pieces of information related to 23,000 patients was left in the locked passenger compartment of the employee's car and stolen. The laptop included sensitive personal and health information, including patient names, dates of birth, billing information, diagnostic information, and Social Security numbers. The user of this laptop had data that was not necessary to perform his job.

VIOLATIONS OF THE FTC ACT

8. Section 5(a) of the FTC Act, 15 U.S.C. § 45(a), prohibits ''unfair or deceptive acts or practices in or affecting commerce."

9. As set forth in Paragraphs 6 and 7, Respondent failed to employ reasonable and appropriate measures to protect personal information against unauthorized access. Respondent's practices caused, or are likely to cause, substantial injury to consumers that is not offset by countervailing benefits to consumers or competition and is not reasonably avoidable by consumers. These

practices were, and are, an unfair act or practice 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 February, 2014, has issued this complaint against Accretive Health.

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 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 Commission Rule 2.34, 16 C.F.R. § 2.34, now in further conformity with the procedure prescribed in Commission Rule 2.34, the Commission hereby issues its complaint, makes the following jurisdictional findings, and enters the following Decision and Order ("Order"):

1. Respondent Accretive Health, Inc. ("Accretive Health" or "Respondent") is a Delaware corporation with its principal executive office located at 401 North Michigan Avenue, Suite 2700, Chicago, Illinois.

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

ORDER

I.

DEFINITIONS

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

A. Unless otherwise specified, "respondent" shall mean Accretive Health, and its successors and assigns.

B. **"Personal Information"** means 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; (c) an email address or other online contact information, such as 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) an insurance account number or other insurance information; (i) credit or debit card information; (j) a persistent identifier, such as a customer number held in a "cookie," a static Internet Protocol ("IP") address, or a processor

serial number; or (k) any information that is combined with any of (a) through (j) above.

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

II.

IT IS ORDERED that respondent shall, no later than the date of entry of this Order, establish and implement, and thereafter maintain, or continue to maintain a comprehensive information security program reasonably designed to protect the security, confidentiality, and integrity of personal information collected from or about consumers. Such program, the content and implementation of which must be fully documented in writing, shall contain administrative, technical, and physical safeguards appropriate to respondent's size and complexity, the nature and 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 the assessment of the sufficiency of any safeguards in place to control the risks. At a minimum, this risk assessment should include consideration of the risks in each relevant area of operations, including but not limited to: (a) employee training and management; (b) information systems, including network and software design, information processing, storage, transmission, and disposal; and (c) prevention, detection, and response to attacks, intrusions, and other system failures;

C. The design and implementation of reasonable safeguards to control the risks identified through risk assessment and regular testing and 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 Paragraph 3 of this Section, any material changes to operations or business arrangements, or any other circumstances that Defendant knows or has reason to know may have material impact on the effectiveness of the information security program.

III.

IT IS FURTHER ORDERED that, in connection with its compliance of Section II of the Order, respondent shall obtain initial and biennial assessments and reports ("Assessments") of respondent 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) a person qualified as a Certified Information System Security Professional (CISSP) or as a Certified Information Systems Auditor (CISA); (b) a person holding Global Information Assurance Certification (GIAC) from the System Administrator, Audit, Network, Security (SANS) Institute; or (c) a similarly qualified person or organization approved by the Associate Director of Enforcement, Bureau of Consumer Protection, Federal Trade Commission, 600 Pennsylvania Avenue, NW, Washington, DC 20580. The reporting period for the Assessments shall cover (i) the first one hundred and eighty (180) days after service of the Order for the Initial Assessment and (ii) 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 Section II of the 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 of Enforcement, Federal Trade Commission, 600 Pennsylvania Avenue, NW, Washington, DC 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, initial and biennial Assessments shall be sent by overnight courier (not the U.S. Postal Service) to the Associate Director, Division of Enforcement, Bureau of Consumer Protection, Federal Trade Commission, 600 Pennsylvania Avenue, NW, Washington, DC 20580, with the subject line *FTC v. Accretive Health, Inc*., FTC File Number 1223077. *Provided, however*, that in lieu of overnight courier, an Assessment may be sent by first class mail, but only if an electronic version of such

Assessment 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 Commission for inspection and copying:

A. For a period of three (3) years after the date of preparation of each Assessment required under Section III of the 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 Section II of this order, for the compliance period covered by such Assessment;

B. Unless covered by IV.1, 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 documents, whether prepared by or on behalf of Respondent, that contradict, qualify, or call into question compliance with the Order.

V.

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. 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. Respondent must secure a signed and dated statement acknowledging receipt of this order, within thirty (30) days of delivery, from all persons receiving a copy of the order pursuant to this section.

VI.

IT IS FURTHER ORDERED that respondent shall notify the Commission at least thirty (30) days prior to any change 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 Accretive Health, Inc.*, FTC File No. 1223077. *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 February 5, 2034, 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; and

B. this order's application to any respondent that is not named as a defendant in such complaint; and

C. This order if such complaint is filed after the order has terminated pursuant to this part.

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

By the Commission.

ANALYSIS OF CONSENT ORDER TO AID PUBLIC COMMENT

The Federal Trade Commission has accepted, subject to final approval, a consent order applicable to Accretive Health Systems, Inc.

Analysis to Aid Public Comment

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

Accretive Health enters into service agreements with hospital systems around the country to provide services related to the hospital systems' "revenue cycle" operations. Revenue cycle operations include registration, transcription, coding and medical documentation, billing, pricing, and collection of past due accounts. In exchange for these services, hospital systems pay Accretive Health both fixed fees and incentive payments based on a percentage of the monetary benefit from increased revenues. Accretive Health employees work at hospital facilities to assist with these services. As part of its service to client hospitals, Accretive Health collects, maintains, and has access to information about hospitals' patients, including sensitive health and personal information. This information may include patient names, dates of birth, billing information, diagnostic information, and Social Security numbers.

The Commission's complaint alleges that Accretive Health unfairly failed to provide reasonable and appropriate security for consumers' personal information it collected and maintained by engaging in a number of practices that, taken together, unreasonably and unnecessarily exposed consumers' personal data to unauthorized access. Among other things, Accretive Health created unnecessary risks of unauthorized access or theft of personal information by:

a. Transporting laptops containing personal information in a manner that made them vulnerable to theft or other misappropriation;

b. Failing to adequately restrict access to, or copying of, personal information based on an employee's need for information;

c. Failing to ensure that employees removed information from their computers for which they no longer had a business need; and

d. Using consumers' personal information in training sessions with employees and failing to ensure that the information was removed from employees' computers following the training.

The complaint further alleges that these failures contributed to a July 2011 incident in Minneapolis, Minnesota in which an Accretive Health laptop containing over 600 files with over 20 million pieces of information related to 23,000 patients was left in the locked passenger compartment of the employee's car and stolen. The laptop included sensitive health and personal information, including patient names, dates of birth, billing information, diagnostic information, and Social Security numbers. The user of this laptop had data that was not necessary to perform his job.

The proposed order contains provisions designed to prevent Accretive Health from engaging in the future in practices similar to those alleged in the complaint.

Part II of the proposed order requires Accretive Health to establish and maintain, or continue to 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 Accretive Health'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 Accretive Health 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 Accretive Health, 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 Accretive Health 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, information has been protected.

Parts IV through VIII of the proposed order are reporting and compliance provisions. Part IV requires Accretive Health 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, Accretive Health 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 Accretive Health 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

FOWLERVILLE FORD, INC.

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

Docket No. C-4433; File No. 132 3023
Complaint, February 20, 2014 – Decision, February 20, 2014

This consent order addresses Fowlerville Ford, Inc.'s claims made in advertisements and failure to disclose or disclose adequately terms of certain financing offered, despite the respondent's use of certain triggering terms in the advertisements. The complaint alleges that respondent has advertised that consumers have won a prize worth between $1,000 and $25,000. The complaint further alleges that, in fact, consumers have not won a prize worth between $1,000 and $25,000. The consent order prohibits the respondent from misrepresenting the material terms of any prize, sweepstakes, giveaway, or other incentive, including whether a consumer has won a prize, sweepstakes, giveaway, or other incentive, and the nature, value, or amount of a prize, sweepstakes, giveaway, or other incentive required to be paid at lease inception, and the amounts of all monthly or other periodic payments. The order also requires that the respondent clearly and conspicuously make all of the disclosures required by the Truth in Lending Act and Regulation Z if it states relevant triggering terms, including the monthly financing payment.

Participants

For the *Commission*: *Sana Chriss, Mark Glassman, John Jacobs, Carole Reynolds, Jason Schall, Christina Tusan,* and *Katherine Worthman.*

For the *Respondent*: *Roy R. Hunsinger, solo practitioner.*

COMPLAINT

The Federal Trade Commission ("Commission), having reason to believe that Fowlerville Ford Inc., a corporation ("respondent"), has violated provisions of the Federal Trade Commission Act ("FTC Act"), the Truth in Lending Act ("TILA"), and its implementing Regulation Z, 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 8100 Country Corner Dr., Fowlerville, MI 48836. Respondent offers motor vehicles for sale or lease.

2. The acts or practices of respondent 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. Since at least May 2011, respondent has disseminated or caused to be disseminated advertisements promoting the purchase, financing, and leasing of their motor vehicles.

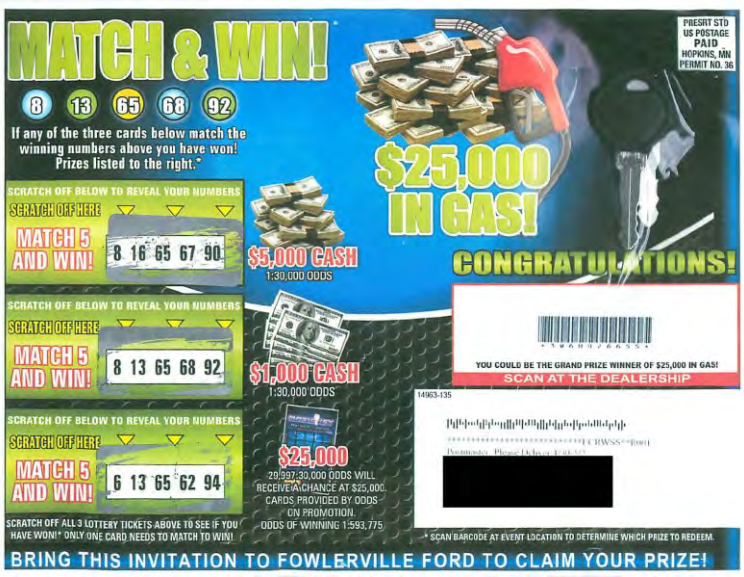
Mailed Promotions

4. Respondent's advertisements have included, but are not necessarily limited to, promotions mailed to consumers. A copy of one such promotion is attached as Exhibit A.

a. This promotion includes a "Match & Win" invitation page, which resembles a sweepstakes entry ticket. It lists a series of winning numbers and prominently represents that "[i]f any of the three cards below match the winning numbers above you have won! Prizes listed to the right.*"

b. The promotion includes three scratch-off entry "cards," with prizes listed to the right: $5,000, $1,000, and $25,000. In all or virtually all instances, when consumers have scratched the cards to reveal numbers underneath, at least one set of numbers has corresponded to the winning numbers.

c. In bold letters across the bottom, the promotion states "BRING THIS INVITATION TO FOWLERVILLE FORD TO CLAIM YOUR PRIZE!" A typical and illustrative "Match & Win" entry page is depicted below:



d. In numerous instances, consumers have attempted to collect a prize by presenting a card with winning numbers at the Fowlerville Ford dealership. However, no consumer has received any of the prizes advertised in the promotion.

Video Advertisement

5. Respondents also have disseminated or caused to be disseminated advertisements to the public promoting credit sales and other extensions of closed-end credit in consumer credit transactions, as the terms "advertisement," "closed-end credit," "credit sale," and "consumer credit" are defined in Section 226.2 of Regulation Z, 12 C.F.R. § 226.2, as amended.

6. One such video advertisement has been posted on the website YouTube.com. A video copy of the advertisement is attached as Exhibit B, and screenshot captures of the video are attached as Exhibit C. The advertisement contains the following statements and depictions.

a. The video shows a 2010 Cobalt LT, accompanied by prominent graphics in the center of the screen representing:

$234 DOWN

$234/MONTH

While these representations appear on screen, a Fowlerville Ford representative stands next to the vehicle and states, "We've got some holiday deals for you. How about this 2010 Cobalt LT, only $234 down and $234 a month?"

Also while these representations appear on screen, small text appears briefly on the bottom of the screen stating, "72 months. 4.55% Interest. With Approved Credit. See dealer for details."

The advertisement does not clearly and conspicuously disclose the repayment terms and fails to disclose the annual percentage rate, or "APR," using that term.

b. The video also shows a 2007 Grand Prix accompanied by prominent graphics in the center of the screen representing:

$169 DOWN

$169/MONTH

While these representations appear on screen, the Fowlerville Ford representative continues, "Or this 2007 Grand Prix, only $169 down and $169 per month?"

Also while these representations appear on screen, small text appears briefly on the bottom of the screen

stating, "72 months. 4.55% Interest. With Approved Credit. See dealer for details."

The advertisement does not clearly and conspicuously disclose the repayment terms and fails to disclose the annual percentage rate, or "APR," using that term.

c. The video includes a similar advertisement for a 2008 Suzuki SX4, which also represents down payment and monthly payment amounts. The advertisement does not clearly and conspicuously disclose the repayment terms and fails to disclose the annual percentage rate, or "APR," using that term.

VIOLATIONS OF THE FEDERAL TRADE COMMISSION ACT

Count I

Misrepresentation That Consumers Have Won a Prize

7. Through the means described in Paragraph 4, respondent has represented expressly or by implication that consumers have won a prize worth between $1,000 and $25,000 that can be collected at the Fowlerville Ford dealership.

8. In truth and in fact, consumers have not won a prize worth between $1,000 and $25,000.

9. Respondent's practices constitute deceptive acts or practices in violation of Section 5(a) of the FTC Act, 15 U.S.C. § 45(a).

VIOLATION OF THE TRUTH IN LENDING ACT AND REGULATION Z

10. Under Section 144 of the TILA and Section 226.24(d) of Regulation Z, as amended, advertisements promoting closed-end credit in consumer credit transactions are required to make certain disclosures ("additional terms") if they state any of several terms, such as the monthly payment ("TILA triggering terms").

11. Respondent's advertisements promoting closed-end credit, including but not necessarily limited to those described in Paragraph 6, are subject to the requirements of the TILA and Regulation Z.

Count II

Failure to Disclose or Disclose Clearly and Conspicuously Required Credit Information

12. Respondent's advertisements promoting closed-end credit, including but not necessarily limited to those described in Paragraph 6, have included TILA triggering terms, but have failed to disclose or disclose clearly and conspicuously, additional terms required by the TILA and Regulation Z, including one or more of the following:

a. The amount or percentage of the down payment.

b. The terms of repayment, including any balloon payment.

c. The "annual percentage rate," using that term, and, if the rate may be increased after consummation, that fact.

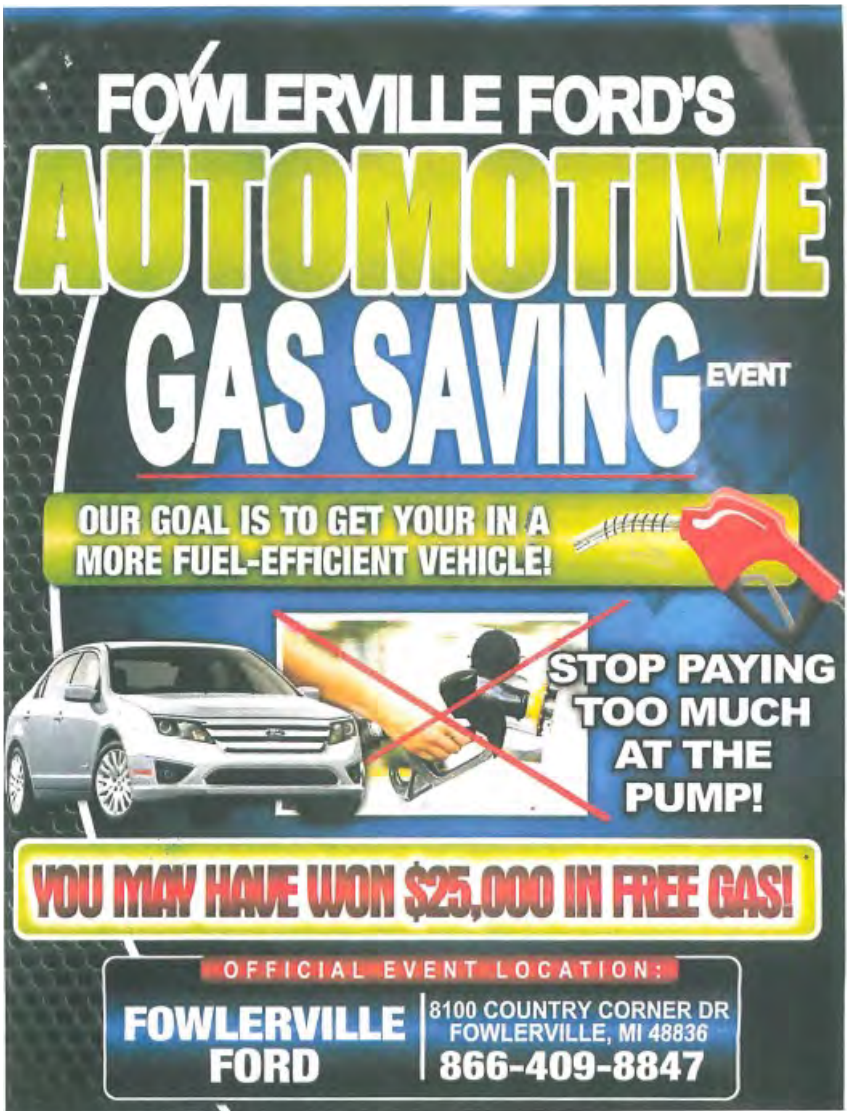
13. Therefore, the practices set forth in Paragraph 12 of this Complaint have violated Section 144 of the TILA, 15 U.S.C. § 1664, and Section 226.24(d) of Regulation Z, 12 C.F.R. § 226.24(d), as amended.

THEREFORE, the Federal Trade Commission, this twentieth day of February, 2014, has issued this complaint against respondent.

By the Commission.

Complaint

Exhibit A



Complaint


MATCH & WIN!
8 13 65 68 92
If any of the three cards below match the winning numbers above you have won! Prizes listed to the right.*
SCRATCH OFF BELOW TO REVEAL YOUR NUMBERS
SCRATCH OFF HERE
MATCH 5 AND WIN!
8 16 65 67 90
$5,000 CASH
1:30,000 ODDS
SCRATCH OFF BELOW TO REVEAL YOUR NUMBERS
SCRATCH OFF HERE
MATCH 5 AND WIN!
8 13 65 68 92
$1,000 CASH
1:30,000 ODDS
SCRATCH OFF BELOW TO REVEAL YOUR NUMBERS
SCRATCH OFF HERE
MATCH 5 AND WIN!
6 13 65 62 94
$25,000
29,997-30,000 ODDS WILL RECEIVE A CHANCE AT $25,000. CARDS PROVIDED BY ODDS ON PROMOTION. ODDS OF WINNING 1:593,775
SCRATCH OFF ALL 3 LOTTERY TICKETS ABOVE TO SEE IF YOU HAVE WON!* ONLY ONE CARD NEEDS TO MATCH TO WIN!
$25,000 IN GAS!
CONGRATULATIONS!
PRESRT STD US POSTAGE PAID HOPKINS, MN PERMIT NO. 36
YOU COULD BE THE GRAND PRIZE WINNER OF $25,000 IN GAS!
SCAN AT THE DEALERSHIP
14963-135
[redacted]
* SCAN BARCODE AT EVENT LOCATION TO DETERMINE WHICH PRIZE TO REDEEM.
BRING THIS INVITATION TO FOWLERVILLE FORD TO CLAIM YOUR PRIZE!


OVER 100 CARS IN STOCK FROM $2950
2008 MERCURY MILAN STK#3418R
RETAIL VALUE $19,250
FOWLERVILLE FORD PRICE $15,500
2008 FORD EXPLORER STK#3423R
RETAIL VALUE $22,600
FOWLERVILLE FORD PRICE $18,000
2006 LANDROVER LR3 STK#11423A
RETAIL VALUE $22,000
FOWLERVILLE FORD PRICE $18,500
2006 LINCOLN TOWNCAR STK#34005
RETAIL VALUE $16,000
FOWLERVILLE FORD PRICE $11,500
NO CREDIT? BAD CREDIT?
No Problem!
Bankruptcy Charge Offs, Divorced, Repossession, Tax Liens, Credit Card Difficulties...
CREDIT AMNESTY GETS YOU THE CREDIT YOU NEED!
WE MAY BE ABLE TO GET YOU INTO A NEW FUEL EFFICIENT VEHICLE FOR LESS THEN YOU ARE PAYING FOR YOUR GUZZLER
PUSH PULL OR DRAG
$2,000 MINIMUM TRADE!
† Minimum $8,000 purchase
$0 DOWN
ON NEW VEHICLES!
With Approved Credit. See dealer for details.

Complaint


TUESDAY MAY 3 9AM-8PM
WEDNESDAY MAY 4 9AM-8PM
THURSDAY MAY 5 9AM-8PM
FRIDAY MAY 6 9AM-8PM
SATURDAY MAY 7 10AM-4PM
2003 FORD TAURUS
Only ONE Available
$88 Down
$109 /Month
2005 FORD TAURUS
Only ONE Available
$99 Down
$159 /Month
OFFICIAL EVENT LOCATION:
FOWLERVILLE FORD
8100 COUNTRY CORNER DR
FOWLERVILLE, MI 48836
866-409-8847
GET BETTER GAS MILEAGE!
DON'T MISS THIS EVENT!
COME IN BEFORE YOUR TANK HITS EMPTY!
FOWLERVILLE FORD
Clearance Event Savings Certificate
Not a Check
Valid May 3rd - May 7th, 2011
TO THE ORDER OF Valued Customer
$2,876.00
Two Thousand Eight Hundred Seventy-Six and 00/100 DOLLARS
MEMO: Certificate good only towards selected pre-owned vehicles. No cash Value.
Cannot be used in conjunction with any other offer. Minimum $8,000 purchase.
Fowlerville Ford

Complaint

Exhibit B

Exhibit B

Fowlerville Ford, LLC

Video Advertisement
(Electronic File)

Complaint

Exhibit C

Exhibit C
Page 1 of 3

Exhibit C
Page 2 of 3

Complaint

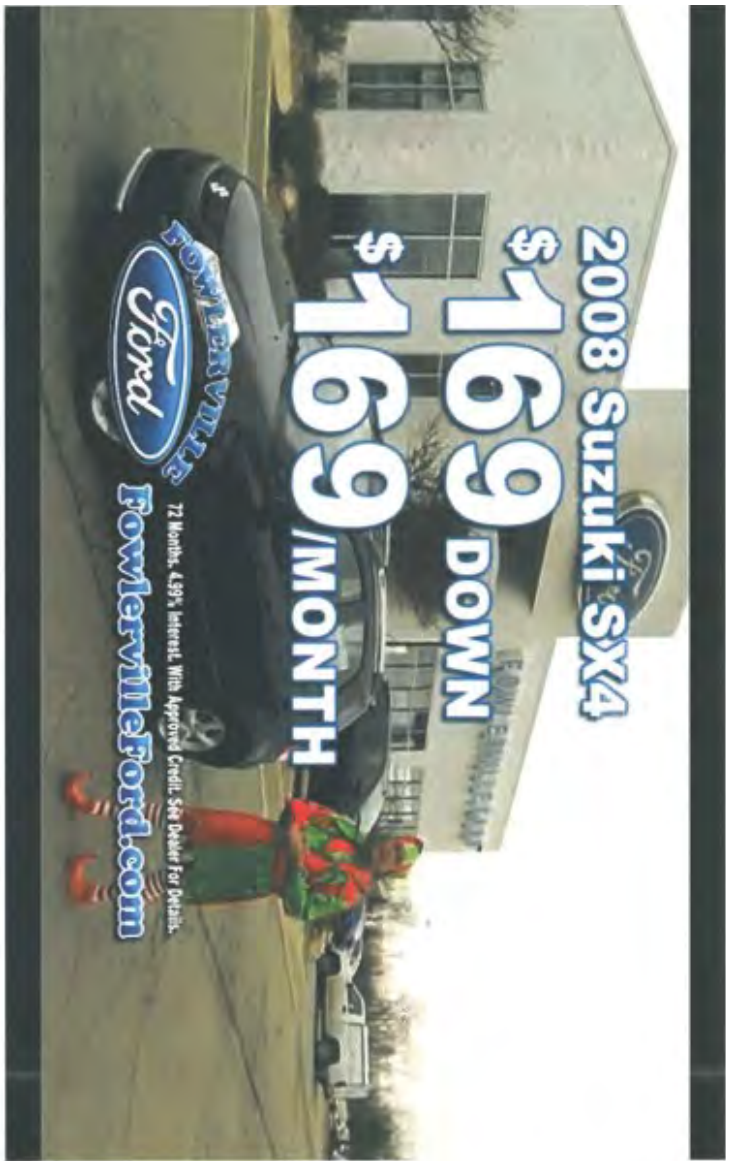


Exhibit C
Page 3 of 3

DECISION AND ORDER

The Federal Trade Commission having initiated an investigation of certain acts and practices of respondent named in the caption hereof, and respondent having been furnished thereafter with a copy of a draft complaint which the Bureau of Consumer Protection proposed to present to the Commission for its consideration and which, if issued by the Commission, would charge respondent with violations of the Federal Trade Commission Act ("FTC Act"), the Truth in Lending Act ("TILA"), and its implementing Regulation Z; and

Respondent, respondent's attorney, and counsel for the Commission having thereafter executed an agreement containing a 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 respondent has violated the FTC Act, the TILA, and its implementing Regulation Z, and that a complaint should issue stating its charges in that respect, and having thereupon accepted the executed consent agreement and placed such consent agreement on the public record for a period of thirty (30) days for the receipt and consideration of public comments, now in further conformity with the procedure prescribed in 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, Fowlerville Ford, Inc., is a Delaware corporation with its principal office or place of business at 8100 Country Corner Dr., Fowlerville, MI 48836. Respondent offers motor vehicles for sale or lease.

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

A. Unless otherwise specified, "respondent" shall mean Fowlerville Ford, Inc., and its successors and assigns.

B. "Advertisement" shall mean a commercial message in any medium that directly or indirectly promotes a consumer transaction.

C. "Clearly and conspicuously" shall mean as follows:

1. In a print advertisement, the disclosure shall be in a type size, location, and in print that contrasts with the background against which it appears, sufficient for an ordinary consumer to notice, read, and comprehend it.

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

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

4. In a radio advertisement, the disclosure shall be delivered in a volume and cadence sufficient for an ordinary consumer to hear and comprehend it.

5. In all advertisements, the disclosure shall be in understandable language and syntax. Nothing contrary to, inconsistent with, or in mitigation of the disclosure shall be used in any advertisement or promotion.

D. "Material" shall mean likely to affect a person's choice of, or conduct regarding, goods or services.

E. "Motor vehicle" or "vehicle" shall mean:

1. Any self-propelled vehicle designed for transporting persons or property on a street, highway, or other road;

2. Recreational boats and marine equipment;

3. Motorcycles;

4. Motor homes, recreational vehicle trailers, and slide-in campers; and

5. Other vehicles that are titled and sold through dealers.

I.

IT IS HEREBY ORDERED that respondent and its officers, agents, representatives, and employees, directly or indirectly, in connection with any advertisement for the purchase, financing, or leasing of motor vehicles, shall not, in any manner, expressly or by implication:

A. Misrepresent the material terms of any prize, sweepstakes, giveaway, or other incentive, including whether a consumer has won a prize, sweepstakes, giveaway, or other incentive, and the nature, value, or

amount of a prize, sweepstakes, giveaway, or other incentive.

B. Misrepresent any material fact about the price, sale, financing, or leasing of any vehicle.

II.

IT IS FURTHER ORDERED that respondent and its officers, agents, representatives, and employees, directly or indirectly, in connection with any advertisement for the purchase, financing, or leasing of motor vehicles, shall not, in any manner, expressly or by implication:

A. State the amount or percentage of any downpayment, the number of payments or period of repayment, the amount of any payment, or the amount of any finance charge, without disclosing clearly and conspicuously all of the following terms:

1. The amount or percentage of the downpayment;

2. The terms of repayment; and

3. The annual percentage rate, using the term "annual percentage rate" or the abbreviation "APR." If the annual percentage rate may be increased after consummation of the credit transaction, that fact must also be disclosed; or

B. State a rate of finance charge without stating the rate as an "annual percentage rate" or the abbreviation "APR," using that term; or

C. Fail to comply in any respect with Regulation Z, 12 C.F.R. Part 226, as amended, and the Truth in Lending Act, as amended, 15 U.S.C. §§ 1601-1667.

III.

IT IS FURTHER ORDERED that respondent 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;

C. All evidence in its possession or control that contradicts, qualifies, or calls 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. Any documents reasonably necessary to demonstrate full compliance with each provision of this order, including but not limited to all documents obtained, created, generated, or that in any way relate to the requirements, provisions, or terms of this order, and all reports submitted to the Commission pursuant to this order.

IV.

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

V.

IT IS FURTHER ORDERED that respondent shall notify the Commission at least thirty (30) days prior to any change in the corporation(s) that may affect compliance obligations arising

under this order, including but not limited to a dissolution, assignment, sale, merger, or other action that would result in the emergence of a successor corporation; the creation or dissolution of a subsidiary, parent, or affiliate that engages in any acts or practices subject to this order; the proposed filing of a bankruptcy petition; or a change in the corporate name or address. *Provided, however*, that, with respect to any proposed change in the corporation about which respondent learns less than thirty (30) days prior to the date such action is to take place, respondent shall notify the Commission as soon as is practicable after obtaining such knowledge. 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 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: FTC v. Fowlerville Ford, Inc.

VI.

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 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.

VII.

This order will terminate on February 20, 2034, 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;

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 ("FTC") has accepted, subject to final approval, an agreement containing a consent order from Fowlerville Ford, 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 FTC 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 respondent is a motor vehicle dealer. According to the FTC complaint, respondent has advertised that consumers have won a prize worth between $1,000 and $25,000. The complaint alleges that, in fact, consumers have not won a prize worth between $1,000 and $25,000. The complaint alleges therefore that the respondent's representations are false or misleading in violation of Section 5 of the FTC Act. In addition, the complaint alleges a violation of the Truth in Lending Act ("TILA") and its implementing Regulation Z for failing to disclose or disclose

adequately terms of certain financing offered, despite the respondent's use of certain triggering terms in the advertisements.

The proposed order is designed to prevent the respondent from engaging in similar deceptive practices in the future. Part I.A prohibits the respondent from misrepresenting the material terms of any prize, sweepstakes, giveaway, or other incentive, including whether a consumer has won a prize, sweepstakes, giveaway, or other incentive, and the nature, value, or amount of a prize, sweepstakes, giveaway, or other incentive required to be paid at lease inception, and the amounts of all monthly or other periodic payments. Part I.B prohibits the respondent from misrepresenting any other material fact about the price, sale, financing, or leasing of any vehicle.

Part II of the proposed order addresses the TILA allegation. It requires that the respondent clearly and conspicuously make all of the disclosures required by TILA and Regulation Z if it states relevant triggering terms, including the monthly financing payment. In addition, Part II prohibits any other violation of TILA and Regulation Z.

Part III of the proposed order requires respondent to keep copies of relevant advertisements and materials substantiating claims made in the advertisements. Part IV requires that respondent provide copies of the order to certain of its personnel. Part V requires notification to the Commission regarding changes in corporate structure that might affect compliance obligations under the order. Part VI requires the respondent to file compliance reports with the Commission. Finally, Part VII 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 complaint or proposed order, or to modify in any way the proposed order's terms.

Complaint

IN THE MATTER OF

LUIS ALFONSO SIERRE
D/B/A
CASINO AUTO SALES

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

Docket No. C-4434; File No. 132 3107
Complaint, February 20, 2014 – Decision, February 20, 2014

This consent order addresses Luis Alfonso Sierra d/b/a/ Casino Auto Sales' advertisements of cars for sale. The complaint alleges that the respondent's advertisements feature photographs of numerous cars, with a price prominently displayed below each car, and that the respondent has advertised that each car is available for purchase at the price that is prominently displayed below the car. The complaint further alleges that, in fact, the featured cars are not available for purchase at the prices that are displayed below each car, and that, instead, the purchase price of each car is actually $5,000 more than the advertised price. The consent order prohibits the respondent from misrepresenting the cost of purchasing a vehicle, including but not necessarily limited to (1) the purchase price of the vehicle, or (2) any finance terms, including the amount or percentage of the down payment, the number of payments or period of repayment, the amount of any payment, and the repayment obligation over the full term of the loan, including any balloon payment.

Participants

For the *Commission*: *Sana Chriss, Mark Glassman, John Jacobs, Carole Reynolds, Jason Schall, Christina Tusan,* and *Katherine Worthman.*

For the *Respondent*: *Alexander J. Petale, Law Offices of Alexander J. Petale.*

COMPLAINT

The Federal Trade Commission, having reason to believe that Luis Alfonso Sierra ("respondent"), an individual trading and doing business as Casino Auto Sales, has violated provisions of the Federal Trade Commission Act ("FTC Act"), and it appearing to the Commission that this proceeding is in the public interest, alleges:

Complaint

1. Respondent Luis Alfonso Sierra is an individual trading and doing business as Casino Auto Sales with his principal office or place of business at 13025 Valley Boulevard, La Puente, California 91746. Individually, or in concert with others, he formulates, directs, controls, or participates in the policies, acts, or practices alleged in this complaint. Respondent offers automobiles for sale to consumers.

2. The acts or practices of respondent 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. Since at least January 2013, respondent has disseminated or caused to be disseminated advertisements to the public promoting the purchase and finance of automobiles.

4. Respondent has placed advertisements in multiple publications. Respondent has placed such advertisements, for example, in numerous editions of a free advertising circular titled *myautoplus.com*. Each edition of this circular is also made available online at www.myautoplus.com. A copy of one such advertisement is attached as Exhibit A. Respondent has also placed such advertisements in numerous editions of a free advertising circular titled *autoaviso.com*. A copy of one such advertisement is attached as Exhibit B. The advertisements attached as Exhibits A and B contain the statements and depictions described in Paragraphs 5 and 6 below. Respondent's other advertisements in *myautoplus.com* and *autoaviso.com* contain substantially similar statements and depictions.

5. Respondent's advertisements, including but not limited to those attached as Exhibits A and B, include numerous photographs of individual automobiles offered for sale. A price is prominently displayed immediately below each automobile. For example, Exhibit A features a 2008 Chevy Tahoe LS as follows:

6. Respondent's advertisements include statements related to the prices of the featured vehicles in small print at the bottom of the advertisements. For example, Exhibit A contains the following statements:

> *Prices after $5,000 down + Tax, Lic & Doc fees, on approved credit.
>
> * * *
>
> Precios despues de $5,000 de pago inicial + Tax, Lic. & Doc. En crédito aprobado.
>
> (This statement translated into English means "Prices after $5,000 down + Tax, Lic. & Doc. In approved credit.")

7. Thus, the actual price of each of respondent's advertised vehicles is $5,000 more than the dollar amount that is prominently displayed immediately below the vehicle.

FEDERAL TRADE COMMISSION ACT VIOLATIONS

Count I

Misrepresentation Regarding Purchase Price of the Vehicles

8. In numerous instances, through the means described in Paragraphs 4 and 5, respondent has represented, expressly or by implication, that vehicles are available for purchase at the prices prominently advertised.

9. In truth and in fact, vehicles are not available for purchase at the prices prominently advertised. Consumers must pay an additional $5,000 to purchase the advertised vehicles. Therefore, respondent's representation as alleged in Paragraph 8 was, and is, false and misleading.

Respondent's practices 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 twentieth day of February, 2014, has issued this complaint against respondent.

By the Commission.

Complaint

Exhibit A

FA-8 CASINO EXHIBIT A Orange County / Inland Empire

Complaint


www.myautoplus.com
800-631-6871
CASINO
13025 Valley Blvd.
La Puente, CA
'08 GMC SIERRA
$13,995
$13,995
'08 CHEVY SILVERADO
Bancarrota OK Reposeciones OK 1er Comprador OK
'06 BMW 750LI $16,995
'06 BMW 750I $16,995
'06 BMW 325 $9,995
'10 DODGE CHALLENGER $18,995
'08 MINI COOPER $9,995
'07 CHRYSLER 300C $9,995
NAVIGATION
'05 DODGE MAGNUM R/T $8,995
'07 LINCOLN MARK LT $17,995
'05 DODGE RAM HEMI $17,995
'08 CHEVY SILVERADO $11,995
'09 DODGE RAM $13,995
'03 HUMMER H2 $14,995
'05 HUMMER H2 $17,995
'07 RANGE ROVER $23,995
'03 HUMMER H2 $14,995
4683EV04B
Orange County / Inland Empire
CASINO EXHIBIT A
A-1

Complaint

Exhibit B

CASINO EXHIBIT B

CASINO EXHIBIT B

DECISION AND ORDER

The Federal Trade Commission having initiated an investigation of certain acts and practices of respondent named in the caption hereof, and respondent having been furnished thereafter with a copy of a draft complaint which the Western Region-Los Angeles proposed to present to the Commission for its consideration and which, if issued by the Commission, would charge respondent with violation of the Federal Trade Commission Act ("FTC Act"); and

Respondent, respondent's attorney, and counsel for the Commission having thereafter executed an agreement containing a 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 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 consent agreement on the public record for a period of thirty (30) days for the receipt and consideration of public comments, now in further conformity with the procedure prescribed in Section 2.34 of its Rules, the Commission hereby issues its complaint, makes the following jurisdictional findings, and enters the following order:

1. Respondent, Luis Alfonso Sierra, is an individual trading and doing business as Casino Auto Sales with his principal place of business at 13025 Valley Boulevard, La Puente, California 91746.

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

A. Unless otherwise noted, "respondent" shall mean Luis Alfonso Sierra.

B. "Advertisement" shall mean a commercial message in any medium that directly or indirectly promotes a consumer transaction.

C. "Clearly and conspicuously" shall mean as follows:

1. In a print advertisement, the disclosure shall be in a type size, location, and in print that contrasts with the background against which it appears, sufficient for an ordinary consumer to notice, read, and comprehend it.

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

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

4. In a radio advertisement, the disclosure shall be delivered in a volume and cadence sufficient for an ordinary consumer to hear and comprehend it.

5. In all advertisements, the disclosure shall be in understandable language and syntax. Nothing contrary to, inconsistent with, or in mitigation of the disclosure shall be used in any advertisement or promotion.

D. "Material" shall mean likely to affect a person's choice of, or conduct regarding, goods or services.

E. "Motor vehicle" or "vehicle" shall mean:

1. Any self-propelled vehicle designed for transporting persons or property on a street, highway, or other road;

2. Recreational boats and marine equipment;

3. Motorcycles;

4. Motor homes, recreational vehicle trailers, and slide-in campers; and

5. Other vehicles that are titled and sold through dealers.

I.

IT IS HEREBY ORDERED that respondent and its officers, agents, representatives, and employees, directly or indirectly, in connection with any advertisement for the purchase, financing, or leasing of motor vehicles, shall not, in any manner, expressly or by implication:

A. Misrepresent the cost of purchasing a vehicle, including but not necessarily limited to:

1. The purchase price of the vehicle; or

2. Any finance terms, including the amount or percentage of the down payment, the number of payments or period of repayment, the amount of any payment, and the repayment obligation over

the full term of the loan, including any balloon payment; or

B. Misrepresent any other material fact about the price, sale, financing, or leasing of any vehicle.

II.

IT IS FURTHER ORDERED that respondent 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;

C. All evidence in its possession or control that contradicts, qualifies, or calls 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. Any documents reasonably necessary to demonstrate full compliance with each provision of this order, including but not limited to all documents obtained, created, generated, or that in any way relate to the requirements, provisions, or terms of this order, and all reports submitted to the Commission pursuant to this order.

III.

IT IS FURTHER ORDERED that respondent shall deliver a copy of this order to all current and future principals, officers, directors, and managers, and to all current and future employees, agents, and representatives having responsibilities with respect to the subject matter of this order, and shall secure from each such person a signed and dated statement acknowledging receipt of the

order. Respondent shall deliver this order to current personnel within thirty (30) days after the date of service of this order, and to future personnel within thirty (30) days after the person assumes such position or responsibilities.

IV.

IT IS FURTHER ORDERED that respondent 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 respondent's new business address and telephone number and a description of the nature of the business or employment and his duties and responsibilities. Unless otherwise directed by a representative of the Commission in writing, all notices required by this Part shall be emailed to Debrief@ftc.gov or sent by overnight courier (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: FTC v. Luis Alfonso Sierra.

V.

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

VI.

This order will terminate on February 20, 2034, 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;

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 ("FTC") has accepted, subject to final approval, an agreement containing a consent order from Luis Alfonso Sierra d/b/a/ Casino Auto Sales. 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 FTC 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 respondent operates a motor vehicle dealership. According to the FTC complaint, the respondent has advertised cars for sale. The complaint alleges that the respondent's advertisements feature photographs of numerous cars, with a price prominently displayed below each car, and that the respondent has advertised that each car is available for purchase at the price that

is prominently displayed below the car. The complaint alleges that, in fact, the featured cars are not available for purchase at the prices that are displayed below each car, and that, instead, the purchase price of each car is actually $5,000 more than the advertised price.

The proposed order is designed to prevent the respondent from engaging in similar deceptive practices and law violations in the future. Part I.A prohibits the respondent from misrepresenting the cost of purchasing a vehicle, including but not necessarily limited to (1) the purchase price of the vehicle, or (2) any finance terms, including the amount or percentage of the down payment, the number of payments or period of repayment, the amount of any payment, and the repayment obligation over the full term of the loan, including any balloon payment. Part I.B prohibits the respondent from misrepresenting any other material fact about the price, sale, financing, or leasing of any vehicle.

Part II of the proposed order requires the respondent to keep copies of relevant advertisements and materials substantiating claims made in the advertisements. Part III requires that the respondent provide copies of the order to certain personnel. Part IV requires notification to the Commission regarding changes in the respondent's business activities or employment, or his affiliation with any new business or employment. Part V requires the respondent to file compliance reports with the Commission. Finally, 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 complaint or proposed order, or to modify in any way the proposed order's terms.

Complaint

IN THE MATTER OF

MOHAMMAD SABHA
D/B/A
RAINBOW AUTO SALES

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

Docket No. C-4435; File No. 132 3140
Complaint, February 20, 2014 – Decision, February 20, 2014

This consent order addresses Mohammad Sabha, also d/b/a Rainbow Auto Sales' advertisements of cars for sale. The complaint alleges that the respondent's advertisements feature photographs of numerous cars, with a price prominently displayed below each car, and that the respondent has advertised that each car is available for purchase at the price that is prominently displayed below the car. The complaint further alleges that, in fact, the featured cars are not available for purchase at the prices that are displayed below each car, and that, instead, the purchase price of each car is actually $5,000 more than the advertised price. The consent order prohibits the respondent from misrepresenting the cost of purchasing a vehicle, including but not necessarily limited to (1) the purchase price of the vehicle, or (2) any finance terms, including the amount or percentage of the down payment, the number of payments or period of repayment, the amount of any payment, and the repayment obligation over the full term of the loan, including any balloon payment.

10.

Participants

For the *Commission*: *Sana Chriss, Mark Glassman, John Jacobs, Carole Reynolds, Jason Schall, Christina Tusan,* and *Katherine Worthman.*

For the *Respondent*: *Sam Nordean, Consumer Protection Law Group.*

COMPLAINT

The Federal Trade Commission, having reason to believe that Mohammad Sabha ("respondent"), an individual trading and doing business as Rainbow Auto Sales, has violated provisions of the Federal Trade Commission Act ("FTC Act"), and it appearing to the Commission that this proceeding is in the public interest, alleges:

1. Respondent Mohammad Sabha is an individual trading and doing business as Rainbow Auto Sales with his principal office or place of business at 3700 Firestone Blvd., South Gate, California 90280. Individually, or in concert with others, he formulates, directs, controls, or participates in the policies, acts, or practices alleged in this complaint.

2. The acts or practices of respondent 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. Since at least March 1, 2013, respondent has disseminated or caused to be disseminated advertisements to the public promoting the purchase and finance of automobiles.

4. Respondent has placed advertisements in numerous editions of a free advertising circular titled *myautoplus.com*. Each edition of the circular is also made available online at www.myautoplus.com. A copy of one such advertisement is attached is Exhibit A. This advertisement contains the statements and depictions described in Paragraphs 5 and 6 below. Respondent's other advertisements in *myautoplus.com* contain substantially similar statements and depictions.

5. Respondent's advertisements, including but not limited to the advertisement attached as Exhibit A, include numerous photographs of individual automobiles offered for sale. A price is prominently displayed immediately below each automobile. For example, the advertisement attached as Exhibit A features a 2003 Hummer H2 as follows:

6. The following statements related to the prices of the featured vehicles appear in small print at the bottom of

respondent's advertisements, including but not limited to the advertisement attached as Exhibit A:

> Precios despues de $5,000 de enganche + tax + licencia + cargos por documentación con crédito aprobado.
>
> > (This statement translated into English is: "Prices after $5,000 down + tax + license + documentation fees with credit approval.")
>
> Prices after $5,000 down + tax + lic + doc fees on approved credit.

7. Thus, the actual price of each of respondent's advertised vehicles is $5,000 more than the dollar amount that is prominently displayed immediately below the vehicle.

FEDERAL TRADE COMMISSION ACT VIOLATIONS

Count I

Misrepresentation Regarding Purchase Price of the Vehicles

8. In numerous instances, through the means described in Paragraphs 4 and 5, respondent has represented, expressly or by implication, that vehicles are available for purchase at the prices prominently advertised.

9. In truth and in fact, vehicles are not available for purchase at the prices prominently advertised. Consumers must pay an additional $5,000 to purchase the advertised vehicles. Therefore, respondent's representation as alleged in Paragraph 8 was, and is, false and misleading.

10. Respondent's practices 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 twentieth day of February, 2014, has issued this complaint against respondent.

By the Commission.

Exhibit A

Complaint


www.myautoplus.com
RAINBOW AUTO
3700 FIRESTONE BLVD. SOUTH GATE
'07 CHEVY AVALANCHE
$12,998
'05 BMW 645
$LLAME
'05 FORD F-150 XLT
$9,995
'07 AUDI A4 2.0T
$10,995
'04 CHRYSLER PACIFICA
$5,995
'02 BMW 745
$9,995
'10 DODGE CHARGER
$10,995
'06 NISSAN 350Z
$9,995
'07 CHRYSLER ACREE
$12,995
$7,995
'04 LAND ROVER RANGE ROVER
$14,995
'00 DODGE RAM SPORT
$3,995
'10 SCION TC
$8,995
'04 AUDI A6
$6,995
'06 TOYOTA 4RUNNER
$9,995
'09 CHRYSLER 300
$8,995
'06 MBZ E550
$16,995
800-366-0341
Los Angeles
FA-17

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 respondent having been furnished thereafter with a copy of a draft complaint which the Western Region-Los Angeles proposed to present to the Commission for its consideration and which, if issued by the Commission, would charge respondent with violation of the Federal Trade Commission Act ("FTC Act"); and

Respondent, respondent's attorney, and counsel for the Commission having thereafter executed an Agreement Containing Consent Order ("Consent Agreement"), which includes: a statement by respondent that he 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 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 Consent Agreement on the public record for a period of thirty (30) days for the receipt and consideration of public comments, now in further conformity with the procedure prescribed in Section 2.34 of its Rules, the Commission hereby issues its complaint, makes the following jurisdictional findings, and enters the following order:

1. Respondent, Mohammad Sabha, is an individual trading and doing business as Rainbow Auto Sales, with his principal place of business at 3700 Firestone Blvd., South Gate, California 90280.

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

A. Unless otherwise noted, "respondent" shall mean Mohammad Sabha.

B. "Advertisement" shall mean a commercial message in any medium that directly or indirectly promotes a consumer transaction.

C. "Clearly and conspicuously" shall mean as follows:

1. In a print advertisement, the disclosure shall be in a type size, location, and in print that contrasts with the background against which it appears, sufficient for an ordinary consumer to notice, read, and comprehend it.

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

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

4. In a radio advertisement, the disclosure shall be delivered in a volume and cadence sufficient for an ordinary consumer to hear and comprehend it.

5. In all advertisements, the disclosure shall be in understandable language and syntax. Nothing contrary to, inconsistent with, or in mitigation of the disclosure shall be used in any advertisement or promotion.

D. "Material" shall mean likely to affect a person's choice of, or conduct regarding, goods or services.

E. "Motor vehicle" or "vehicle" shall mean:

1. Any self-propelled vehicle designed for transporting persons or property on a street, highway, or other road;

2. Recreational boats and marine equipment;

3. Motorcycles;
4. Motor homes, recreational vehicle trailers, and slide-in campers; and

5. Other vehicles that are titled and sold through dealers.

I.

IT IS HEREBY ORDERED that respondent and respondent's officers, agents, representatives, and employees, directly or indirectly, in connection with any advertisement for the purchase, financing, or leasing of motor vehicles, shall not, in any manner, expressly or by implication:

A. Misrepresent the cost of purchasing a vehicle, including but not necessarily limited to:

1. The purchase price of the vehicle; or

2. Any finance terms, including the amount or percentage of the down payment, the number of payments or period of repayment, the amount of any payment, and the repayment obligation over

the full term of the loan, including any balloon payment; or

B. Misrepresent any other material fact about the price, sale, financing, or leasing of any vehicle.

II.

IT IS FURTHER ORDERED that respondent 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;

C. All evidence in respondent's possession or control that contradicts, qualifies, or calls 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. Any documents reasonably necessary to demonstrate full compliance with each provision of this order, including but not limited to all documents obtained, created, generated, or that in any way relate to the requirements, provisions, or terms of this order, and all reports submitted to the Commission pursuant to this order.

III.

IT IS FURTHER ORDERED that respondent shall deliver a copy of this order to all current and future principals, officers, directors, and managers, and to all current and future employees, agents, and representatives having responsibilities with respect to the subject matter of this order, and shall secure from each such person a signed and dated statement acknowledging receipt of the

order. Respondent shall deliver this order to current personnel within thirty (30) days after the date of service of this order, and to future personnel within thirty (30) days after the person assumes such position or responsibilities.

IV.

IT IS FURTHER ORDERED that respondent 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(s); 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 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: FTC v. Mohammad Sabha.

V.

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

Analysis to Aid Public Comment

VI.

This order will terminate on February 20, 2034, 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;

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 ("FTC") has accepted, subject to final approval, an agreement containing a consent order from Mohammad Sabha, also d/b/a Rainbow Auto Sales. 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 FTC 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 respondent operates a motor vehicle dealership. According to the FTC complaint, the respondent has advertised cars for sale. The complaint alleges that the respondent's advertisements feature photographs of numerous cars, with a price prominently displayed below each car, and that the respondent has advertised that each car is available for purchase at the price that is prominently displayed below the car. The complaint alleges that, in fact, the featured cars are not available for purchase at the prices that are displayed below each car, and that, instead, the purchase price of each car is actually $5,000 more than the advertised price.

The proposed order is designed to prevent the respondent from engaging in similar deceptive practices and law violations in the future. Part I.A prohibits the respondent from misrepresenting the cost of purchasing a vehicle, including but not necessarily limited to (1) the purchase price of the vehicle, or (2) any finance terms, including the amount or percentage of the down payment, the number of payments or period of repayment, the amount of any payment, and the repayment obligation over the full term of the loan, including any balloon payment. Part I.B prohibits the respondent from misrepresenting any other material fact about the price, sale, financing, or leasing of any vehicle.

Part II of the proposed order requires the respondent to keep copies of relevant advertisements and materials substantiating claims made in the advertisements. Part III requires that the respondent provide copies of the order to certain personnel. Part IV requires notification to the Commission regarding changes in the respondent's business activities or employment, or his affiliation with any new business or employment. Part V requires the respondent to file compliance reports with the Commission. Finally, Part VI 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 aid public comment on the proposed order. It is not intended to constitute an official interpretation of the complaint or proposed order, or to modify in any way the proposed order's terms.

Complaint

IN THE MATTER OF

NORM REEVES, INC.
D/B/A
NORM REEVES HONDA SUPERSTORE

CONSENT ORDER, ETC. IN REGARD TO ALLEGED VIOLATIONS OF SECTION 5 OF THE FEDERAL TRADE COMMISSION ACT, THE TRUTH IN LENDING ACT, THE CONSUMER LEASING ACT, REGULATION M, AND REGULATION Z

Docket No. C-4436; File No. 132 3151
Complaint, February 20, 2014 – Decision, February 20, 2014

This consent order addresses Norm Reeves, Inc.'s advertising of lease and financing offers and failure to clearly and conspicuously disclose the costs and terms of certain leases offered and the amount or percentage of the downpayment, despite the respondent's use of certain triggering terms in the advertisements. The complaint alleges that the respondent has advertised that consumers can pay "$0" up-front to lease a car, and has depicted several cars in its advertisements to which this offer applies, listing a specific monthly lease payment for each such car. The complaint further alleges that, in fact, for a $0 up-front payment, consumers cannot lease the cars shown in the advertisements for the advertised monthly payment amounts, and that instead, consumers must also pay a security deposit and/or significant fees, including but not limited to an acquisition fee. The complaint further alleges, in connection with its advertising of financing offers, that the respondent has advertised that it offers 0% APR financing on all new cars without disclosing adequately that consumers who finance more than a certain amount -- *e.g.*, $12,000 -- will be charged more than 0% APR. The consent order requires that the respondent clearly and conspicuously make all of the disclosures required by the Consumer Leasing Act, the Truth in Lending Act and Regulations M and Z when any of its advertisements states relevant triggering terms. The order also prohibits the respondent from misrepresenting the cost of: (1) leasing a vehicle, including but not limited to the total amount due at lease inception, the downpayment, amount down, acquisition fee, capitalized cost reduction, any other amount required to be paid at lease inception, and the amounts of all monthly or other periodic payments; or (2) purchasing a vehicle with financing, including but not necessarily limited to the amount or percentage of the downpayment, the number of payments or period of repayment, the amount of any payment, the annual percentage rate or any other finance rate, and the repayment obligation over the full term of the loan, including any balloon payment.

Complaint

Participants

For the *Commission*: *Sana Chriss, Mark Glassman, John Jacobs, Carole Reynolds, Jason Schall, Christina Tusan,* and *Katherine Worthman.*

For the *Respondent*: *Aaron Jacoby* and *Melanie Joo, Arent Fox LLP.*

COMPLAINT

The Federal Trade Commission, having reason to believe that Norm Reeves, Inc., a corporation also doing business as Norm Reeves Honda Superstore ("respondent"), has violated provisions of the Federal Trade Commission Act ("FTC Act"), the Consumer Leasing Act ("CLA"), and its implementing Regulation M, and the Truth in Lending Act ("TILA"), and its implementing Regulation Z, and it appearing to the Commission that this proceeding is in the public interest, alleges:

1. Respondent Norm Reeves, Inc. is a California corporation, also doing business as Norm Reeves Honda Superstore, with its principal office or place of business at 18500 Studebaker Road, Cerritos, California 90703. Respondent offers automobiles for sale or lease to consumers.

2. The acts or practices of respondent 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. Since at least March 16, 2013, respondent has disseminated or caused to be disseminated advertisements to the public promoting the purchase, finance, and leasing of automobiles.

4. Respondent has disseminated or caused to be disseminated advertisements promoting consumer leases for automobiles, as the terms "advertisement" and "consumer lease" are defined in Section 213.2 of Regulation M, 12 C.F.R. § 213.2, as amended.

5. Respondent has disseminated or caused to be disseminated advertisements to the public promoting credit sales and other

extensions of closed-end credit in consumer credit transactions, as the terms "advertisement," "closed-end credit," "credit sale," and "consumer credit" are defined in Section 226.2 of Regulation Z, 12 C.F.R. § 226.2, as amended.

6. Respondent has placed numerous such advertisements promoting consumer leases for automobiles and credit sales and other extensions of closed-end credit in consumer credit transactions in the *Los Angeles Times* newspaper. A copy of one such advertisement that appeared in the *Los Angeles Times* is attached as Exhibit A. This advertisement contains the statements and depictions described in Paragraphs 7 through 8 below. Respondent's advertisements in other editions of the *Los Angeles Times* contain substantially similar statements and depictions.

7. Respondent's advertisements deceptively promote lease offers with $0 due at lease inception.

a. For example, the following statement is prominently featured at the top of the advertisement attached as Exhibit A:

b. Photographs of several different 2013-model-year automobiles appear below this statement. Each automobile appears in a separate box that includes a bold graphic stating "**$0 DOWN**," in addition to a specific monthly payment amount.

c. Additional terms are also included below each car in very small print. This fine print states: "All-New 2013 [model name] closed end lease for $[monthly payment amount shown above] per month plus security deposit, acquisition fee, tax, title and license fees for 36 months on approved credit. $0 due at lease signing."

d. Additional fine print appears at the very bottom of each of respondent's advertisements, which states:

"All advertised prices exclude government fees and taxes, any finance charges, any dealer document processing charge, any electronic filing charge, and any emission testing charge."

e. Thus, consumers cannot pay the "$0 DUE AT LEASE SIGNING" that is prominently stated at the top. They must also pay a security deposit and/or fees, including but not limited to an acquisition fee.

8. Respondent's advertisements also deceptively promote "0% APR" financing on a vehicle purchase. For example, the advertisement attached as Exhibit A includes the following statements and depictions.

a. The following statement promoting "0% APR" financing on all new Hondas is prominently featured at or near the top of the advertisement:

b. The advertisement also includes the following statement promoting 0% APR financing on new models of the "2012 Honda Civic Natural Gas":

c. However, the text in fine print below each of the statements depicted immediately above states that the 0% APR does not apply if consumers finance more than a certain amount. For example, the fine print

> under the statement promoting 0% APR financing on all new Hondas states the following:
>
> 0% APR financing available up to $12,000 financed on approved tier one credit. 0% APR financing for 60 months on all new Honda models is $16.67 per month per $1,000 financed. If more than $12,000 is financed, then the 0% goes to 0.9% on approved tier one credit. Dealer participation may affect consumer cost.

FEDERAL TRADE COMMISSION ACT VIOLATIONS

Count I

Misrepresentation of Amount Due at Lease Inception

9. Through the means described in Paragraph 7, respondent has represented, expressly or by implication, that consumers can pay $0 at lease inception to lease the vehicles shown in the advertisements for the advertised monthly payment amount.

10. In truth and in fact, consumers cannot pay $0 at lease inception to lease the vehicles shown in the advertisement for the advertised monthly payment amount. Consumers must also pay a security deposit and/or significant fees, including but not limited to an acquisition fee. Therefore, the representation set forth in Paragraph 9 was, and is, false or misleading.

11. Respondent's practices 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).

Count II

Failure to Adequately Disclose APR

12. Through the means described in Paragraph 8, respondent has represented that consumers who finance new vehicles purchased from respondent will be charged 0% APR on the amount financed. Respondent has failed to disclose adequately that consumers who finance more than a certain amount will be charged more than 0% APR. This fact would be material to

consumers. The failure to disclose this fact, in light of the representations made, was, and is, a deceptive practice.

13. Respondent's practices 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).

VIOLATION OF THE CONSUMER LEASING ACT AND REGULATION M

14. Under Section 184 of the CLA and Section 213.7 of Regulation M, advertisements promoting consumer leases are required to make certain disclosures ("CLA additional terms") if they state any of several terms, such as the amount of any payment ("CLA triggering terms"). 15 U.S.C. § 1667c; 12 C.F.R. § 213.7.

15. Respondent's advertisements promoting consumer leases, including but not necessarily limited to the advertisements described in Paragraphs 6 and 7, are subject to the requirements of the CLA and Regulation M.

Count III

Failure to Disclose or to Disclose Clearly and Conspicuously Required Lease Information

16. Respondent's advertisements promoting consumer leases, including but not necessarily limited to the advertisements described in Paragraphs 6 and 7, have included CLA triggering terms, but have failed to disclose or to disclose clearly and conspicuously CLA additional terms required by the CLA and Regulation M, including one or more of the following:

a. That the transaction advertised is a lease.

b. The total amount due prior to or at consummation or by delivery, if delivery occurs after consummation.

c. Whether or not a security deposit is required.

d. The number, amount, and timing of scheduled payments.

e. With respect to a lease in which the liability of the consumer at the end of the lease term is based on the anticipated residual value of the property, that an extra charge may be imposed at the end of the lease term.

17. Therefore, the practices set forth in Paragraph 16 of this Complaint have violated Section 184 of the CLA, 15 U.S.C. § 1667c, and Section 213.7 of Regulation M, 12 C.F.R. § 213.7.

VIOLATIONS OF THE TRUTH IN LENDING ACT AND REGULATION Z

18. Under Section 144 of the TILA and Section 226.24(d) of Regulation Z, as amended, advertisements promoting closed-end credit in consumer credit transactions are required to make certain disclosures ("TILA additional terms") if they state any of several terms, such as the monthly payment ("TILA triggering terms").

19. Respondent's advertisements promoting closed-end credit, including but not necessarily limited to those described in Paragraph 8, are subject to the requirements of the TILA and Regulation Z.

Count IV

Failure to Disclose or Disclose Clearly and Conspicuously Required Credit Information

20. Respondent's advertisements promoting closed-end credit, including but not necessarily limited to those described in Paragraph 8, have included TILA triggering terms, but have failed to disclose or disclose clearly and conspicuously TILA additional terms required by the TILA and Regulation Z, including one or more of the following:

a. The amount or percentage of the downpayment.

b. The terms of repayment, including any balloon payment.

c. The "annual percentage rate," using that term, and, if the rate may be increased after consummation, that fact.

21. Therefore, the practices set forth in Paragraph 20 of this Complaint have violated Section 144 of the TILA, 15 U.S.C. § 1664, and Section 226.24(d) of Regulation Z, 12 C.F.R. § 226.24(d), as amended.

THEREFORE, the Federal Trade Commission, this twentieth day of February, 2014, has issued this complaint against respondent.

By the Commission.

Complaint

Exhibit A

DECISION AND ORDER

The Federal Trade Commission having initiated an investigation of certain acts and practices of respondent named in the caption hereof, and respondent having been furnished thereafter with a copy of a draft complaint which the Western Region-Los Angeles proposed to present to the Commission for its consideration and which, if issued by the Commission, would charge respondent with violation of the Federal Trade Commission Act ("FTC Act"), the Consumer Leasing Act ("CLA"), and the Truth in Lending Act ("TILA"); and

Respondent, respondent's 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 respondent has violated the FTC Act, the TILA, and the CLA, and that a complaint should issue stating its charges in that respect, and having thereupon accepted the executed Consent Agreement and placed such Consent Agreement on the public record for a period of thirty (30) days for the receipt and consideration of public comments, now in further conformity with the procedure prescribed in Section 2.34 of its Rules, the Commission hereby issues its complaint, makes the following jurisdictional findings, and enters the following order:

1. Respondent, Norm Reeves, Inc., is a California corporation with its principal office or place of business at 18500 Studebaker Road, Cerritos, California 90703.

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

A. Unless otherwise specified, "respondent" shall mean Norm Reeves, Inc., and its successors and assigns.

B. "Advertisement" shall mean a commercial message in any medium that directly or indirectly promotes a consumer transaction.

C. "Clearly and conspicuously" shall mean as follows:

1. In a print advertisement, the disclosure shall be in a type size, location, and in print that contrasts with the background against which it appears, sufficient for an ordinary consumer to notice, read, and comprehend it.

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

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

4. In a radio advertisement, the disclosure shall be delivered in a volume and cadence sufficient for an ordinary consumer to hear and comprehend it.

5. In all advertisements, the disclosure shall be in understandable language and syntax. Nothing contrary to, inconsistent with, or in mitigation of the disclosure shall be used in any advertisement or promotion.

D. "Consumer credit" shall mean credit offered or extended to a consumer primarily for personal, family, or household purposes, as set forth in Section 226.2(a)(12) of Regulation Z, 12 C.F.R. § 226.2(a)(12), as amended.

E. "Consumer lease" shall mean a contract in the form of a bailment or lease for the use of personal property by a natural person primarily for personal, family, or household purposes, for a period exceeding four months and for a total contractual obligation not exceeding the applicable threshold amount, whether or not the lessee has the option to purchase or otherwise become the owner of the property at the expiration of the lease, as set forth in Section 213.2 of Regulation M, 12 C.F.R. § 213.2, as amended.

F. "Lease inception" shall mean prior to or at consummation of the lease or by delivery, if delivery occurs after consummation.

G. "Material" shall mean likely to affect a person's choice of, or conduct regarding, goods or services.

H. "Motor vehicle" or "vehicle" shall mean:

1. Any self-propelled vehicle designed for transporting persons or property on a street, highway, or other road;

2. Recreational boats and marine equipment;

3. Motorcycles;

4. Motor homes, recreational vehicle trailers, and slide-in campers; and

5. Other vehicles that are titled and sold through dealers.

I.

IT IS HEREBY ORDERED that respondent and its officers, agents, representatives, and employees, directly or indirectly, in connection with any advertisement for the purchase, financing, or leasing of motor vehicles, shall not, in any manner, expressly or by implication:

A. Misrepresent the cost of:

1. Leasing a vehicle, including but not necessarily limited to, the total amount due at lease inception, the downpayment, amount down, acquisition fee, capitalized cost reduction, any other amount required to be paid at lease inception, and the amounts of all monthly or other periodic payments; or

2. Purchasing a vehicle with financing, including but not necessarily limited to, the amount or percentage of the downpayment, the number of payments or period of repayment, the amount of any payment, the annual percentage rate or any other finance rate, and the repayment obligation over the full term of the loan, including any balloon payment; or

B. Misrepresent any other material fact about the price, sale, financing, or leasing of any vehicle.

II.

IT IS FURTHER ORDERED that respondent and its officers, agents, representatives, and employees, directly or indirectly, in connection with any advertisement for the purchase or financing of motor vehicles, shall not in any manner, expressly or by implication, make any representation regarding an annual percentage rate or other interest rate, unless the representation clearly and conspicuously discloses any material limitation on

obtaining the rate, including whether different rates apply based on the amount financed, and if so, the different rates that apply.

III.

IT IS FURTHER ORDERED that respondent and its officers, agents, representatives, and employees, directly or indirectly, in connection with any advertisement for any consumer lease, shall not, in any manner, expressly or by implication:

A. State the amount of any payment or that any or no initial payment is required at lease inception without disclosing clearly and conspicuously the following terms:

1. That the transaction advertised is a lease;

2. The total amount due at lease signing or delivery;

3. Whether or not a security deposit is required;

4. The number, amounts, and timing of scheduled payments; and

5. That an extra charge may be imposed at the end of the lease term in a lease in which the liability of the consumer at the end of the lease term is based on the anticipated residual value of the vehicle; or

B. Fail to comply in any respect with Regulation M, 12 C.F.R. Part 213, as amended, and the Consumer Leasing Act, 15 U.S.C. §§ 1667-1667f, as amended.

IV.

IS FURTHER ORDERED that respondent and its officers, agents, representatives, and employees, directly or indirectly, in connection with any advertisement for any extension of consumer credit, shall not, in any manner, expressly or by implication:

A. State the amount or percentage of any downpayment, the number of payments or period of repayment, the

amount of any payment, or the amount of any finance charge, without disclosing clearly and conspicuously all of the following terms:

1. The amount or percentage of the downpayment;

2. The terms of repayment; and

3. The annual percentage rate, using the term "annual percentage rate" or the abbreviation "APR." If the annual percentage rate may be increased after consummation of the credit transaction, that fact must also be disclosed; or

B. State a rate of finance charge without stating the rate as an "annual percentage rate" or the abbreviation "APR," using that term; or

C. Fail to comply in any respect with Regulation Z, 12 C.F.R. Part 226, as amended, and the Truth in Lending Act, as amended, 15 U.S.C. §§ 1601-1667.

V.

IT IS FURTHER ORDERED that respondent 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;

C. All evidence in its possession or control that contradicts, qualifies, or calls 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. Any documents reasonably necessary to demonstrate full compliance with each provision of this order, including but not limited to all documents obtained, created, generated, or that in any way relate to the requirements, provisions, or terms of this order, and all reports submitted to the Commission pursuant to this order.

VI.

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

VII.

IT IS FURTHER ORDERED that respondent shall notify the Commission at least thirty (30) days prior to any change in the corporation(s) that may affect compliance obligations arising under this order, including but not limited to a dissolution, assignment, sale, merger, or other action that would result in the emergence of a successor corporation; the creation or dissolution of a subsidiary, parent, or affiliate that engages in any acts or practices subject to this order; the proposed filing of a bankruptcy petition; or a change in the corporate name or address. *Provided, however*, that, with respect to any proposed change in the corporation about which respondent learns less than thirty (30) days prior to the date such action is to take place, respondent shall notify the Commission as soon as is practicable after obtaining such knowledge. 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 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: FTC v. Norm Reeves, Inc.

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 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 on February 20, 2034, 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;

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 ("FTC") has accepted, subject to final approval, an agreement containing a consent order from Norm Reeves, 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 FTC 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 respondent is a motor vehicle dealer. According to the FTC complaint, respondent has advertised cars for leasing, and has also advertised financing offers. In connection with its advertising of lease offers, the complaint alleges, the respondent has advertised that consumers can pay "$0" up-front to lease a car, and has depicted several cars in its advertisements to which this offer applies, listing a specific monthly lease payment for each such car. The complaint alleges that, in fact, for a $0 up-front payment, consumers cannot lease the cars shown in the advertisements for the advertised monthly payment amounts, and that instead, consumers must also pay a security deposit and/or significant fees, including but not limited to an acquisition fee. The complaint alleges that, therefore, the respondent's representations are false or misleading in violation of Section 5 of the FTC Act. In addition, the complaint alleges a violation of the Consumer Leasing Act and Regulation M for failing to clearly and conspicuously disclose the costs and terms of certain leases offered, despite the respondent's use of certain triggering terms in the advertisements.

The complaint further alleges, in connection with its advertising of financing offers, that the respondent has advertised that it offers 0% APR financing on all new cars. According to the complaint, the respondent's advertisements have failed to disclose adequately that consumers who finance more than a certain amount -- *e.g.*, $12,000 -- will be charged more than 0% APR. The complaint alleges that, therefore, the respondent's representations are deceptive in violation of Section 5 of the FTC

Act. In addition, the complaint alleges a violation of the Truth in Lending Act and Regulation Z for failing to clearly and conspicuously disclose the amount or percentage of the downpayment, despite the respondent's use of certain triggering terms in the advertisements.

The proposed order is designed to prevent the respondent from engaging in similar deceptive practices and law violations in the future. Part I.A prohibits the respondent from misrepresenting the cost of: (1) leasing a vehicle, including but not limited to the total amount due at lease inception, the downpayment, amount down, acquisition fee, capitalized cost reduction, any other amount required to be paid at lease inception, and the amounts of all monthly or other periodic payments; or (2) purchasing a vehicle with financing, including but not necessarily limited to the amount or percentage of the downpayment, the number of payments or period of repayment, the amount of any payment, the annual percentage rate or any other finance rate, and the repayment obligation over the full term of the loan, including any balloon payment. Part I.B prohibits the respondent from misrepresenting any other material fact about the price, sale, financing, or leasing of any vehicle.

Part II of the proposed order prohibits the respondent from making any representation regarding an annual percentage rate or other interest rate, unless the representation clearly and conspicuously discloses any material limitation on obtaining the rate, including whether different rates apply based on the amount financed, and if so, the different rates that apply.

Part III of the proposed order addresses the CLA allegation. It requires that the respondent clearly and conspicuously make all of the disclosures required by CLA and Regulation M when any of its advertisements states relevant triggering terms. In addition, Part III prohibits any other violation of CLA and Regulation M.

Part IV of the proposed order addresses the TILA allegation. It requires that the respondent make all of the disclosures required by TILA and Regulation Z when any of its advertisements states relevant triggering terms. In addition, Part IV prohibits any other violation of TILA and Regulation Z.

Analysis to Aid Public Comment

Part V of the proposed order requires respondent to keep copies of relevant advertisements and materials substantiating claims made in the advertisements. Part VI requires that respondent provide copies of the order to certain of its personnel. Part VII requires notification to the Commission regarding changes in corporate structure that might affect compliance obligations under the order. Part VIII requires the respondent to file compliance reports with the Commission. Finally, Part IX 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 complaint or proposed order, or to modify in any way the proposed order's terms.

Complaint

IN THE MATTER OF

NEW WORLD AUTO IMPORTS, INC. D/B/A SOUTHWEST KIA; NEW WORLD AUTO IMPORTS OF ROCKWALL, INC. D/B/A SOUTHWEST KIA AND SOUTHWEST KIA OF ROCKWALL; AND HAMPTON TWO AUTO CORPORATION D/B/A SOUTHWEST KIA, SOUTHWEST KIA-NW, AND SOUTHWEST KIA MESQUITE

CONSENT ORDER, ETC. IN REGARD TO ALLEGED VIOLATIONS OF SECTION 5 OF THE FEDERAL TRADE COMMISSION ACT, THE TRUTH IN LENDING ACT, THE CONSUMER LEASING ACT, REGULAION M, AND REGULATION Z

Docket No. C-4437; File No. 132 3165
Complaint, February 20, 2014 – Decision, February 20, 2014

This consent order addresses New World Auto Imports, Inc. d/b/a Southwest Kia, New World Auto Imports of Rockwall, Inc. d/b/a Southwest Kia and Southwest Kia of Rockwall, and Hampton Two Auto Corporation d/b/a Southwest Kia, Southwest Kia-NW, and Southwest Kia Mesquite's advertisements for automobiles for sale; and failing to disclose clearly and conspicuously certain costs and terms when advertising leases and credit.] The complaint alleges that respondents have advertised that consumers can finance the purchase of vehicles for the advertised terms, including the advertised monthly payment amount however, the monthly payment increases dramatically at the end of the transaction, because consumers owe a balloon payment of many thousand dollars. The complaint further alleges that respondents have advertised that consumers can pay $27 at lease inception to lease the advertised vehicles for the advertised monthly payment amount, but do not disclose that consumers must also pay fees, including but not limited to an acquisition fee, which is $595, and the first month's payment, for a total of at least $700 for each vehicle. The consent order requires that the respondents clearly and conspicuously make all of the disclosures required by the Truth in Lending Act and Regulation Z if they state the amount or percentage of any downpayment, the number of payments or period of repayment, the amount of any payment, or the amount of any finance charge ,and the disclosures required by the Consumer Leasing Act and Regulation M if they state relevant trigger terms, including the monthly lease payment or the amount of any payment or that any or no initial payment is required at lease inception. The order also

prohibits the respondents from misrepresenting any material fact about the price, sale, financing, or leasing of any vehicle.

Participants

For the *Commission*: *Sana Chriss, Mark Glassman, John Jacobs, Carole Reynolds, Jason Schall, Christina Tusan*, and *Katherine Worthman.*

For the *Respondents*: *Shahab Salehoun, President, pro se.*

COMPLAINT

The Federal Trade Commission, having reason to believe that New World Auto Imports, Inc., d/b/a Southwest Kia, a corporation, New World Auto Imports of Rockwall, Inc. d/b/a/ Southwest Kia and Southwest Kia of Rockwall, a corporation, and Hampton Two Auto Corporation, d/b/a Southwest Kia, Southwest Kia-NW, and Southwest Kia Mesquite, a corporation ("respondents"), have violated provisions of the Federal Trade Commission Act ("FTC Act"), the Truth in Lending Act ("TILA"), and its implementing Regulation Z, and the Consumer Leasing Act ("CLA"), and its implementing Regulation M, and it appearing to the Commission that this proceeding is in the public interest, alleges:

1. Respondent New World Auto Imports, Inc., d/b/a Southwest Kia ("New World Auto") is a Texas corporation with its principal office or place of business at 39650 Lyndon B. Johnson Freeway, Dallas, TX 75237. New World Auto offers automobiles for sale or lease to consumers.

2. Respondent New World Auto Imports of Rockwall, Inc. d/b/a Southwest Kia and Southwest Kia of Rockwall ("New World Auto Rockwall") is a Texas corporation with its principal office or place of business at 1790 East Interstate 30, Rockwall, TX 75087. New World Auto Rockwall offers automobiles for sale or lease to consumers.

3. Respondent Hampton Two Auto Corporation, d/b/a Southwest Kia, Southwest Kia-NW, and Southwest Kia Mesquite ("Hampton Two Auto") is a Texas corporation with its principal

office or place of business at 1919 Oates Drive, Mesquite, TX 75150. Hampton Two Auto offers automobiles for sale or lease to consumers.

4. The acts or practices of respondents 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.

5. Since at least April 2012, respondents have disseminated or caused to be disseminated advertisements to the public promoting the purchase and finance of automobiles. Since at least April 2013, respondents have disseminated or caused to be disseminated advertisements to the public promoting the leasing of automobiles.

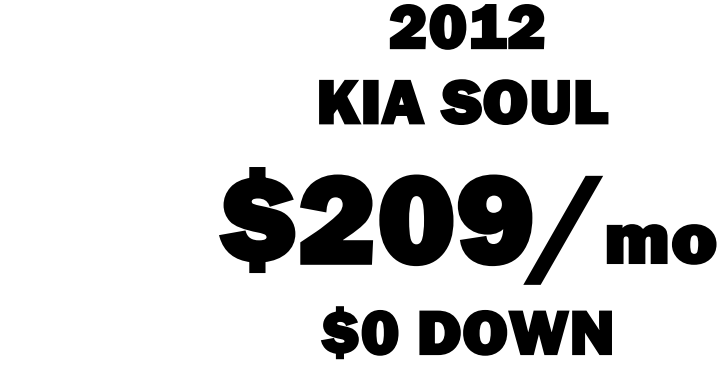
6. Respondents have disseminated or caused to be disseminated advertisements to the public promoting credit sales and other extensions of closed-end credit in consumer credit transactions, as the terms "advertisement," "closed-end credit," "credit sale," and "consumer credit" are defined in Section 226.2 of Regulation Z, 12 C.F.R. § 226.2, as amended.

7. Respondents have disseminated or caused to be disseminated advertisements promoting consumer leases for automobiles, as the terms "advertisement" and "consumer lease" are defined in Section 213.2 of Regulation M, 12 C.F.R. § 213.2, as amended.

8. One example of the credit advertisements that New World Auto has disseminated or caused to be disseminated has been posted on the website YouTube.com. A video copy of the advertisement is attached as Exhibit A, and a screenshot capture of the video is attached as Exhibit B. The advertisement contains the following statements and depictions:

a. A screen depicts a new Kia Soul, accompanied by prominent graphics representing:

Complaint



While these representations appear on screen, a voice over states, "$0 down delivers a brand new Kia Soul for only $209 a month" and "you can drive a brand new Kia Soul for $0 down, and only $209 a month."

Also, for part of the time while these representations appear on screen, a statement consisting of small white text set against a multi-color background appears on the bottom center of the screen, stating:

$16450 MSRP, $1050 discount, TT&L, due at signing 4.95 APR, $500 KMF origination support WAC 36 month balloon financing,12k miles/yr 20 cent per mile over limit

After the above small text statement no longer appears on the screen, a person on the screen states, "you can drive a brand new Kia Soul for $0 down and only $209 a month."

Based on the terms set forth in small text, consumers' monthly payments will amount to a fraction of the total cost of the vehicle. Consumers thus will owe a final balloon payment of many thousands of dollars for this transaction.

9. One example of the credit advertisements that New World Auto Rockwall has disseminated or caused to be disseminated has been posted on the website YouTube.com. A video copy of the advertisement is attached as Exhibit C, and a screenshot capture

of the video is attached as Exhibit D. The advertisement contains the following statements and depictions:

A screen depicts a new 2013 Kia Sorento, accompanied by prominent graphics representing:

2013 KIA
SORENTO

$239/mo

While this representation appears on screen, a person on the screen states, "Drive a brand new 2013 Kia Sorento for only $239 a month."

Also, while this representation appears on screen, a statement consisting of small white text set against a multi-color background appears on the bottom of the screen. This statement is virtually illegible, but appears to refer, among other things, to financing of 36 months, a balloon payment of over $13,000, and a downpayment of $2439.

Based on the terms set forth in small text, consumers' monthly payments will amount to a fraction of the total cost of the vehicle. Consumers thus will be obligated to pay a balloon payment of many thousands of dollars for this transaction.

10. Other examples of the credit advertisements that respondents have disseminated or caused to be disseminated have been posted on these companies' websites at southwestkia.com (ads for New World Auto, New World Auto Rockwall and Hampton Two Auto); Southwestkia-rockwall.com (ads for New World Auto Rockwall); and Southwest Kia-Mesquite.com (ads for Southwest Kia-Mesquite). The screenshot of an ad at www.Southwestkia.com attached as Exhibits E-F depicts a new Kia Optima and new Kia Sorento.

Exhibit E-1 depicts the landing page at www.Southwestkia.com, showing the Kia Optima with the following prominent offer.

Exhibit E-2 depicts the landing page at www.Southwestkia.com, showing the Kia Sorento with the following prominent offer.

2013 KIA OPTIMA $27 DOWN & $189 MONTH*

2013 KIA SORENTO $27 DOWN & $239 Mo*

Beneath the offers are blurred, miniscule fine print statements that are illegible. Links to additional information appear in small print at the bottom of the offers.

Exhibit F depicts the page that is shown when consumers click on the above links. The page shows the same vehicles and prominent offers:

2013 KIA OPTIMA $27 DOWN & $189 MONTH*

2013 KIA SORENTO $27 DOWN & $239 Mo*

At the bottom of this screen are two fine print statements, one for the Optima and another for the Sorento:

a. Optima fine print statement:

38 Month KMP retail balloon @ 189.00 per month w $27 down . . .
Balloon payment of $11,744.20 (52%). $289 Payment based on .70% APR
With KMF balloon program . . .

b. Sorento fine print statement:

38 Month KMF retail balloon @ 239.00 per month w $27.00 down. . .
Balloon payment of $12,187.50 (50%). $239 Payment based on 1.8% APR
with KMF balloon program.. .

Based on the terms set forth in fine print, consumers' monthly payments will amount to a fraction of the total cost of the vehicles. Consumers thus will be obligated to pay a balloon payment of many thousands of dollars for these transactions.

11. Examples of the lease advertisements that respondents have disseminated or caused to be disseminated have been posted on these companies' websites at Southwest Kia.com (ads for New World Auto, New World Auto Rockwall and Hampton Two Auto); Southwest Kia-Rockwall.com (ads for New World Auto Rockwall); and Southwest Kia-Mesquite.com (ads for Southwest Kia-Mesquite). The screenshot of an ad at www.Southwest kia.com attached as Exhibits G-H depicts a new Kia Soul, Kia Optima, and Kia Sorento.

Exhibit G depicts the landing page at www.Southwestkia.com, with the Kia Soul, Kia Optima, and Kia Sorento, with the following prominent offers:

DRIVE HOME TODAY IN A NEW KIA FOR ONLY $27 DOWN &

$169MO*	**$189MO***	**$239MO***
2013 SOUL	**2013 OPTIMA**	**2013 SORENTO**

Beneath the Sorento is a minuscule fine print statement that states:

*38 month KMF Lease. Please see dealer for full details.

No further information regarding the lease offer is available on this webpage, or by clicking on this webpage.

A drop-down menu at the top of the landing page is entitled, "Specials." If consumers open this drop-down menu, and if they then click on "Specials, New Vehicles," they are led to a page that again shows the Kia Soul, Kia Optima, and Kia Sorento. Exhibit H depicts the new Kia Soul, Kia Optima, and Kia Sorento, with the following prominent offers:

New Kia Specials in Dallas, Mesquite, and Rockwall, TX

DRIVE HOME TODAY IN A NEW KIA FOR ONLY $27 DOWN &

$169MO*	**$189MO***	**$239MO***
2014 SOUL	**2013 OPTIMA**	**2013 SORENTO**

At the bottom of this page, the following statement appears in miniscule fine print:

> 2013 Kia Optima . . . 36 Month KMF lease @ $189 a month with $27 down. . . Payment is based on $27 + first payment down. Payment excludes TTL and $595 acquisition fee . . .
>
> 2013 Kia Sorento . . . 36 Month KMF lease @ $239 a month with $27 down . . . Payment is based on $27 + first first payment down. Payment excludes TTL and $595 acquisition fee .. .
>
> 2013 Kia Soul . . . 36 Month KMF lease @ $169 a month with $27 down . . . Payment is based on $27 + first Payment down. Payment excludes TTL and $595 acquisition fee . . .

Thus, consumers will have to pay hundreds of dollars at lease signing.

FEDERAL TRADE COMMISSION ACT VIOLATIONS

Count I

Misrepresentation Regarding Monthly Payment Amount

12. Through the means described in Paragraphs 8 – 10, respondents have represented, expressly or by implication, that consumers can finance the purchase of vehicles for the prominently advertised terms, including the advertised monthly payment amount.

13. In truth and in fact, consumers cannot finance the purchase of vehicles for the prominently advertised terms, including the advertised monthly payment amount. The consumers' monthly payments for the vehicles increase dramatically at the end of the transaction, because they owe a balloon payment of many thousand dollars. Therefore, respondents' representations as alleged in Paragraph 12 were, and are, false and misleading.

14. Respondents' practices 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).

Count II

Misrepresentation of Amount Due at Lease Inception

15. Through the means described in Paragraph 11, respondents have represented, expressly or by implication, that consumers can pay $27 at lease inception to lease the advertised vehicles for the advertised monthly payment amount.

16. In truth and in fact, consumers cannot pay $27 at lease inception to lease the advertised vehicles for the advertised monthly payment amount. Consumers must also pay fees, including but not limited to an acquisition fee, which is $595, and the first month's payment, for a total of at least $700 for each vehicle. Therefore, the representation set forth in Paragraph 15 was, and is, false and misleading.

17. Respondents' practices 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).

VIOLATIONS OF THE TRUTH IN LENDING ACT AND REGULATION Z

18. Under Section 144 of the TILA and Section 226.24(d) of Regulation Z, as amended, advertisements promoting closed-end credit in consumer credit transactions are required to make certain disclosures ("TILA additional terms") if they state any of several terms, such as the monthly payment ("TILA triggering terms").

19. Respondents' advertisements promoting closed-end credit, including but not necessarily limited to those described in Paragraphs 8 - 10, are subject to the requirements of the TILA and Regulation Z.

Count III

Failure to Disclose or Disclose Clearly and Conspicuously Required Credit Information

20. Respondents' advertisements promoting closed-end credit, including, but not limited to, those described in Paragraphs 8 - 10, have included TILA triggering terms, but have failed to disclose, and/or failed to disclose clearly and conspicuously, TILA additional terms required by the TILA and Regulation Z, including one or more of the following:

a. The amount or percentage of the downpayment.

b. The terms of repayment, which reflect the repayment obligations over the full term of the loan, including any balloon payment.

c. The "annual percentage rate," using that term, and, if the rate may be increased after consummation, that fact.

21. Therefore, the practices set forth in Paragraph 20 of this Complaint have violated Section 144 of the TILA, 15 U.S.C. § 1664, and Section 226.24(d) of Regulation Z, 12 C.F.R. § 226.24(d), as amended.

VIOLATION OF THE CONSUMER LEASING ACT AND REGULATION M

22. Under Section 184 of the CLA and Section 213.7 of Regulation M, advertisements promoting consumer leases are required to make certain disclosures ("CLA additional terms") if they state any of several terms, such as the amount of any payment ("CLA triggering terms"). 15 U.S.C. § 1667c; 12 C.F.R. § 213.7.

23. Respondents' advertisements promoting consumer leases, including but not necessarily limited to those described in Paragraph 11, are subject to the requirements of the CLA and Regulation M.

Count IV

Failure to Disclose or to Disclose Clearly and Conspicuously Required Lease Information

24. Respondents' advertisements promoting consumer leases, including but not necessarily limited to those described in Paragraph 11, have included CLA triggering terms, but have failed to disclose or to disclose clearly and conspicuously CLA additional terms required by the CLA and Regulation M, including one or more of the following:

a. That the transaction advertised is a lease.

b. The total amount due prior to or at consummation or by delivery, if delivery occurs after consummation.

c. Whether or not a security deposit is required.

d. The number, amount, and timing of scheduled payments.

e. With respect to a lease in which the liability of the consumer at the end of the lease term is based on the anticipated residual value of the property, that an extra charge may be imposed at the end of the lease term.

25. Therefore, the practices set forth in Paragraph 24 of this Complaint have violated Section 184 of the CLA, 15 U.S.C. § 1667c, and Section 213.7 of Regulation M, 12 C.F.R. § 213.7.

THEREFORE, the Federal Trade Commission, this twentieth day of February, 2014, has issued this complaint against respondents.

By the Commission.

Complaint

Exhibit A

Exhibit A

Southwest Kia Video Advertisement

Complaint

Exhibit B

Exhibit B – Southwest Kia Video Advertisement – Screen Shot

Complaint

Exhibit C

Complaint

Exhibit D

Exhibit D – Southwest Kia Video Advertisement – Screen Shot

Complaint

Exhibit E

Exhibit E-1 – Southwest Kia Website Advertisement – Landing Page (Optima)

Exhibit E-2 – Southwest Kia Website Advertisement – Landing Page (Sorento)

Complaint

Exhibit F

Exhibit G

Exhibit G – Southwest Kia Website Advertisement
Landing Page (Soul, Optima, and Sorento)

Exhibit H

DECISION AND ORDER

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

Respondents 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 respondents have violated the FTC Act, the TILA, and the CLA, and that a complaint should issue stating its charges in that respect, and having thereupon accepted the executed consent agreement and placed such consent agreement on the public record for a period of thirty (30) days for the receipt and consideration of public comments, now in further conformity with the procedure prescribed in 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 New World Auto Imports, Inc., d/b/a Southwest Kia ("New World Auto Imports, Inc.") is a Texas corporation with its principal office or place of business at 39650 Lyndon B. Johnson Freeway, Dallas, TX 75236.

2. Respondent New World Auto Imports of Rockwall, Inc., d/b/a Southwest Kia and Southwest Kia of Rockwall ("New World Auto Imports of Rockwall,

Inc.") is a Texas corporation with its principal office or place of business at 190 East Interstate 30, Rockwall, TX 750887.

3. Respondent Hampton Two Auto Corporation, d/b/a Southwest Kia, Southwest Kia-NW, and Southwest Kia Mesquite (" Hampton Two Auto Corporation") is a Texas corporation with its principal office or place of business at 1919 Oates Drive, Mesquite, TX 75150.

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

A. Unless otherwise specified, "respondents" shall mean New World Auto Imports, Inc., New World Auto Imports of Rockwall, Inc., and Hampton Two Auto Corporation, and their successors and assigns.

B. "Advertisement" shall mean a commercial message in any medium that directly or indirectly promotes a consumer transaction.

C. "Clearly and conspicuously" shall mean as follows:

1. In a print advertisement, the disclosure shall be in a type size, location, and in print that contrasts with the background against which it appears, sufficient for an ordinary consumer to notice, read, and comprehend it.

2. In an electronic medium, an audio disclosure shall be delivered in a volume and cadence sufficient for an ordinary consumer to hear and comprehend it.

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

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

4. In a radio advertisement, the disclosure shall be delivered in a volume and cadence sufficient for an ordinary consumer to hear and comprehend it.

5. In all advertisements, the disclosure shall be in understandable language and syntax. Nothing contrary to, inconsistent with, or in mitigation of the disclosure shall be used in any advertisement or promotion.

D. "Consumer credit" shall mean credit offered or extended to a consumer primarily for personal, family, or household purposes, as set forth in Section 226.2(a)(12) of Regulation Z, 12 C.F.R. § 226.2(a)(12), as amended.

E. "Consumer lease" shall mean a contract in the form of a bailment or lease for the use of personal property by a natural person primarily for personal, family, or household purposes, for a period exceeding four months and for a total contractual obligation not exceeding the applicable threshold amount, whether or not the lessee has the option to purchase or otherwise become the owner of the property at the expiration of the lease, as set forth in Section 213.2 of Regulation M, 12 C.F.R. § 213.2, as amended.

F. "Lease inception" shall mean prior to or at consummation of the lease or by delivery, if delivery occurs after consummation.

G. "Material" shall mean likely to affect a person's choice of, or conduct regarding, goods or services.

H. "Motor vehicle" or "vehicle" shall mean:

1. Any self-propelled vehicle designed for transporting persons or property on a street, highway, or other road;

2. Recreational boats and marine equipment;

3. Motorcycles;

4. Motor homes, recreational vehicle trailers, and slide-in campers; and

5. Other vehicles that are titled and sold through dealers.

I.

IT IS HEREBY ORDERED that respondents and their officers, agents, representatives, and employees, directly or indirectly, in connection with any advertisement for the purchase, financing, or leasing of motor vehicles, shall not, in any manner, expressly or by implication:

A. Misrepresent the cost of:

1. Purchasing a vehicle with financing, including but not necessarily limited to, the amount or percentage of the down payment, the number of payments or period of repayment, the amount of any payment, and the repayment obligation over the full term of the loan, including any balloon payment; or

2. Leasing a vehicle, including but not necessarily limited to, the total amount due at lease inception, the down payment, amount down, acquisition fee, capitalized cost reduction, any other amount required to be paid at lease inception, and the amounts of all monthly or other periodic payments; or

B. Misrepresent any other material fact about the price, sale, financing, or leasing of any vehicle.

II.

IT IS FURTHER ORDERED that respondents and their officers, agents, representatives, and employees, directly or indirectly, in connection with any advertisement for any extension of consumer credit, shall not in any manner, expressly or by implication:

A. State the amount or percentage of any down payment, the number of payments or period of repayment, the amount of any payment, or the amount of any finance charge, without disclosing clearly and conspicuously all of the following terms:

1. The amount or percentage of the down payment;

2. The terms of repayment; and

3. The annual percentage rate, using the term "annual percentage rate" or the abbreviation "APR." If the annual percentage rate may be increased after consummation of the credit transaction, that fact must also be disclosed; or

B. State a rate of finance charge without stating the rate as an "annual percentage rate" or the abbreviation "APR," using that term; or

C. Fail to comply in any respect with Regulation Z, 12 C.F.R. Part 226, as amended, and the Truth in Lending Act, as amended, 15 U.S.C. §§ 1601-1667.

III.

IT IS FURTHER ORDERED that respondents and their officers, agents, representatives, and employees, directly or indirectly, in connection with any advertisement for any consumer lease, shall not, in any manner, expressly or by implication:

A. State the amount of any payment or that any or no initial payment is required at lease inception, without disclosing clearly and conspicuously the following terms:

1. That the transaction advertised is a lease;

2. The total amount due at lease signing or delivery;

3. Whether or not a security deposit is required;

4. The number, amounts, and timing of scheduled payments; and

5. That an extra charge may be imposed at the end of the lease term in a lease in which the liability of the consumer at the end of the lease term is based on the anticipated residual value of the vehicle; or

B. Fail to comply in any respect with Regulation M, 12 C.F.R. Part 213, as amended, and the Consumer Leasing Act, 15 U.S.C. §§ 1667-1667f, as amended.

IV.

IT IS FURTHER ORDERED that respondents shall, for five (5) years after the last date of dissemination of any representation covered by this order, maintain and upon request make available to the Federal Trade Commission for inspection and copying:

A. All advertisements and promotional materials containing the representation;

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

C. All evidence in its possession or control that contradicts, qualifies, or calls 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. Any documents reasonably necessary to demonstrate full compliance with each provision of this order, including but not limited to all documents obtained, created, generated, or that in any way relate to the requirements, provisions, or terms of this order, and all reports submitted to the Commission pursuant to this order.

V.

IT IS FURTHER ORDERED that respondents shall deliver a copy of this order to all current and future principals, officers, directors, and managers, and to all current and future employees, agents, and representatives having responsibilities with respect to the subject matter of this order, and shall secure from each such person a signed and dated statement acknowledging receipt of the order. Respondents shall deliver this order to current personnel within thirty (30) days after the date of service of this order, and to future personnel within thirty (30) days after the person assumes such position or responsibilities.

VI.

IT IS FURTHER ORDERED that respondents shall notify the Commission at least thirty (30) days prior to any change in the entities 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 entity's name or address. *Provided, however*, that, with respect to any proposed change in the corporation 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 emailed to Debrief@ftc.gov or sent by overnight courier (not 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: FTC v. Southwest Kia.

VII.

IT IS FURTHER ORDERED that respondents, 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, they shall submit additional true and accurate written reports.

VIII.

This order will terminate on February 20, 2034, 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;

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.

ANALYSIS OF CONSENT ORDER TO AID PUBLIC COMMENT

The Federal Trade Commission ("FTC") has accepted, subject to final approval, an agreement containing a consent order from New World Auto Imports, Inc., d/b/a Southwest Kia, New World Auto Imports of Rockwall, Inc., d/b/a Southwest Kia, and Southwest Kia of Rockwall, and Hampton Two Auto Corporation, d/b/a Southwest Kia, Southwest Kia-NW, and Southwest Kia Mesquite. 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 FTC 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 respondents are motor vehicle dealers. According to the FTC complaint, respondents have advertised that consumers can finance the purchase of vehicles for the advertised terms, including the advertised monthly payment amount. The complaint alleges that, in fact, the monthly payment increases dramatically at the end of the transaction, because consumers owe a balloon payment of many thousand dollars. The complaint alleges, therefore, that respondents' representations are false or misleading in violation of Section 5 of the FTC Act. The complaint also alleges that respondents have advertised that consumers can pay $27 at lease inception to lease the advertised vehicles for the advertised monthly payment amount. The complaints alleges that, in fact, consumers must also pay fees,

including but not limited to an acquisition fee, which is $595, and the first month's payment, for a total of at least $700 for each vehicle. The complaint alleges, therefore, that respondents' representations are false or misleading in violation of Section 5 of the FTC Act. In addition, the complaint alleges a violation of the Truth in Lending Act ("TILA") and Regulation Z for failing to disclose clearly and conspicuously certain costs and terms when advertising credit. The complaint also alleges a violation of the Consumer Leasing Act ("CLA") and Regulation M for failing to clearly and conspicuously disclose the costs and terms when advertising leases.

The proposed order is designed to prevent the respondents from engaging in similar deceptive practices in the future. Part I.A prohibits the respondents from misrepresenting the cost of: (1) purchasing a vehicle with financing, including but not necessarily limited to the amount or percentage of the downpayment, the number of payments or period of repayment, the amount of any payment, and the repayment obligation over the full term of the loan, including any balloon payment; or (2) leasing a vehicle, including but not limited to the total amount due at lease inception, the downpayment, amount down, acquisition fee, capitalized cost reduction, any other amount required to be paid at lease inception, and the amounts of all monthly or other periodic payments. Part I.B prohibits the respondents from misrepresenting any other material fact about the price, sale, financing, or leasing of any vehicle.

Part II of the proposed order addresses the TILA allegation. It requires that the respondents clearly and conspicuously make all of the disclosures required by TILA and Regulation Z if they state the amount or percentage of any downpayment, the number of payments or period of repayment, the amount of any payment, or the amount of any finance charge. In addition, Part II prohibits the respondents from stating a rate of finance charge without stating the rate as an "annual percentage rate" or the abbreviation "APR," using that term. Part II also prohibits any other violation of TILA and Regulation Z.

Part III of the proposed order addresses the CLA allegation. It requires that the respondents clearly and conspicuously make all of the disclosures required by CLA and Regulation M if they state

relevant trigger terms, including the monthly lease payment or the amount of any payment or that any or no initial payment is required at lease inception.

Part IV of the proposed order requires respondents to keep copies of relevant advertisements and materials substantiating claims made in the advertisements. Part V requires that respondents provide copies of the order to certain of their personnel. Part VI requires notification to the Commission regarding changes in corporate structure that might affect compliance obligations under the order. Part VII requires the respondents to file compliance reports with the Commission. Finally, Part VIII 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 complaint or proposed order, or to modify in any way the proposed order's terms.

Complaint

IN THE MATTER OF

INFINITI OF CLARENDON HILLS, INC.

CONSENT ORDER, ETC. IN REGARD TO ALLEGED VIOLATIONS OF SECTION 5 OF THE FEDERAL TRADE COMMISSION ACT, THE CONSUMER LEASING ACT AND REGULATION M

Docket No. C-4438; File No. 132 3188
Complaint, February 20, 2014 – Decision, February 20, 2014

This consent order addresses Infiniti of Clarendon Hills, Inc.'s advertisements for motor vehicles for sale and lease and failure to disclose the costs and terms of certain leases offered, despite the respondent's use of certain triggering terms in the advertisements. The complaint alleges that respondent has advertised that consumers can pay $0 up-front to lease a car for a specific monthly payment amount, but the advertised payment amounts exclude substantial fees, including but not limited to the first month's payment and an acquisition fee. The consent order requires that the respondent clearly and conspicuously make all of the disclosures required by the Consumer Leasing Act and Regulation M if it states relevant triggering terms, including the monthly lease payment. The order also prohibits the respondent from misrepresenting any material fact about the price, sale, financing, or leasing of any vehicle.

Participants

For the *Commission*: *Sana Chriss, Mark Glassman, John Jacobs, Carole Reynolds, Jason Schall, Christina Tusan*, and *Katherine Worthman.*

For the *Respondent*: *Horst Korallus, President, pro se.*

COMPLAINT

The Federal Trade Commission, having reason to believe that Infiniti of Clarendon Hills, Inc., a corporation ("respondent"), has violated provisions of the Federal Trade Commission Act ("FTC Act"), the Consumer Leasing Act ("CLA"), and its implementing Regulation M, and it appearing to the Commission that this proceeding is in the public interest, alleges:

1. Respondent is an Illinois corporation with its principal office or place of business at 415 East Ogden Avenue, Clarendon

Hills, Illinois 60514. Respondent offers automobiles for sale or lease to consumers.

2. The acts or practices of respondent 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. Since at least May 2013, respondent has disseminated or caused to be disseminated advertisements to the public promoting the purchase, finance, and leasing of automobiles.

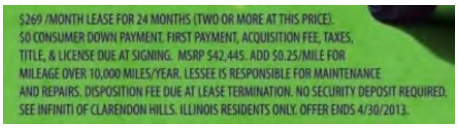
4. Respondent has disseminated or caused to be disseminated advertisements promoting consumer leases for automobiles, as the terms "advertisement" and "consumer lease" are defined in Section 213.2 of Regulation M, 12 C.F.R. §213.2, as amended.

5. Such advertisements have been posted on the website YouTube.com. A video copy of one such YouTube.com advertisement is attached as Exhibit A, and a screenshot capture of the video is attached as Exhibit B. The advertisement contains the following statements and depictions:

A picture of a vehicle appears below these prominent statements. While the statements and vehicle appear, a voice-over states:

> Lease a 2013 Infiniti G37x Sedan for just 269 a month with no money down.

Also, while the statements and vehicle appear, the following statement appears in small text on the bottom left corner of the screen:

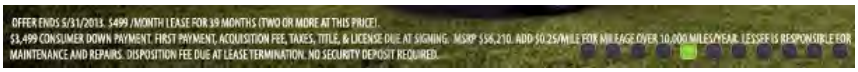


Toward the middle of this statement, the following text appears: "First payment, acquisition fee, taxes, title, & licensing due at signing."

6. Respondent also has placed advertisements representing that vehicles are available for "no money down" and specific monthly lease payment amounts on its website, www.infinitiofclarendonhills.com. Screenshot captures of several such advertisements are attached as Exhibit C.

For example, the following statement appears in one advertisement included in Exhibit C:

At the bottom of the advertisements, small text states that additional money is due at lease signing, including the first month's payment and an acquisition fee. In numerous instances, respondent's advertisements also state that a several-thousand dollar downpayment is due at lease signing. For example, the following statement, reflecting a "$3,499 Consumer Down Payment," appears in one advertisement included in Exhibit C:



Thus, consumers must pay substantially more than the "NO MONEY DOWN" that is prominently stated near the top of the advertisement.

FEDERAL TRADE COMMISSION ACT VIOLATIONS

Count I

Misrepresentation of Amount Due at Lease Inception

7. Through the means described in Paragraphs 5 and 6, respondent has represented, expressly or by implication, that consumers can pay $0 at lease inception to lease the advertised vehicle for the advertised monthly payment amount.

8. In truth and in fact, consumers cannot pay $0 at lease inception to lease the advertised vehicle for the advertised monthly payment amount. Consumers must also make downpayments and/or pay fees, including but not limited to the first month's payment and an acquisition fee, which range from several hundred to several thousand dollars. Therefore, the representation set forth in Paragraph 7 was, and is, false or misleading.

9. Respondent's practices 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).

VIOLATION OF THE CONSUMER LEASING ACT AND REGULATION M

10. Under Section 184 of the CLA and Section 213.7 of Regulation M, advertisements promoting consumer leases are required to make certain disclosures ("additional terms") if they state any of several terms, such as the amount of any payment ("CLA triggering terms"). 15 U.S.C. § 1667c; 12 C.F.R. § 213.7.

11. Respondent's advertisements promoting consumer leases, including but not necessarily limited to those described in Paragraphs 5 and 6, are subject to the requirements of the CLA and Regulation M.

Count II

Failure to Disclose or to Disclose Clearly and Conspicuously Required Lease Information

12. Respondent's advertisements promoting consumer leases, including but not necessarily limited to those described in Paragraphs 5 and 6, have included CLA triggering terms, but have failed to disclose or to disclose clearly and conspicuously additional terms required by the CLA and Regulation M, including one or more of the following:

a. That the transaction advertised is a lease.

b. The total amount due prior to or at consummation or by delivery, if delivery occurs after consummation.

c. Whether or not a security deposit is required.

d. The number, amount, and timing of scheduled payments.

e. With respect to a lease in which the liability of the consumer at the end of the lease term is based on the anticipated residual value of the property, that an extra charge may be imposed at the end of the lease term.

13. Therefore, the practices set forth in Paragraph 12 of this Complaint have violated Section 184 of the CLA, 15 U.S.C. § 1667c, and Section 213.7 of Regulation M, 12 C.F.R. § 213.7.

THEREFORE, the Federal Trade Commission, this twentieth day of February, 2014, has issued this complaint against respondent.

By the Commission.

Complaint

Exhibit A

Exhibit A

Video Advertisement for Infiniti of Clarendon Hills, Inc.

Exhibit B

Complaint

Exhibit C


2013 INFINITI
FX37
$439 /MO.
NO MONEY DOWN
39 MONTHS
INFINITI
LIMITED
ENGAGEMENT
SPRING EVENT


2013 INFINITI
JX35
$439 /MO.
NO MONEY DOWN
39 MONTHS
INFINITI
LIMITED
ENGAGEMENT
SPRING EVENT


2013 INFINITI
G37X
$319 /MO.
NO MONEY DOWN
24 MONTHS
INFINITI
LIMITED
ENGAGEMENT
SPRING EVENT

DECISION AND ORDER

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

Respondent and counsel for the Commission having thereafter executed an agreement containing a 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 respondent has violated the FTC Act, the CLA, and its implementing Regulation M, and that a complaint should issue stating its charges in that respect, and having thereupon accepted the executed consent agreement and placed such consent agreement on the public record for a period of thirty (30) days for the receipt and consideration of public comments, now in further conformity with the procedure prescribed in 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, Infiniti of Clarendon Hills, Inc., is an Illinois corporation with its principal office or place of business at 415 East Ogden Avenue, Clarendon Hills, Illinois 60514.

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

A. Unless otherwise specified, "respondent" shall mean Infiniti of Clarendon Hills, Inc., and its successors and assigns.

B. "Advertisement" shall mean a commercial message in any medium that directly or indirectly promotes a consumer transaction.

C. "Clearly and conspicuously" shall mean as follows:

1. In a print advertisement, the disclosure shall be in a type size, location, and in print that contrasts with the background against which it appears, sufficient for an ordinary consumer to notice, read, and comprehend it.

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

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

4. In a radio advertisement, the disclosure shall be delivered in a volume and cadence sufficient for an ordinary consumer to hear and comprehend it.

5. In all advertisements, the disclosure shall be in understandable language and syntax. Nothing contrary to, inconsistent with, or in mitigation of the disclosure shall be used in any advertisement or promotion.

D. "Consumer lease" shall mean a contract in the form of a bailment or lease for the use of personal property by a natural person primarily for personal, family, or household purposes, for a period exceeding four months and for a total contractual obligation not exceeding the applicable threshold amount, whether or not the lessee has the option to purchase or otherwise become the owner of the property at the expiration of the lease, as set forth in Section 213.2 of Regulation M, 12 C.F.R. § 213.2, as amended.

E. "Lease inception" shall mean prior to or at consummation of the lease or by delivery, if delivery occurs after consummation.

F. "Material" shall mean likely to affect a person's choice of, or conduct regarding, goods or services.

G. "Motor vehicle" or "vehicle" shall mean:

1. Any self-propelled vehicle designed for transporting persons or property on a street, highway, or other road;

2. Recreational boats and marine equipment;

3. Motorcycles;

4. Motor homes, recreational vehicle trailers, and slide-in campers; and

5. Other vehicles that are titled and sold through dealers.

I.

IT IS HEREBY ORDERED that respondent and its officers, agents, representatives, and employees, directly or indirectly, in connection with any advertisement for the purchase, financing, or leasing of motor vehicles, shall not, in any manner, expressly or by implication:

A. Misrepresent the cost of:

1. Leasing a vehicle, including but not necessarily limited to, the total amount due at lease inception, the down payment, amount down, acquisition fee, capitalized cost reduction, any other amount required to be paid at lease inception, and the amounts of all monthly or other periodic payments; or

2. Purchasing a vehicle with financing, including but not necessarily limited to, the amount or percentage of the down payment, the number of payments or period of repayment, the amount of any payment, and the repayment obligation over the full term of the loan, including any balloon payment; or

B. Misrepresent any other material fact about the price, sale, financing, or leasing of any vehicle.

II.

IT IS FURTHER ORDERED that respondent and its officers, agents, representatives, and employees, directly or indirectly, in connection with any advertisement for any consumer lease, shall not, in any manner, expressly or by implication:

A. State the amount of any payment or that any or no initial payment is required at lease inception without

disclosing clearly and conspicuously the following terms:

1. That the transaction advertised is a lease;

2. The total amount due at lease signing or delivery;

3. Whether or not a security deposit is required;

4. The number, amounts, and timing of scheduled payments; and

5. That an extra charge may be imposed at the end of the lease term in a lease in which the liability of the consumer at the end of the lease term is based on the anticipated residual value of the vehicle; or

B. Fail to comply in any respect with Regulation M, 12 C.F.R. Part 213, as amended, and the Consumer Leasing Act, 15 U.S.C. §§ 1667-1667f, as amended.

III.

IT IS FURTHER ORDERED that respondent 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;

C. All evidence in its possession or control that contradicts, qualifies, or calls 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. Any documents reasonably necessary to demonstrate full compliance with each provision of this order, including but not limited to all documents obtained, created, generated, or that in any way relate to the requirements, provisions, or terms of this order, and all reports submitted to the Commission pursuant to this order.

IV.

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

V.

IT IS FURTHER ORDERED that respondent shall notify the Commission at least thirty (30) days prior to any change in the corporation(s) that may affect compliance obligations arising under this order, including but not limited to a dissolution, assignment, sale, merger, or other action that would result in the emergence of a successor corporation; the creation or dissolution of a subsidiary, parent, or affiliate that engages in any acts or practices subject to this order; the proposed filing of a bankruptcy petition; or a change in the corporate name or address. *Provided, however*, that, with respect to any proposed change in the corporation about which respondent learns less than thirty (30) days prior to the date such action is to take place, respondent shall notify the Commission as soon as is practicable after obtaining such knowledge. 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 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: FTC v. Infiniti of Clarendon Hills, Inc.

VI.

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 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.

VII.

This order will terminate on February 20, 2034, 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;

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 ("FTC") has accepted, subject to final approval, an agreement containing a consent order from Infiniti of Clarendon Hills, 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 FTC 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 respondent is a motor vehicle dealer. According to the FTC complaint, respondent has advertised that consumers can pay $0 up-front to lease a car for a specific monthly payment amount. The complaint alleges that, in fact, the advertised payment amounts exclude substantial fees, including but not limited to the first month's payment and an acquisition fee. The complaint alleges therefore that the respondent's representations are false or misleading in violation of Section 5 of the FTC Act. In addition, the complaint alleges a violation of the Consumer Leasing Act and Regulation M for failing to disclose the costs and terms of certain leases offered, despite the respondent's use of certain triggering terms in the advertisements.

The proposed order is designed to prevent the respondent from engaging in similar deceptive practices in the future. Part I.A prohibits the respondent from misrepresenting the cost of: (1) leasing a vehicle, including but not limited to the total amount due at lease inception, the downpayment, amount down, acquisition fee, capitalized cost reduction, any other amount required to be paid at lease inception, and the amounts of all monthly or other periodic payments; or (2) purchasing a vehicle with financing, including but not necessarily limited to the amount or percentage of the downpayment, the number of payments or period of repayment, the amount of any payment, and the repayment obligation over the full term of the loan, including any balloon payment. Part I.B prohibits the respondent from misrepresenting any other material fact about the price, sale, financing, or leasing of any vehicle.

Analysis to Aid Public Comment

Part II of the proposed order addresses the CLA allegation. It requires that the respondent clearly and conspicuously make all of the disclosures required by CLA and Regulation M if it states relevant triggering terms, including the monthly lease payment. In addition, Part II prohibits any other violation of CLA and Regulation M.

Part III of the proposed order requires respondent to keep copies of relevant advertisements and materials substantiating claims made in the advertisements. Part IV requires that respondent provide copies of the order to certain of its personnel. Part V requires notification to the Commission regarding changes in corporate structure that might affect compliance obligations under the order. Part VI requires the respondent to file compliance reports with the Commission. Finally, Part VII 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 complaint or proposed order, or to modify in any way the proposed order's terms.

Complaint

IN THE MATTER OF

NIELSEN HOLDINGS N.V.
AND
ARBITRON INC.

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

Docket No. C-4439; File No. 131 0058
Complaint, February 24, 2014 – Decision, February 24, 2014

This consent order addresses the $1.26 billion acquisition by Nielsen Holdings N.V. of certain assets of Arbitron Inc. The complaint alleges that the acquisition would violate Section 7 of the Clayton Act and Section 5 of the Federal Trade Commission Act by lessening competition in the market for national syndicated cross-platform audience measurement services. The consent order requires the divestiture of assets related to Arbitron's cross-platform audience measurement business, including data from its representative panel.

Participants

For the *Commission*: *Jordan S. Andrew, Erin L. Craig, William Huynh, Stephen A. Mohr, Brian O'Dea, Catherine M. Sanchez,* and *Aylin M. Skroejer.*

For the *Respondents*: *Aidan Synnott, Paul, Weiss, Rifkind, Wharton & Garrison, LLP;* and *Roxann Henry, Morrison and Foerster.*

COMPLAINT

Pursuant to the Clayton Act and the Federal Trade Commission Act ("FTC Act"), and its authority thereunder, the Federal Trade Commission ("Commission"), having reason to believe that Respondent Nielsen Holdings N.V., ("Nielsen"), a corporation subject to the jurisdiction of the Commission, has agreed to acquire Respondent Arbitron Inc. ("Arbitron"), a corporation subject to the jurisdiction of the Commission, in violation of Section 5 of the FTC Act, as amended, 15 U.S.C. § 45, and that such acquisition, if consummated, would violate Section 7 of the Clayton Act, as amended, 15 U.S.C. § 18, and

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

I. RESPONDENTS

1. Respondent Nielsen is a corporation organized, existing, and doing business under and by virtue of the laws of the Netherlands, with its office and principal place of business located at 85 Broad Street, New York, New York 10004.

2. Respondent Nielsen is engaged in, among other things, the sale of various audience measurement services, including television and cross-platform, to content providers, advertising agencies, and advertisers.

3. Respondent Arbitron 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 9705 Patuxent Woods Drive, Columbia, Maryland, 21046-1572.

4. Respondent Arbitron is engaged in, among other things, the sale of various audience measurement services, including radio and cross-platform, to content providers, advertising agencies, and advertisers.

5. Respondents are, and at all times relevant herein have been, engaged in commerce, as "commerce" is defined in Section 1 of the Clayton Act, as amended, 15 U.S.C. § 12, and are corporations whose businesses are in or affect commerce, as "commerce" is defined in Section 4 of the FTC Act, as amended, 15 U.S.C. § 44.

II. THE PROPOSED ACQUISITION

6. Pursuant to an Agreement and Plan of Merger dated December 17, 2012 (the "Agreement"), Nielsen proposes to acquire Arbitron for approximately $1.26 billion (the "Acquisition").

III. RELEVANT MARKET

7. For the purposes of this Complaint, the relevant line of commerce in which to analyze the effects of the Acquisition is the market for national syndicated cross-platform audience measurement services.

8. For the purposes of this Complaint, the relevant geographic market in which to analyze the effects of the Acquisition is the United States.

IV. STRUCTURE OF THE MARKET

9. Cross-platform audience measurement services report the overall unduplicated audience size (i.e., reach) and frequency of exposure for programming content and advertisements across multiple media platforms, with corresponding individual audience demographic data. Advertisers use audience measurement services to determine which programming content is most likely to deliver audiences within their desired category of potential customers and use such data to make advertising campaign placement and media buying decisions. Similarly, media companies use audience measurement services to assess the value of their own advertising inventory and to inform programming decisions.

10. A national syndicated cross-platform audience measurement service is one that provides all subscribers with the same universe of data, showing the relative national audiences for various programming and advertising. Although there is no commercially available national syndicated cross-platform audience measurement service today, demand for such a service by advertisers and media companies is increasing. Nielsen and Arbitron (in partnership with comScore) have been developing their own national syndicated cross-platform audience measurement services although efforts to date have produced only custom projects or customer-sponsored beta-tests. Nielsen and Arbitron are the best-positioned firms to develop (or partner with others to develop) a national syndicated cross-platform audience measurement service because only Nielsen and Arbitron maintain large, representative panels capable of measuring television with the required individual-level demographics, the data source

preferred by advertisers and media companies. Additionally, both Nielsen and Arbitron have important existing audience measurement technology assets. This makes them better positioned to develop a national syndicated cross-platform audience measurement service than companies that lack large representative panels and existing audience measurement technology assets of the quality and character of Nielsen's and Arbitron's.

V. ENTRY CONDITIONS

11. Sufficient and timely entry or expansion into the market for national syndicated cross-platform audience measurement services is unlikely to deter or counteract any anticompetitive effects created by the Acquisition. In order to compete most effectively in the provision of cross-platform audience measurement services, a firm must have access to television audience data with individual demographics. Entry would not take place in a timely manner because of the significant expense and time required to recruit a representative panel of individuals and develop the necessary technology to generate the data needed to provide the television audience measurement component of a national syndicated cross-platform audience measurement service.

VI. EFFECTS OF THE ACQUISITION

12. The effects of the Acquisition, if consummated, may be to substantially lessen competition and tend to create a monopoly in the market for national syndicated cross-platform audience measurement services 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 among other things:

a. by eliminating future competition between Nielsen and Arbitron for the provision of national syndicated cross-platform audience measurement services;

b. by increasing the likelihood that Respondent Nielsen would unilaterally exercise market power in the market for national syndicated cross-platform audience measurement services;

c. by increasing the likelihood that U.S. customers would be forced to pay higher prices for national syndicated cross-platform audience measurement services.

VII. VIOLATIONS CHARGED

13. The Agreement described in Paragraph 6 constitutes a violation of Section 5 of the FTC Act, as amended, 15 U.S.C. § 45.

14. The Acquisition described in Paragraph 6, if consummated, would constitute a violation of Section 7 of the Clayton Act, as amended, 15 U.S.C. § 18, and Section 5 of the FTC Act, as amended, 15 U.S.C. § 45.

WHEREFORE, THE PREMISES CONSIDERED, the Federal Trade Commission on this twenty-fourth day of February, 2014, issues its Complaint against said Respondent.

By the Commission, Commissioner Ohlhausen recused, and Commissioner Wright dissenting.

DECISION AND ORDER
[Public Record Version]

The Federal Trade Commission ("Commission"), having initiated an investigation of the proposed acquisition by Respondent Nielsen Holdings N.V. ("Nielsen") of the outstanding voting shares of Respondent Arbitron Inc. ("Arbitron"), and Respondents having been furnished thereafter with a copy of a draft of Complaint that the Bureau of Competition proposed to present to the Commission for consideration and which, if issued by the Commission, would charge Respondents with violations of Section 7 of the Clayton Act, as amended, 15 U.S.C. § 18, and Section 5 of the Federal Trade Commission Act, as amended, 15 U.S.C. § 45; and

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

The Commission having thereafter considered the matter and having determined that it had reason to believe that Respondents 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 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 Nielsen is a corporation organized, existing and doing business under and by virtue of the laws of the Netherlands, with its office and principal place of business located at 85 Broad Street, New York, New York 10004.

2. Respondent Arbitron 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 9705 Patuxent Woods Drive, Columbia, Maryland 21046-1572.

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

ORDER

I.

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

A. "Nielsen" means Nielsen Holdings N.V., its directors, officers, employees, agents, representatives, successors, and assigns; and its joint ventures, subsidiaries, divisions, groups and affiliates in each case controlled by Nielsen Holdings N.V., and the respective directors, officers, employees, agents, representatives, successors, and assigns of each. After the Acquisition, the term "Nielsen" shall include Arbitron.

B. "Arbitron" means Arbitron Inc., its directors, officers, employees, agents, representatives, successors, and assigns; and its joint ventures, subsidiaries, divisions, groups and affiliates in each case controlled by Arbitron Inc., and the respective directors, officers, employees, agents, representatives, successors, and assigns of each.

C. "Acquirer" means a Person approved by the Commission to acquire particular assets or rights that Respondents are required, pursuant to this Order, to assign, grant, license, divest, transfer, deliver, or otherwise convey.

D. "Acquisition" means Nielsen's acquisition of Arbitron pursuant to an Agreement and Plan of Merger executed December 17, 2012.

E. "Arbitron Calibration Panel" means the subset of individuals recruited from the Arbitron PPM Panel that provides single source reach levels and overlaps for television, tablets, smartphones, personal computers, and radio (or any other device that performs similar functions), by asking the panelists in addition to their Arbitron PPM Panel responsibilities to download

software on their home personal computer, tablets, and smartphones (or any other device that performs similar functions); "Arbitron Calibration Panel" includes the panel of people as expanded pursuant to Paragraph IV. of this Order.

F. "Arbitron PPM Panel" means the panel of individuals in the U.S. who have been recruited by Arbitron to carry Arbitron's Portable People Meter® ("PPM") device to measure their exposure to encoded audio signals.

G. "Balance of Nation Panel" means a group of individuals recruited to supplement the Arbitron PPM Panel, such that when combined with the Arbitron PPM Panel, national audience projections are possible or enhanced.

H. "Calibration Panel Data" means the data from the Arbitron Calibration Panel or from the expansion of the Arbitron Calibration Panel.

I. "Commission" means Federal Trade Commission.

J. "comScore" means comScore, Inc., a corporation located at 11950 Democracy Drive, Suite 600, Reston, Virginia 20190.

K. "Confidential Information" means information not in the public domain, including, but not limited to, information regarding methodology, encoding share, customer identity, or customer contract details. "Confidential Information" shall not include any information that: (1) is publicly available when provided, disclosed, or otherwise made available; or (2) becomes publicly available after it is provided, disclosed, or otherwise made available by means other than a violation of this Order or Respondents' breach of a confidentiality or non-disclosure agreement.

L. "Cross-Platform Services" means any U.S. service that measures viewing of content, for the purpose of

determining the size and composition of the audience of such programming and/or advertising across multiple distribution platforms including, but not limited to, television, online, mobile, radio and tablets (or any other device that performs similar functions), but in all events measuring at least television and online, and related insights and analytics.

M. "Direct Cost" means cost not to exceed the cost of labor, material, equipment, travel, and other expenditures to the extent the costs are directly incurred to provide the assistance or services required by this Order and that would not otherwise be incurred by Respondents. "Direct Cost" to the Acquirer for its use of any of Respondents' employees' labor shall not exceed the then-current average wage rate for such employee, including benefits.

N. "Encoding Equipment" means all equipment relating to the encoding of audio signals for detection by PPMs, including updates thereto.

O. "Encoding Technology" means all intellectual property, rights, know-how, licenses, and agreement related to the encoding of audio signals for detection by PPMs, including updates thereto.

P. "ESPN" means the multi-platform media company, ESPN, Inc., a subsidiary of The Walt Disney Company, which focuses on sports-related programming including live and recorded event telecasts, sports talk shows, and other original programming, that distributes its content on multiple platforms including cable and satellite television, online, mobile, and radio.

Q. "Key Arbitron Employees" means the employees listed on Confidential Exhibit A of this Order.

R. "Link Meter Technology" means (1) all software (source code and object code) intended for use in Project Blueprint that enables comScore to

synchronize its media measurement data with the panelists in the Arbitron Calibration Panel; and (2) all other rights and interests arising out of, in connection with, or in relation to such software, including, but not limited to, all rights to causes of action and remedies related thereto.

S. "MRC" means the Media Rating Council, which accredits audience measurement services.

T. "Monitor" means the monitor appointed pursuant to Paragraph VI. of this Order.

U. "Panelist Characteristics" means the following information, provided on a non-personally identifiable basis, for a panelist: (1) age; (2) gender; (3) race/ethnicity; (4) presence of children in the household; (5) size of household; (6) time zone; (7) DMA and metro market code; and (8) five-digit zip code.

V. "PPM Equipment" means all equipment related to the operation of, and collection of data from, PPMs, including updates thereto.

W. "PPM Technology" means all intellectual property rights, know-how, licenses, and agreements related to the operation of, and collection of data from, PPMs, including updates thereto.

X. "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.

Y. "Project Blueprint" means the collaboration between Arbitron and comScore for ESPN as contemplated by (1) the Multi-Platform Research Agreement with ESPN between Arbitron, comScore, and ESPN, executed August 8, 2012; and (2) the Collaboration

Agreement between Arbitron and comScore, effective August 1, 2012.

Z. "Prospective Acquirer" means the Person that Respondents (or the Divestiture Trustee, if appointed) intend to submit or have submitted to the Commission for the Commission's prior approval pursuant to Paragraph II.A. (or Paragraph VII., if applicable) of this Order.

AA. "Radio Data" means all data from the Arbitron PPM Panel that reflect Panelist Characteristics, dictionary of reported data fields, and records of encoded radio content detected by the panelists' PPMs as reported consistent with the practices Arbitron used for reporting data for Project Blueprint.

BB. "Remedial Agreement" means the agreement between Respondents and the Acquirer that includes the provisions required by this Order and that has been approved by the Commission, including all amendments, exhibits, attachments, agreements, and schedules thereto, related to the relevant assets or rights to be offered to be assigned, granted, licensed, divested, transferred, delivered, or otherwise conveyed.

CC. "Television Data" means all data from the Arbitron PPM Panel that reflect Panelist Characteristics, dictionary of reported data fields, and records of encoded video content detected by the panelists' PPMs as reported consistent with the practices Arbitron used for reporting data for Project Blueprint, and additionally including time shifted viewing data (which shall include video on demand) identified as such, which additional time shifted viewing data shall be provided to the Acquirer at Direct Cost.

II.

IT IS FURTHER ORDERED that:

A. No later than three (3) months after Respondents execute the Agreement Containing Consent Order, Respondents shall divest the Link Meter Technology absolutely and in good faith and 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 (including execution of a Remedial Agreement) and shall, pursuant to a Remedial Agreement, license to that Acquirer, on a non-exclusive basis, all know-how related to the Link Meter Technology;

1. Respondents shall obtain, and the Acquirer shall grant to Respondents, a royalty-free right to use the Link Meter Technology, for purposes of complying with the requirements of this Order;

2. *Provided, however*, that both the Acquirer and Respondents shall have unrestricted rights to use the know-how relating to the Link Meter Technology and each shall covenant not to bring litigation against the other to enjoin or seek recompense for the use of the Link Meter Technology or software designed to perform similar functions.

B. No later than the date Respondents divest the Link Meter Technology to the Acquirer pursuant to Paragraph II.A., above, Respondents shall, pursuant to a Remedial Agreement, for a period no less than eight (8) years from the date of the divestiture required by Paragraph II.A., above:

1. License to the Acquirer, on a royalty-free basis, for use in developing and providing a calibration panel

and/or Balance of Nation Panel for the provision of Cross-Platform Services:

a. the Encoding Technology; and

b. the PPM Technology; and

2. Provide, at Direct Cost to the Acquirer, such technical assistance (including know-how relating to the Link Meter Technology), Encoding Equipment, and/or PPM Equipment, as requested by the Acquirer to enable the Acquirer to:

a. provide Cross-Platform Services, including to encode additional content and/or advertising and developing and managing any panel using the PPM Technology for Cross-Platform Services provided by the Acquirer to its customers, and

b. obtain accreditation by the MRC in connection with the provision of Cross-Platform Services.

C. No later than the date Respondents divest the Link Meter Technology to the Acquirer pursuant to Paragraph II.A., above, Respondents shall, pursuant to a Remedial Agreement and consistent with the requirements of Paragraph IV.B.1., for a period of no less than eight (8) years from the date of the divestiture required by Paragraph II.A., above, provide to the Acquirer for purposes of developing and providing Cross-Platform Services to its customers, and grant to the Acquirer a perpetual, royalty-free license (for data delivered during the term of the Remedial Agreement) for the use of:

1. Television Data;

2. Radio Data; and

3. Calibration Panel Data;

Respondents shall provide the Television Data, Radio Data, and Calibration Panel Data (except for five- digit zip code data) to the Acquirer on a respondent-level basis and an aggregated basis by specified customers' stations, networks, websites, and/or other media distribution platforms, as identified by the Acquirer, in such form, at such frequency as reasonably requested by the Acquirer, but in no event less frequent than the frequency Arbitron used for reporting data for Project Blueprint, and according to such metrics as reasonably requested by the Acquirer; *provided, however,* that, with respect to five-digit zip code data, Respondents shall provide the total number of individuals by zip code as reasonably requested by the Acquirer (but at least monthly); and if Respondents make any zip code data, or any segment reporting derived from zip codes, available to its customers of national Cross-Platform Services, then Respondents shall provide five-digit zip code data to the Acquirer sufficient to provide similar information to Acquirer's customers, as reasonably requested by the Acquirer; p*rovided further, however*, that Respondents shall have and retain full and exclusive right, title, and ownership interest in and to any information provided by Respondents to the Acquirer except that the Acquirer shall have the right to use the information to develop and provide Cross-Platform Services to its customers pursuant to the Remedial Agreement; p*rovided further, however*, that, with respect to Radio Data, the Acquirer may not disclose Radio Data to any customer of the Acquirer who is not also a subscriber to Arbitron radio ratings.

D. Respondents shall:

1. Have no authority to, and shall not exercise or attempt to exercise any authority to, market or price the Cross-Platform Services that the Acquirer sells to the Acquirer's customers,

2. Not be entitled to any revenue, or portion thereof, that the Acquirer collects from its customers, or attempt to collect any revenue, or portion thereof,

from the Acquirer attributable to revenue that the Acquirer collects from its customers; and

3. Not make any change to the PPM Technology or Encoding Technology that has the effect of eliminating or impairing the ability of the PPM to collect records of encoded video content.

E. The Remedial Agreement shall be incorporated by reference into this Order and made a part hereof. Respondents shall comply with all terms of the Remedial Agreement, and any breach by Respondents of any term of the Remedial Agreement shall constitute a failure to comply with this Order. If any term of the Remedial Agreement varies from the terms of this Order ("Order Term"), then to the extent that Respondents cannot fully comply with both terms, the Order Term shall determine Respondents' obligations under this Order. No Remedial Agreement shall limit or contradict, or be construed to limit or contradict, the terms of this Order, it being understood that nothing in this Order shall be construed to reduce any rights or benefits of any Acquirer or to reduce any obligations of Respondents under such agreement.

F. The purpose of this Paragraph II is to ensure that the Acquirer can offer Cross-Platform Services, with the goal of providing a national syndicated cross-platform audience measurement service, and to remedy the lessening of competition resulting from the Acquisition as alleged in the Commission's complaint.

III.

IT IS FURTHERED ORDERED that Respondents shall:

A. No later than ten (10) days after a request from a Prospective Acquirer, provide the Prospective Acquirer with the following information for each Key Arbitron Employee, as and to the extent permitted by law:

1. Name, job title or position, date of hire, and effective service date;

2. A specific description of the employee's responsibilities;

3. The base salary or current wages;

4. The most recent bonus paid, aggregate annual compensation for Respondents' last fiscal year, and current target or guaranteed bonus; if any;

5. Employment status (i.e. active or on leave or disability, full-time or part-time);

6. Any other material terms and conditions of employment in regard to such employee that are not otherwise generally available to similarly situated employees; and

7. At the Prospective Acquirer's option, copies of all employee benefit plans and summary plan descriptions (if any) applicable to the Key Arbitron Employee;

B. No later than ten (10) days after a request from a Prospective Acquirer, provide to the Prospective Acquirer an opportunity to meet personally and outside the presence or hearing of any employee or agent of any Respondent, with any one or more of the Key Arbitron Employees, and to make offers of employment to any one or more of the Key Arbitron Employees.

C. Not interfere, directly or indirectly, with the hiring or employing by the Prospective Acquirer of any Key Arbitron Employees, not offer any incentive to such employees to decline employment with the Prospective Acquirer, and not otherwise interfere with the recruitment of any Key Arbitron Employees by the Prospective Acquirer;

D. Remove any impediments within the control of Respondents that may deter Key Arbitron Employees from accepting employment with the Prospective Acquirer, including, but not limited to, removal of any non-compete or confidentiality provisions of employment or other contracts with Respondents that may affect the ability or incentive of those individuals to be employed by the Prospective Acquirer, and shall not make any counteroffer to a Key Arbitron Employee who receives a written offer of employment from the Prospective Acquirer; *provided, however*, that nothing in this Order shall be construed to require Respondents to terminate the employment of any employee or prevent Respondents from continuing the employment of any employee.

E. For Key Arbitron Employees who have accepted offers of employment with the Acquirer, not, for a period of one (1) year following the date such Key Arbitron Employee begins employment with the Acquirer, directly or indirectly, solicit or otherwise attempt to induce such Key Arbitron Employees to terminate his or her employment with the Acquirer; *provided, however*, that Respondents may:

1. Advertise for employees in newspapers, trade publications, or other media, or engage recruiters to conduct general employee search activities, in either case not targeted specifically at Key Arbitron Employees; or

2. Hire Key Arbitron Employees who apply for employment with Respondents, as long as such employees were not solicited by Respondents in violation of this Paragraph; *provided further, however*, that this Paragraph shall not prohibit Respondents from making offers of employment to or employing any Key Arbitron Employee if the Acquirer has notified Respondents in writing that the Acquirer does not intend to make an offer of employment to that employee, or where such an offer has been made and the employee has declined

the offer, or where the employee's employment has been terminated by the Acquirer.

F. For any employees (except those listed on Confidential Exhibit B) who are terminated by Respondents who had responsibilities for or were involved in Project Blueprint or who are engineers knowledgeable about the Encoding Technology, Respondents shall remove any impediments within the control of Respondents that may deter such employee from accepting employment with the Acquirer, including, but not limited to, removal, solely to the extent needed for the Acquirer's provision of Cross-Platform Services, of any non-compete or confidentiality provisions of employment or other contracts with Respondents that may affect the ability or incentive of those individuals to be employed by the Acquirer, and shall not make any counteroffer to such an employee who receives a written offer of employment from the Acquirer.

IV.

IT IS FURTHER ORDERED that:

A. Respondents shall:

1. Manage and maintain (and expand as required by Paragraph IV.A.2., below) the Arbitron Calibration Panel consistent with Respondents' own business practices and under the following conditions:

   a. Respondents shall assure that the Arbitron Calibration Panel comprises at least two thousand panelists no later than six (6) weeks after the date of the signing of the Remedial Agreement;

   b. Respondents shall require the Acquirer to pay the Direct Costs directly attributable to managing and maintaining the Arbitron Calibration Panel*; provided, however*, that Respondents may enter into a Remedial

Agreement that includes additional payments to which the Acquirer agrees, as approved by the Commission;

c. the Acquirer shall have full and exclusive right, title, and ownership interest in and to any and all data generated by the Arbitron Calibration Panel; for the avoidance of doubt, Respondents shall retain all right, title and ownership interest in all underlying data from the PPM Panel that is an input into the data generated by the Arbitron Calibration Panel;

d. at the Acquirer's option, Respondents shall have the right to use the data generated by the Arbitron Calibration Panel at a cost negotiated and agreed to by the Acquirer and Respondents, as reviewed and approved by the Monitor in consultation with Commission staff;

e. *provided, however,* that Respondents shall have no obligation to manage and maintain the Arbitron Calibration Panel if the Acquirer requests in writing (with copies to the Commission staff and the Monitor) that it no longer requires that the Arbitron Calibration Panel be maintained; and

f. *provided, further, however* that Respondents shall have no obligation to continue to manage and maintain the Arbitron Calibration Panel if (1) the Acquirer fails to pay the Direct Costs directly attributable to managing and maintaining the Arbitron Calibration Panel as required by the Remedial Agreement; (2) Respondents notify the Acquirer, the Monitor, and Commission staff of Acquirer's failure to pay Direct Costs and give the Acquirer thirty (30) days from receiving that notice to cure the failure; and (3) the Acquirer fails to cure.

2. At the request of the Acquirer, expand the Arbitron Calibration Panel beyond the two (2) thousand panelists required in Paragraph IV.A.1.a. to enable national projections under the following conditions:

    a. Respondents shall require the Acquirer to pay the Direct Costs directly attributable to the expansion of the Arbitron Calibration Panel; *provided, however*, that Respondents may enter into a Remedial Agreement that includes additional payments to which the Acquirer agrees, as approved by the Commission;

    b. the Acquirer shall have full and exclusive right, title, and ownership interest in and to any and all data generated by the expansion of the Arbitron Calibration Panel; and

    c. at the Acquirer's option, Respondents shall have the right to use the data generated by the expansion of the Arbitron Calibration Panel at a cost negotiated and agreed to by the Acquirer and Respondents, as reviewed and approved by the Monitor in consultation with Commission staff;

B. Respondents shall manage and maintain (and expand as required by Paragraph IV.B.2. below) the Arbitron PPM Panel consistent with Respondents' own practices and under the following conditions:

1. Respondents shall require the Acquirer to pay the Direct Costs directly attributable to the cost of providing the data generated by the Arbitron PPM Panel to the Acquirer; *provided, however*, that Respondents may enter into a Remedial Agreement that includes additional payments to which the Acquirer agrees, as approved by the Commission; and

2. At the request of the Acquirer, expand the Arbitron PPM Panel to enable national projections under the following conditions:

   a. Respondents shall require the Acquirer to pay the Direct Costs directly attributable to such expansion and to the collection of those data that are provided to and used solely by the Acquirer; *provided, however*, that Respondents may enter into a Remedial Agreement that includes additional payments to which the Acquirer agrees, as approved by the Commission;

   b. the Acquirer shall have full and exclusive right, title, and ownership interest in and to any and all data generated by the expansion of the Arbitron PPM Panel; and

   c. at the Acquirer's option, Respondents shall have the right to use the data generated by the expansion of the Arbitron PPM Panel at a cost negotiated and agreed to by the Acquirer and Respondents, as reviewed and approved by the Monitor in consultation with Commission staff.

V.

IT IS FURTHER ORDERED that after the date of the divestiture of the Link Meter Technology, Respondents shall not disclose, provide, discuss, exchange, circulate, convey, or otherwise furnish Confidential Information of the Acquirer, directly or indirectly, to or with any of Respondents' employees, officers, directors, agents or representatives with responsibilities relating to Respondents' audience measurement business, except as necessary to comply with the requirements of this Order.

VI.

IT IS FURTHER ORDERED that:

A. At any time after Respondents sign the Consent Agreement in this matter, the Commission may appoint a monitor ("Monitor") to assure that Respondents comply with all obligations and perform all responsibilities required by this Order and the Remedial Agreement.

B. The Commission shall select the Monitor, subject to the consent of Respondents, which consent shall not be unreasonably withheld. If Respondents have not opposed, in writing, including the reasons for opposing, the selection of a proposed Monitor within ten (10) days after notice by the staff of the Commission to Respondents of the identity of any proposed Monitor, Respondents shall be deemed to have consented to the selection of the proposed Monitor.

C. Not later than ten (10) days after the appointment of the Monitor, Respondents shall execute an agreement that, subject to the prior approval of the Commission, confers upon the Monitor all the rights and powers necessary to permit the Monitor to monitor Respondents' compliance with the requirements of this Order and the Remedial Agreement.

D. If a Monitor is appointed by the Commission, Respondents shall consent to the following terms and conditions regarding the powers, duties, authorities, and responsibilities of the Monitor:

1. The Monitor shall have the power and authority to monitor Respondents' compliance with the requirements of this Order, and shall exercise such power and authority and carry out the duties and responsibilities of the Monitor in a manner consistent with the underlying purpose of this

Order and in consultation with the Commission or Commission staff.

2. The Monitor shall act in a fiduciary capacity for the benefit of the Commission.

3. The Monitor shall serve until termination of this Order.

4. The Monitor shall report in writing to the Commission every sixty (60) days concerning the Monitor's duties and responsibilities.

5. Subject to any demonstrated legally recognized privilege, the Monitor shall have full and complete access to Respondents' personnel, books, documents, records kept in the ordinary course of business, facilities and technical information, and such other relevant information as the Monitor may reasonably request, related to Respondents' compliance with their obligations under this Order. Respondents shall cooperate with any reasonable request of the Monitor and shall take no action to interfere with or impede the Monitor's ability to monitor Respondents' compliance with this Order and the Remedial Agreement.

6. The Monitor shall serve, without bond or other security, at the expense of Respondents, on such reasonable and customary terms and conditions as the Commission may set. The Monitor shall have authority to employ, at the expense of Respondents, such consultants, accountants, attorneys and other representatives and assistants as are reasonably necessary to carry out the Monitor's duties and responsibilities.

7. Respondents shall indemnify the Monitor and hold the Monitor harmless against all 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.

8. Respondents may require the Monitor and each of the Monitor's consultants, accountants, attorneys and other representatives and assistants to sign a customary confidentiality agreement; *provided, however*, that such agreement shall not restrict the Monitor (and its representatives) from providing any information to, or receiving information from, the Commission.

9. The Commission may, among other things, require the Monitor and each of the Monitor's consultants, accountants, attorneys and other representatives and assistants to sign an appropriate confidentiality agreement related to Commission materials and information received in connection with the performance of the Monitor's duties.

10. In the event the Commission determines that the Monitor is no longer willing or able to perform his/her duties under this Order, or has ceased to act or failed to act diligently, the Commission may appoint a substitute Monitor in the same manner as provided in this Paragraph.

11. The Commission may on its own initiative, or at the request of the Monitor, issue such additional orders or directions as may be necessary or appropriate to assure compliance with the requirements of this Order.

12. The Monitor appointed pursuant to this Paragraph VI. may be the same person appointed as the Divestiture Trustee pursuant to Paragraph VII. of this Order.

VII.

IT IS FURTHER ORDERED that:

A. If Respondents have not fully complied with the divestiture and licensing obligations of Paragraph II. of this Order, the Commission may appoint a Divestiture Trustee to perform Respondents' obligations in a manner that satisfies the requirements of this Order, including, but not limited to, Paragraphs II. and IV. In the event that the Commission or the Attorney General brings an action pursuant to Section 5(*l*) of the Federal Trade Commission Act, 15 U.S.C. § 45(*l*), or any other statute enforced by the Commission, Respondents shall consent to the appointment of a Divestiture Trustee in such action to divest the required assets. Neither the appointment of a Divestiture Trustee nor a decision not to appoint a Divestiture Trustee under this Paragraph VII.A. shall preclude the Commission or the Attorney General from seeking civil penalties or any other relief available to it, including a court-appointed Divestiture Trustee, pursuant to Section 5(*l*) of the Federal Trade Commission Act, or any other statute enforced by the Commission, for any failure by Respondents to comply with this Order.

B. The Commission shall select the Divestiture Trustee, subject to the consent of Respondents, which consent shall not be unreasonably withheld. The Divestiture Trustee shall be a person with experience and expertise in acquisitions and divestitures in the media industry. If Respondents have not opposed, in writing, including the reasons for opposing, the selection of a proposed Divestiture Trustee within ten (10) days after notice by the staff of the Commission to Respondents of the identity of any proposed Divestiture Trustee, Respondents shall be deemed to have consented to the selection of the proposed Divestiture Trustee.

1. No later than ten (10) days after the appointment of a Divestiture Trustee, Respondents shall execute a trust agreement that, subject to the prior approval

of the Commission, transfers to the Divestiture Trustee all rights and powers necessary to permit the Divestiture Trustee to effectuate the divestiture required by, and satisfy the additional obligations imposed by, this Order.

2. If a Divestiture Trustee is appointed by the Commission or a court pursuant to this Paragraph, Respondents shall consent to the following terms and conditions regarding the Divestiture Trustee's powers, duties, authority, and responsibilities:

   a. subject to the prior approval of the Commission, the Divestiture Trustee shall have the exclusive power and authority to effectuate the divestiture required by, and satisfy the additional obligations imposed by, this Order.

   b. the Divestiture Trustee shall have six (6) months after the date the Commission approves the trust agreement described herein to accomplish the divestiture, which shall be subject to the prior approval of the Commission. If, however, at the end of the six (6) month period, the Divestiture Trustee has submitted a plan to satisfy the obligations of Paragraphs II. and IV. of this Order, or believes that such obligations can be achieved within a reasonable time, the period may be extended by the Commission, or, in the case of a court-appointed Divestiture Trustee, by the court; *provided*, *however*, that the Commission may extend the period for only an additional three (3) months.

   c. 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.

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

d. the Divestiture Trustee shall use commercially reasonable efforts to negotiate the most favorable price and terms available in each contract that is submitted to the Commission, subject to Respondents' absolute and unconditional obligation to divest expeditiously subject to the provisions of Paragraphs II. and IV., including, but not limited to, the requirement that the Acquirer pay Direct Costs as required by Paragraphs IV.A.1.b, IV.A.2.a., IV.B.1., and IV.B.2.a. The divestiture shall be made in the manner and to an acquirer as required by this Order; *provided, however*, if the Divestiture Trustee receives bona fide offers from more than one acquiring entity, and if the Commission determines to approve more than one such acquiring entity, the Divestiture Trustee shall divest to the acquiring entity selected by Respondents from among those approved by the Commission; *provided further, however*, that Respondents shall select such entity within five (5) days after receiving notification of the Commission's approval.

e. the Divestiture Trustee shall serve, without bond or other security, at the cost and expense of Respondents, on such reasonable and customary terms and conditions as the Commission or a court may set. The Divestiture Trustee shall have the authority to

employ, at the cost and expense of Respondents, such consultants, accountants, attorneys, investment bankers, business brokers, appraisers, and other representatives and assistants as are necessary to carry out the Divestiture Trustee's duties and responsibilities. The Divestiture Trustee shall account for all monies derived from the divestiture and all expenses incurred. After approval by the Commission of the account of the Divestiture Trustee, including fees for the Divestiture Trustee's services, all remaining monies shall be paid at the direction of Respondents, and the Divestiture Trustee's power shall be terminated. The compensation of the Divestiture Trustee shall be based at least in significant part on a commission arrangement contingent on the divestiture of all of the relevant assets that are required to be divested by this Order.

f. Respondents shall indemnify the Divestiture Trustee and hold the Divestiture Trustee harmless against any losses, claims, damages, liabilities, or expenses arising out of, or in connection with, the performance of the Divestiture Trustee's duties, including all reasonable fees of counsel and other expenses incurred in connection with the preparation for, or defense of, any claim, whether or not resulting in any liability, except to the extent that such losses, claims, damages, liabilities, or expenses result from gross negligence, malfeasance, willful or wanton acts, or bad faith by the Divestiture Trustee.

g. the Divestiture Trustee shall have no obligation or authority to operate or maintain the relevant assets required to be divested by this Order.

h. the Divestiture Trustee shall report in writing to Respondents and to the Commission every

thirty (30) days concerning the Divestiture Trustee's efforts to accomplish the divestiture.

i. Respondents may require the Divestiture Trustee and each of the Divestiture Trustee's consultants, accountants, attorneys, and other representatives and assistants to sign a customary confidentiality agreement; *provided, however,* such agreement shall not restrict the Divestiture Trustee from providing any information to the Commission.

j. 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 related to Commission materials and information received in connection with the performance of the Divestiture Trustee's duties.

C. If the Commission determines that the Divestiture Trustee has ceased to act or failed to act diligently, the Commission may appoint a substitute Divestiture Trustee in the same manner as provided in this Paragraph VII.

D. The Commission or, in the case of a court-appointed Divestiture Trustee, the court, may on its own initiative or at the request of the Divestiture Trustee, issue such additional orders or directions as may be necessary or appropriate to accomplish the divestitures required by this Order.

E. The Divestiture Trustee appointed pursuant to this Paragraph VII. may be the same person appointed as the Monitor pursuant to Paragraph VI. of this Order.

VIII.

IT IS FURTHER ORDERED that:

A. No later than thirty (30) days after the date this Order is issued, and every thirty (30) days thereafter until the Link Meter Technology is divested and the Remedial Agreement entered into pursuant to Paragraph II of this Order is approved by the Commission, Respondents shall submit to the Commission (and a complete copy to the Monitor) 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, among other things that are required from time to time, a full description of the efforts being made to comply with Paragraph II of this Order, including a description of all substantive contacts or negotiations and the identity and contact information of all parties contacted. Respondents shall include in the reports copies of all material written communications to and from such parties, all internal memoranda, and all reports and recommendations concerning completing the obligations.

B. One (1) year after this Order is issued, annually for the next seven (7) years on the anniversary of that date, and at other times as the Commission may require, Respondents shall file verified written reports with the Commission setting forth in detail the manner and form in which they have complied and are complying with this Order.

IX.

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

A. Any proposed dissolution of such Respondent;

B. Any proposed acquisition, merger, or consolidation of such Respondent; 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 this Order.

X.

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

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

B. To interview officers, directors, or employees of Respondents, who may have counsel present, regarding such matters.

XI.

IT IS FURTHER ORDERED that this Order shall terminate on February 24, 2022.

By the Commission, Commissioner Ohlhausen recused, and Commissioner Wright dissenting.

Analysis to Aid Public Comment

Confidential Exhibits A and B

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

ANALYSIS OF CONSENT ORDER TO AID PUBLIC COMMENT

Introduction

The Federal Trade Commission ("Commission") has accepted, subject to final approval, an Agreement Containing Consent Order ("Consent Agreement") from Nielsen Holdings N.V. ("Nielsen") and Arbitron Inc. ("Arbitron"). The purpose of the proposed Consent Agreement is to remedy the anticompetitive effects that would otherwise result from Nielsen's acquisition of Arbitron. Under the terms of the proposed Consent Agreement, Nielsen is required to divest and/or license certain technological assets (including intellectual property) and data to an acquirer approved by the Commission ("Acquirer"), enabling the Acquirer to develop and provide a national syndicated cross-platform audience measurement service.

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

Pursuant to an Agreement and Plan of Merger dated December 17, 2012, Nielsen proposes to acquire Arbitron for approximately $1.26 billion. The Commission's complaint alleges that the proposed acquisition, if consummated, would violate Section 7 of the Clayton Act, as amended, 15 U.S.C. § 18, and Section 5 of the Federal Trade Commission Act, as amended,

15 U.S.C. § 45, by lessening competition in the market for national syndicated cross-platform audience measurement services.

The Parties

Nielsen, headquartered in New York, New York and Diemen, the Netherlands, is a leading global media measurement and research company. In the United States, Nielsen provides television, online, mobile, and cross-platform audience measurement services to media companies, advertisers, and advertising agencies. Nielsen is the dominant provider of television audience measurement services[1] in the United States. In 2012, Nielsen generated global sales of $5.6 billion, about half of which it derived from business in the United States.

Arbitron, headquartered in Columbia, Maryland, is a leading media measurement and research company. Arbitron's radio ratings, which also estimate listenership size and demographic composition, are the standard metric used by radio broadcasters and advertisers to buy and sell radio advertising. Arbitron also offers products that measure television, online, mobile and cross-platform audiences. Almost all of Arbitron's 2012 revenue of $449 million was derived from business within the United States.

The Relevant Product and Structure of the Market

The proposed acquisition would harm competition for national syndicated cross-platform audience measurement services. The proliferation of personal computers, smartphones and tablets has dramatically changed the way in which U.S. consumers are exposed to advertising and programming. As a result, advertisers and media companies desire cross-platform audience measurement services that measure audiences *across* multiple media platforms, as opposed to services that report audiences for a single media platform, such as television, in isolation. Cross-platform audience measurement services report the overall unduplicated audience size (i.e., reach) and frequency of exposure

1 Nielsen's television audience ratings provide the size and demographic composition of the audiences for television programming, and are the primary currency by which the buying and selling of commercial airtime is negotiated.

for programming content and advertisements across multiple media platforms, with corresponding individual-level audience demographic data. A syndicated national cross-platform audience measurement service is one that provides all subscribers with the same universe of data, showing the relative audiences across platforms for various programming content and advertising.

To be competitively viable, a national syndicated cross-platform audience measurement service must include two key features. First, it must have an accurate and widely-accepted television audience measurement component, as television viewing represents the vast majority of media consumption and accounts for the majority of advertising dollars. Second, a national syndicated cross-platform audience measurement service must report individual-level demographic data. Advertisers need individual-level demographic data in order to determine which programming content is most likely to deliver audiences within their desired category of potential customers and to make advertising campaign placement and media buying decisions. Similarly, media companies need individual-level demographic data to assess the value of their own advertising inventory and to inform programming decisions.

Although there is no national syndicated cross-platform audience measurement service today, demand for such a service by advertisers and media companies is increasing rapidly. Nielsen and Arbitron are developing national syndicated cross-platform audience measurement services. Nielsen currently provides Cross-Platform Campaign Ratings on a custom-basis and plans to launch a similar Cross-Platform Program Ratings service in the coming year. Arbitron partnered with comScore Inc. ("comScore") to provide customized cross-platform audience measurement services to ESPN, widely known as "Project Blueprint" Although these services are currently custom projects and/or customer-sponsored beta tests, Nielsen and Arbitron are developing national syndicated offerings.

Nielsen and Arbitron are the best-positioned firms to develop (or partner with others to develop) a national syndicated cross-platform audience measurement service because of their existing audience measurement panels and proven audience measurement technology assets. Large, representative panels, like those used

by Nielsen and Arbitron for their respective television and radio audience measurement businesses, are considered the most accurate and preferred sources of individual-level demographic data for audience measurement purposes. Only Nielsen and Arbitron maintain large, representative panels capable of measuring television with the required individual-level demographics. Other firms working to develop cross-platform audience measurement services are not as well positioned to compete with Nielsen and Arbitron to develop a national syndicated cross-platform audience measurement service because they lack the representative panels, existing audience measurement technology assets of the quality and character of Nielsen's and Arbitron's, and strong brands in audience measurement.

The United States is the appropriate geographic market in which to analyze the competitive effects of the proposed transaction. Purchasers of U.S. cross-platform audience measurement services require these services to assist them in making decision about buying and selling advertising inventory aimed at U.S. consumers. National U.S. cross-platform audience measurement services provide U.S. customers with data on U.S. audiences and require a significant presence in the United States to gather such audience data.

Entry

Sufficient and timely entry or expansion into the market for national syndicated cross-platform audience measurement services is unlikely to deter or counteract the anticompetitive effects of the proposed acquisition. In order to offer national syndicated cross-platform audience measurements, a firm must have access to television audience data with individual-level demographic data. Establishing the infrastructure to recruit and maintain a representative panel of individuals needed to provide the television audience measurement component of a national syndicated cross-platform audience measurement service requires substantial upfront and on-going investments. New entrants would also have to develop or license technology capable of collecting and generating the underlying data needed to provide a national syndicated cross-platform audience measurement service. Further, in order to attract customers, a new entrant must establish

a strong reputation for quality and reliability in audience measurement. These significant barriers ensure that entry would not be timely, likely, or sufficient to counteract the anticompetitive effects of the proposed acquisition for several years at a minimum.

Effects of the Acquisition

The acquisition is likely to cause significant competitive harm in the market for national syndicated cross-platform audience measurement services. Nielsen and Arbitron are the best-positioned firms to develop (or partner with others to develop) national syndicated cross-platform audience measurement services. Both companies expect their respective cross-platform audience measurement services to become national syndicated offerings. The elimination of future competition between Nielsen and Arbitron would likely cause U.S. customers to pay higher prices for national syndicated cross-platform audience measurement services and result in less innovation for cross platform measurement services.

The Consent Agreement

The proposed Consent Agreement resolves the Acquisition's likely anticompetitive effects in the market for national syndicated cross-platform audience measurement services by requiring the divestiture of assets related to Arbitron's cross-platform audience measurement business, including data from its representative panel, to an Acquirer within three months of executing the consent agreement.

Pursuant to the proposed Consent Agreement, the Acquirer will receive the assets necessary to replicate Arbitron's participation in the development of a national syndicated cross-platform audience measurement service. Among other things, the Consent Agreement requires Nielsen to provide the Acquirer with a perpetual, royalty-free license to data, including individual-level demographic data, and technology related to Arbitron's cross-platform audience measurement business for a period of no less than eight years. Nielsen will also be required to make improvements and enhancements to the Arbitron panels at the request and expense of the Acquirer that will further the

Acquirer's ability to offer a national syndicated cross-platform audience measurement service. With respect to Arbitron personnel involved in cross-platform services, the Consent Agreement removes impediments that might otherwise deter certain Key Arbitron Employees from accepting employment with the Acquirer. It also requires that Nielsen provide the Acquirer with certain technical assistance, at the request of the Acquirer to facilitate the Acquirer's ability to replicate Arbitron's position in the cross-platform audience measurement market. Collectively, these provisions are intended to enable the Acquirer to develop and provide a national syndicated cross-platform audience measurement service to its customers. The Consent Agreement is designed to ensure that the benefits of competition that would have been realized from Arbitron's provision of cross-platform audience measurement services, are not lost as a result of the acquisition.

The Commission has appointed a monitor to oversee Nielsen's compliance with all of its obligations and performance of its responsibilities pursuant to the Commission's Decision and Order (the "Order"). The monitor is required to file periodic reports with the Commission to ensure that the Commission remains informed about efforts to accomplish the divestiture and Nielsen's compliance with its ongoing obligations and responsibilities pursuant to the Order until the Order terminates.

Finally, the proposed Consent Agreement contains provisions that allow the Commission to appoint a divestiture trustee if any or all of the above remedies are not accomplished within the time frames required by the Consent Agreement. The divestiture trustee may be appointed to accomplish any and all of the remedies required by the proposed Consent Agreement that have not yet been fulfilled upon expiration of the time period allotted.

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

STATEMENT OF THE FEDERAL TRADE COMMISSION[1]

Today, the Commission is taking remedial action concerning the proposed acquisition of Arbitron Inc. by Nielsen Holdings N.V. We believe Nielsen's acquisition of Arbitron is likely to deprive media companies and advertisers of the benefits of competition between two firms that are currently developing, and are most likely to be effective suppliers of, syndicated cross-platform audience measurement services.[2] Our remedy is tailored to counteract the likely anticompetitive effects of the proposed acquisition while leaving intact any efficiencies that might be gained from the combination of the two companies. The remedy is consistent with the analytical framework through which we evaluate the effects of all mergers that come before us, whether those effects are likely to occur immediately or in the foreseeable future.

Nielsen and Arbitron are best known for their respective single-platform TV and radio audience measurement services. Nielsen ratings are the industry benchmark for determining the size and demographics of television audiences. Nielsen maintains a national panel of 20,000 households, comprising nearly 50,000 individuals whose television programming consumption is monitored on a continual basis. Arbitron provides radio ratings for traditional, or "terrestrial," radio that are similar to Nielsen's television ratings. Arbitron's panel covers 48 local markets and consists of approximately 70,000 people whose exposure to programming is captured by its proprietary Personal People Meter ("PPM") technology. In addition to measuring radio consumption, Arbitron measures panelists' television consumption and provides out-of-home audience measurement data to television broadcasters.

As television viewership has shifted from traditional television screens to mobile devices, tablets, and personal computers,

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1 This statement reflects the majority view of Chairwoman Ramirez and Commissioner Brill. Commissioner Ohlhausen is recused and took no part in the decision on this matter.

2 A syndicated cross-platform audience measurement product is one that provides all subscribers with each programmer's unduplicated audience across platforms.

traditional television measurement is capturing a decreasing portion of the total viewing audience. As a result, media companies and advertisers are now seeking measurement services that account for the entire audience. Specifically, they seek a cross-platform solution that measures audiences across multiple platforms as well as determines the extent of audience duplication (e.g., whether the same individual is watching a program on both traditional TV and on the Internet). Media companies and advertisers would then use those measurements to determine the relative value of advertising inventory. This type of cross-platform measurement product has yet to be developed and marketed. But there is wide consensus among media companies and advertisers that Nielsen and Arbitron are best-positioned to provide this service because they are the only two companies that operate large and demographically representative panels that are capable of reporting television programming viewership, which is critical to developing a cross-platform product that meets likely customer demand. While other companies provide estimates of aggregate cross-platform viewership, only Nielsen and Arbitron provide individual demographic data, such as age and gender information, for television and, hence, cross-platform measurement.

The Commission also has reason to believe that Nielsen and Arbitron are the best-positioned firms to develop (or partner with others to develop) such a service. Nielsen already offers several products that provide audience measurement across different media platforms, including its Extended Screen and Cross-Platform Campaign Ratings ("XCR") products. Extended Screen measures television and online viewing for a subset of its national panel. XCR is an advertising campaign measurement tool that combines online viewership data with Nielsen's national television measurement product. Nielsen is in the process of introducing a product targeted at programmers, called Digital Program Ratings, that will measure the audiences for television programs that appear on line, and plans to launch a cross-platform measurement product, Cross-Platform Program Ratings, next year.

Arbitron is also developing a cross-platform audience measurement solution. Last year, it began a collaboration with comScore known as "Project Blueprint" to develop a product for

ESPN. Arbitron is contributing in-home and out-of-home television audience demographic data sourced from its PPM radio panel, radio audience data, and a "calibration" panel recruited from its PPM panel to measure audience duplication across platforms. comScore is providing online measurement and set-top box data. Arbitron has stated that Project Blueprint is "a major jumping off point" toward a "syndicable type [cross-platform] service," and both ESPN and comScore are enthusiastic about the project. There is considerable industry interest in participating in the next phase of Project Blueprint.

Networks and advertisers believe that any syndicated cross-platform measurement services of Nielsen and Arbitron would compete directly. The proposed transaction would eliminate that competition. Although this is a future market, with an amount of concomitant uncertainty, effective merger enforcement always requires a forward-looking analysis of likely competitive effects. On the evidence here, the Commission has reason to believe that the proposed remedy is necessary to address the likely competitive harm that would result from the acquisition.

The proposed Consent Order is designed to address these specific competitive concerns by requiring divestiture of assets relating to Arbitron's cross-platform audience measurement services business, including audience data with individual-level demographic information and related technology, software, and intellectual property. The Consent Agreement also requires that the combined firm provide the acquirer with any needed technical assistance, and provide the acquirer with the tools and ability to expand the PPM panel to obtain additional data it deems necessary. With the divested assets, the acquirer will be well-positioned to step into Arbitron's shoes and replace the future competition between Nielsen and Arbitron that will be lost as a result of the proposed acquisition.

We agree with Commissioner Wright that the analysis of a merger's competitive effects in any market, including markets where the products are still in the development phase, must always be strongly rooted in the evidence. Where the product at issue is not yet on the market, it can be difficult to develop the evidence necessary to predict accurately the nature and extent of competition. Nevertheless, the 2010 Guidelines specifically

indicate that the agencies will consider whether the merging firms have been or likely will become "substantial head-to-head competitors" absent the merger. § 2.1.4.[3]

Here, there is considerable evidence from which to predict that an anticompetitive effect is likely to occur if these two companies are allowed to merge without a remedy. Both companies meet the standard to be considered actual potential entrants.[4] As evidenced in both internal documents and statements they have made publicly and to potential customers, Nielsen and Arbitron (with comScore) both have invested significant time and resources to develop a national syndicated cross-platform audience measurement service. There is extensive evidence from customers that Nielsen and Arbitron are best positioned to compete in this area given their ability to provide individual-level demographic data. This forms the basis for our concern that there would be anticompetitive consequences from the combination, despite the fact that others are trying to develop cross-platform measurement services of their own. Customer views that Nielsen and Arbitron would be by far the two strongest competitors are supported by Nielsen and Arbitron statements about the products they are each developing and, in some cases, already beta testing with customers.

As with any transaction, the Commission does not merely accept a remedy because it is able to obtain one. We have accepted this consent because we have reason to believe that the transaction will harm competition, and because it is in the public interest to do so.

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3 In particular, the 2010 Horizontal Merger Guidelines explain that "[m]ost merger analysis is necessarily predictive, requiring an assessment of what will likely happen if a merger proceeds as compared to what will likely happen if it does not. Given this inherent need for prediction, these Guidelines reflect the congressional intent that merger enforcement should interdict competitive problems in their incipiency, and that certainty about anticompetitive effect is seldom possible and not required for a merger to be illegal." § 1.

4 Commissioner Wright cites *B.A.T Indus.*, 104 F.T.C. 852 (1984), as the applicable standard for actual potential entry. Most federal courts have applied a less stringent standard.

We recognize that the overall combination of Nielsen and Arbitron could yield efficiencies outside of the market that concerns us. The proposed consent does not affect those efficiencies. We also took into account the parties' predictions that national syndicated cross-platform measurement services were likely to have relatively modest sales for some time. Weighing these considerations and the evidence of likely harm, we have concluded that the public interest is best served by allowing the transaction to proceed while remedying the competitive concerns. The remedy proposed in this matter does just that.

Dissenting Statement of Commissioner Joshua D. Wright

The Commission has voted to issue a Complaint and Decision & Order ("Order") against Nielsen Holdings N.V. ("Nielsen") to remedy the allegedly anticompetitive effects of Nielsen's proposed acquisition of Arbitron Inc. ("Arbitron"). I dissented from the Commission's decision because the evidence is insufficient to provide reason to believe Nielsen's acquisition will substantially lessen competition in the future market for national syndicated cross-platform audience measurement services in violation of Section 7 of the Clayton Act. I want to commend staff for conducting a thorough investigation. Staff has worked diligently to collect and analyze a substantial quantity of documentary and testimonial evidence, and has provided thoughtful analysis of the transaction's potential effects. Based upon this evidence and analysis, I conclude there is no reason to believe the transaction violates Section 7 of the Clayton Act.[1] It follows, in my view, that the Commission should close the

1 15 U.S.C. § 21(b) (2006) ("Whenever the Commission . . . vested with jurisdiction thereof shall have reason to believe that any person is violating or has violated any of the provisions of sections 13, 14, 18, and 19 of this title, it shall issue and serve upon such person and the Attorney General a complaint stating its charges in that respect . . . .").

investigation and allow the parties to complete the merger without imposing a remedy.

I. Predicting Competitive Effects in Future Markets

Nielsen and Arbitron do not currently compete in the sale of national syndicated cross-platform audience measurement services. In fact, there is no commercially available national syndicated cross-platform audience measurement service today.[2] The Commission thus challenges the proposed transaction based upon what must be acknowledged as a novel theory—that is, that the merger will substantially lessen competition in a market that does not today exist. The Commission asserts that, in the absence of the merger, Nielsen and Arbitron would invest heavily in the development of national syndicated cross-platform audience measurement services, and that the products ultimately yielded by those efforts would compete directly against one another to the benefit of consumers. The Commission therefore has required Nielsen to license Arbitron's television audience measurement service to a third party in hopes of allowing the third party to one day offer national syndicated cross-platform measurement services in competition with Nielsen.

A future market case, such as the one alleged by the Commission today, presents a number of unique challenges not confronted in a typical merger review or even in "actual potential competition" cases. For instance, it is inherently more difficult in future market cases to define properly the relevant product market, to identify likely buyers and sellers, to estimate cross-elasticities of demand or understand on a more qualitative level potential product substitutability, and to ascertain the set of potential entrants and their likely incentives.[3] Although all

2 Complaint ¶ 10, Nielsen Holdings N.V., FTC File No. 131-0058 (Sept. 20, 2013).

3 Somewhere between typical merger cases and future market cases are "actual potential competition" cases. Competitive effects in such cases typically are less difficult to predict than in future market cases because the Commission at least can identify the relevant product market and interview current buyers and sellers. Nevertheless, competitive effects in actual potential competition cases still are more difficult, on balance, to assess than typical merger cases because the agency must predict whether a party is likely to enter the relevant market absent the merger. It is because of this uncertainty and the

merger review necessarily is forward looking, it is an exceedingly difficult task to predict the competitive effects of a transaction where there is insufficient evidence to reliably answer these basic questions upon which proper merger analysis is based.[4] Without these critical inputs, our current economic toolkit provides little basis from which to answer accurately the question of whether a merger implicating a future market will result in a substantial lessening of competition.

The Commission of course already routinely engages in predictive merger analysis that seeks to compare present competitive activities to future market conditions.[5] For instance, the Horizontal Merger Guidelines ("Merger Guidelines") call upon the antitrust agencies to take into account efficiencies claimed by the parties, the likelihood of successful entry, and the possibility of a failing firm defense.[6] Significantly, however, each of these predictions about the evolution of a market is based upon a fact-intensive analysis rather than relying upon a general presumption that economic theory teaches that an increase in market concentration implies a reduced incentive to invest in innovation.[7] For example, when parties seek to show that a

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potential for conjecture that the courts and agencies have cabined the actual potential competition doctrine by, for instance, applying a heightened standard of proof for showing a firm likely would enter the market absent the merger. *See e.g.*, B.A.T. Indus., 104 F.T.C. 852, 926-28 (1984) (applying a "clear proof" standard).

4 *See* Douglas H. Ginsburg & Joshua D. Wright, *Dynamic Analysis and The Limits of Antitrust Institutions*, 78 ANTITRUST L.J. 1, 15-17 (2012) (describing some difficulties associated with further incorporating dynamic analysis into merger review).

5 *See id.* at 8-10 (identifying areas in the merger context where the antitrust agencies have been able to predict confidently effects on future competition).

6 U.S. DEP'T OF JUSTICE & FED. TRADE COMM'N, HORIZONTAL MERGER GUIDELINES §§ 9-11 (2010), *available at* http://www.justice.gov/atr/public/guidelines/hmg-2010.html [hereinafter 2010 MERGER GUIDELINES].

7 The link between market structure and incentives to innovate remains inconclusive. *See, e.g.*, Ginsburg & Wright, *supra* note 4, at 4-5 ("To this day, the complex relationship between static product market competition and the incentive to innovate is not well understood."); Richard J. Gilbert, *Competition and Innovation*, *in* 1 ABA SECTION OF ANTITRUST LAW, ISSUES IN COMPETITION LAW AND POLICY 577, 583 (W. Dale Collins ed., 2008)

proposed transaction has efficiencies that mitigate the anticompetitive concerns, they must provide the agencies with clear evidence showing that the claimed efficiencies are cognizable, merger-specific, and verifiable.[8] Similarly, when assessing whether future entry would counteract a proposed transaction's competitive concerns, the agencies evaluate a number of facts—such as the history of entry in the relevant market and the costs a future entrant would need to incur to be able to compete effectively—to determine whether entry is "timely, likely, and sufficient."[9] Likewise, to prove a failing firm defense successfully, the parties must show several specific facts, such as an inability to meet financial obligations in the near future or to reorganize in bankruptcy, to allow the agencies to predict that the firm would fail absent the merger. [10]

I believe the Commission is at its best when it relies upon such fact-intensive analysis, guided by well-established and empirically grounded economic theory, to predict the competitive effects of a proposed merger.[11] When the Commission's antitrust analysis comes unmoored from such fact-based inquiry, tethered tightly to robust economic theory, there is a more significant risk that non-economic considerations, intuition, and policy preferences influence the outcome of cases. Consequently, in merger cases where only limited or ambiguous evidence exists upon which to base our predictive conclusions, I believe the Commission will be best served by acknowledging these institutional limitations rather than challenging the transaction.

("[E]conomic theory does not provide unambiguous support either for the view that market power generally threatens innovation by lowering the return to innovative efforts nor the Schumpeterian view that concentrated markets generally promote innovation.").

8 2010 MERGER GUIDELINES, *supra* note 6, at § 10.

9 *Id.* at § 9.

10 *Id.* at § 11.

11 *See generally* Joshua D. Wright, Comm'r, Fed. Trade Comm'n, Evidence-Based Antitrust Enforcement in the Technology Sector (Feb. 23, 2013), Remarks at the Competition Law Center *available at* http://www.ftc.gov/speeches/wright/130223chinaevidence.pdf.

Although future market cases may warrant investigation under certain circumstances, the inherent difficulties associated with analyzing the competitive effects of a transaction where the market does not yet exist, and the present inability of economic theory and evidence to support confident and reliable prediction, each suggest such cases typically will not warrant an enforcement action.

II. The Evidence Does Not Provide a Reason to Believe the Transaction Will Result in a Substantial Lessening of Competition in the National Syndicated Cross-Platform Audience Measurement Market

At the outset, it is important to recognize that our task is not simply to assess whether Nielsen and Arbitron are the firms best positioned today to develop national syndicated cross-platform audience measurement services. They very well may be when compared to other options available today. However, our task is decidedly different and requires us to evaluate instead whether the merger will result in a substantial lessening of competition in a relevant product market. I have not been presented evidence sufficient to provide a reason to believe the proposed merger will substantially reduce future competition in the sale of national syndicated cross-platform audience measurement services. My decision is based primarily upon the absence of answers to key questions that are necessary to draw reliable conclusions about the merger's likely competitive effects.

For example, we do not know whether each of the parties could and would develop a cross-platform product for the relevant market (however defined) absent the merger. For instance, if syndication ultimately is required for a successful cross-platform service, we do not know whether this is something both parties could offer. Furthermore, if the parties were to develop cross-platform products, we do not know the ultimate attributes of these products and whether, and to what extent, they would be substitutable by consumers. For example, we do not know if the parties would offer daily ratings or monthly ratings, and whether consumers would consider monthly and daily ratings to be complements or substitutes. Finally, we also do not know how the market will evolve, what other potential competitors might

exist, and whether and to what extent these competitors might impose competitive constraints upon the parties.

Further, because cross-platform products are at best at the nascent stages of development, it is difficult even to define the relevant product market.[12] Indeed, the investigation has uncovered that "cross-platform services" means very different things to different industry participants. As with likely competitive effects from the transaction, there are also a number of questions we simply cannot reliably answer at this time with respect to defining the future market in which the competitive effects will allegedly occur. For example, across how many platforms must the product provide audience measurement in order to be competitive? Does the product need to be syndicated or do cross-platform products impose competitive constraints upon one another irrespective of syndication? Does the product truly need to be national and to what extent? Will customers require Nielsen's "currency" measurement to be a component or will something less suffice? Will radio audience measurement be a necessary component for a cross-platform audience measurement service to be successful? Depending upon the answers to these questions, the proper relevant product market unsurprisingly may be defined quite differently than it is defined in the Commission's Complaint.

It is true that the same concerns arising from predicting future anticompetitive effects also provide a challenge to predicting any cognizable efficiencies arising from the transaction. However, even assuming away the uncertainty discussed above, the evidence suggests that any anticompetitive effects arising from the transaction would be relatively small. One reason for this is that the alleged relevant market would constitute a small fraction of the value of the overall deal. Indeed, there is no reason to believe the prospect of supracompetitive profits in the national syndicated cross-platform audience measurement services market motivated the transaction. A substantial fraction of the potentially

12 Although the Merger Guidelines provide that the agencies need not begin their merger analysis by defining the relevant product market—that is to say, defining the relevant product market before assessing effects, the Merger Guidelines do not dispense with market definition because it is important to understanding where those effects ultimately might occur.

cognizable efficiencies from the transaction arise in markets that already exist—that is, outside the alleged relevant market. While out-of-market efficiencies are generally discounted by the agencies, the Merger Guidelines' analysis rejects the view that form should trump substance when assessing competitive effects. Indeed, the Merger Guidelines suggest that the Commission will consider out-of-market efficiencies when they are "inextricably linked" with the transaction as a whole and are likely to be large relative to any likely anticompetitive effects.[13] This appears to be precisely such a case. To be clear, I do not base my disagreement with the Commission today on the possibility that the potential efficiencies arising from the transaction would offset any anticompetitive effect. As discussed above, I find no reason to believe the transaction is likely to substantially lessen competition because the evidence does not support the conclusion that it is likely to generate anticompetitive effects in the alleged relevant market.

For these reasons, I dissent from the Commission's conclusion that there is reason to believe the proposed transaction will substantially lessen competition in the alleged relevant market.

III. Ensuring Consent Agreements are in the Public Interest

Nielsen and Arbitron have agreed to certain concessions in a Consent Agreement with the Commission despite the lack of evidence supporting the conclusion that the proposed transaction will result in a substantial lessening of competition in the market for national syndicated cross-platform audience measurement services. Some may conclude that there can be no harm in the Commission entering into a consent agreement and issuing a Complaint and Order imposing a remedy with sophisticated and willing parties. That of course need not be true. Nor does that view logically follow from the Commission's mission to prevent anticompetitive conduct and to promote consumer welfare.

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13 2010 MERGER GUIDELINES, *supra* note 6, § 10 n. 14.

Whether parties to a transaction are willing to enter into a consent agreement will often have little to do with whether the agreed upon remedy actually promotes consumer welfare. The Commission's ability to obtain concessions instead reflects the weighing by the parties of the private costs and private benefits of delaying the transaction and potentially litigating the merger against the private costs and private benefits of acquiescing to the proposed terms.[14] Indeed, one can imagine that where, as here, the alleged relevant product market is small relative to the overall deal size, the parties would be happy to agree to concessions that cost very little and finally permit the deal to close. Put simply, where there is no reason to believe a transaction violates the antitrust laws, a sincerely held view that a consent decree will improve upon the post-merger competitive outcome or have other beneficial effects does not justify imposing those conditions. Instead, entering into such agreements subtly, and in my view harmfully, shifts the Commission's mission from that of antitrust enforcer to a much broader mandate of "fixing" a variety of perceived economic welfare-reducing arrangements.

Consents can and do play an important and productive role in the Commission's competition enforcement mission. Consents can efficiently address competitive concerns arising from a merger by allowing the Commission to reach a resolution more quickly and at less expense than would be possible through litigation. However, consents potentially also can have a detrimental impact upon consumers. The Commission's consents serve as important guidance and inform practitioners and the business community about how the agency is likely to view and remedy certain mergers.[15] Where the Commission has endorsed by way of consent a willingness to challenge transactions where it might not be able to meet its burden of proving harm to

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14 *See* Douglas H. Ginsburg & Joshua D. Wright, *Antitrust Settlements: The Culture of Consent*, *in* 1 WILLIAM E. KOVACIC: AN ANTITRUST TRIBUTE – LIBER AMICORUM 177, 179-80 (2012).

15 *See, e.g.*, Deborah L. Feinstein, Bureau of Competition Dir., Fed. Trade Comm'n, The Significance of Consent Orders in the Federal Trade Commission's Competition Enforcement Efforts, Remarks at GCR Live, 4-5 (Sept. 17, 2013), *available at* http://www.ftc.gov/speeches/dfeinstein/130917gcrspeech.pdf.

competition, and which therefore at best are competitively innocuous, the Commission's actions may alter private parties' behavior in a manner that does not enhance consumer welfare.[16] Because there is no judicial approval of Commission settlements, it is especially important that the Commission take care to ensure its consents are in the public interest.[17]

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16 *See* Ginsburg & Wright, *supra* note 14, at 179.

17 15 U.S.C. § 45(b) (2006); *see also* J. Thomas Rosch, Comm'r, Fed. Trade Comm'n, Consent Decrees: Is the Public Getting Its Money's Worth (Apr. 7, 2011), Remarks at the XVIIIth St. Gallen International Competition Law Forum, *available at* http://www.ftc.gov/speeches/rosch/110407roschconsent decrees.pdf (stating that "we at the Commission are responsible for conducting our own public interest inquiry before accepting proposed consent decrees, and this inquiry operates as a check on the 'wide discretion' that we otherwise wield to combat methods, acts and practices that violate the antitrust and consumer protection laws").

Complaint

IN THE MATTER OF

NISSAN OF SOUTH ATLANTA, LLC
D/B/A
NISSAN SOUTH

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

Docket No. C-4441; File No. 132 3163
Complaint, February 28, 2014 – Decision, February 28, 2014

This consent order addresses Nissan of South Atlanta, LLC also d/b/a Nissan South's advertisements for automobiles and failure to clearly and conspicuously disclose required information concerning costs and credit terms. The complaint alleges that respondent has advertised that consumers can finance the purchase of vehicles by paying $99 per month with a $0 down payment however; consumers will pay $99 per month for only the first two months of an 84-month period. The complaint further alleges that the advertisements fail to state the amount of each payment beyond the first two months of financing. The consent order requires clear and conspicuous Truth in Lending Act and Regulation Z disclosures when advertising any of the relevant triggering terms with regard to issuing consumer credit. It also requires that if any finance charge is advertised, the rate be stated as an "annual percentage rate" using that term or the abbreviation "APR." Additionally, the order prohibits the respondent from misrepresenting any other material fact about the price, sale, financing, or leasing of any vehicle.

Participants

For the *Commission*: *Sana Chriss, Mark Glassman, John Jacobs, Carole Reynolds, Jason Schall, Christina Tusan,* and *Katherine Worthman.*

For the *Respondent*: *Stephen H. Block, Barrett, Daffin, Frappier, Levine & Block, LLP.*

COMPLAINT

The Federal Trade Commission, having reason to believe that Nissan of South Atlanta, LLC, also doing business as Nissan South ("respondent"), has violated provisions of the Federal Trade Commission Act ("FTC Act"), the Truth in Lending Act ("TILA"), and its implementing Regulation Z, and it appearing to

the Commission that this proceeding is in the public interest, alleges:

1. Respondent is a Georgia corporation with its principal office or place of business at 6889 Jonesboro Road, Morrow, Georgia, 30260-2902. Respondent offers automobiles for sale or lease to consumers.

2. The acts or practices of respondent 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. Since at least February 2013, respondent has disseminated or caused to be disseminated advertisements to the public promoting the purchase, finance, and leasing of automobiles.

4. Respondent has disseminated or caused to be disseminated advertisements to the public promoting credit sales and other extensions of closed-end credit in consumer credit transactions, as the terms "advertisement," "closed-end credit," "credit sale," and "consumer credit" are defined in Section 226.2 of Regulation Z, 12 C.F.R. § 226.2, as amended.

5. Such advertisements include print advertisements published in paper circulations of Cars Magazine. A copy of one such advertisement is attached as Exhibit A. This advertisement contains the statements and depictions described below. Respondent's advertisements in other editions of Cars Magazine contain substantially similar statements.

a. The top portion of the advertisement attached as Exhibit A includes the following representation in large, bold font:

$0 DOWN $99/MO

b. The middle portion of the advertisement depicts several vehicles, most of which contain the representation:

$0 DOWN · $99/MO

c. The bottom portion of the advertisement includes the following representation in small text:

$0 DOWN AT 5.499% APR FOR 84 MONTHS WITH APPROVED CREDIT. SEE DEALER FOR DETAILS. DEALER RETAINS ALL REBATES.
$99/MO IS FOR 1ST 2 MONTHS. CANNOT EXCEED TOTAL VALUE OF $800.
NOT APPLICABLE WITH ANY OTHER OFFER

6. Respondent's advertisements fail to state clearly and conspicuously that consumers will pay $99 per month for only the first two months of an 84-month period. The advertisements also fail to state the amount of each payment beyond the first two months of financing.

FEDERAL TRADE COMMISSION ACT VIOLATIONS

Count I

Misrepresentation Regarding Monthly Payment Amount

7. Through the means described in Paragraph 5, respondent has represented, expressly or by implication, that consumers can finance vehicles for the prominently advertised terms, including the advertised monthly payment amount.

8. In truth and in fact, consumers cannot finance the vehicles for the prominently advertised terms, including the advertised monthly payment amount of $99. Instead, consumers pay $99 each month for the first two months only, and consumers owe a different monthly amount for the remaining 82 months. Accordingly, respondent's representation as alleged in Paragraph 7 was, and is, false and misleading.

9. Respondent's practices 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).

VIOLATIONS OF THE TRUTH IN LENDING ACT AND REGULATION Z

10. Under Section 144 of the TILA and Section 226.24(d) of Regulation Z, as amended, advertisements promoting closed-end credit in consumer credit transactions are required to make certain

disclosures ("additional terms") if they state any of several terms, such as the monthly payment ("TILA triggering terms").

11. Respondent's advertisements promoting closed-end credit, including but not necessarily limited to those described in Paragraph 5, are subject to the requirements of the TILA and Regulation Z.

Count II

Failure to Disclose or Disclose Clearly and Conspicuously Required Credit Information

12. Respondent's advertisements promoting closed-end credit, including but not necessarily limited to those described in Paragraph 5, have included TILA triggering terms, but have failed to disclose or disclose clearly and conspicuously, additional terms required by the TILA and Regulation Z, including one or more of the following:

a. The amount or percentage of the down payment.

b. The terms of repayment, including any balloon payment.

c. The "annual percentage rate," using that term, and, if the rate may be increased after consummation, that fact.

13. Therefore, the practices set forth in Paragraph 12 of this Complaint have violated Section 144 of the TILA, 15 U.S.C. § 1664, and Section 226.24(d) of Regulation Z, 12 C.F.R. § 226.24(d), as amended.

THEREFORE, the Federal Trade Commission, this twenty-eighth day of February, 2014, has issued this complaint against respondent.

By the Commission.

Exhibit A

DECISION AND ORDER

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

charge respondent with violations of the Federal Trade Commission Act ("FTC Act"); the Truth in Lending Act ("TILA"), as amended, 15 U.S.C. §§ 1601-1667; and Regulation Z, 12 C.F.R. Part 226; and

Respondent, respondent's attorney, and counsel for the Commission having thereafter executed an agreement containing a 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 respondent has violated the FTC Act, TILA, and Regulation Z, and that a complaint should issue stating its charges in that respect, and having thereupon accepted the executed consent agreement and placed such consent agreement on the public record for a period of thirty (30) days for the receipt and consideration of public comments, now in further conformity with the procedure prescribed in 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, Nissan of South Atlanta, LLC, also doing business as Nissan South, is a Georgia corporation with its principal office or place of business at 6889 Jonesboro Road, Morrow, Georgia 30260.

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

A. Unless otherwise specified, "respondent" shall mean Nissan of South Atlanta, LLC, also doing business as Nissan South, and its successors and assigns.

B. "Advertisement" shall mean a commercial message in any medium that directly or indirectly promotes a consumer transaction.

C. "Clearly and conspicuously" shall mean as follows:

1. In a print advertisement, the disclosure shall be in a type size, location, and in print that contrasts with the background against which it appears, sufficient for an ordinary consumer to notice, read, and comprehend it.

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

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

4. In a radio advertisement, the disclosure shall be delivered in a volume and cadence sufficient for an ordinary consumer to hear and comprehend it.

5. In all advertisements, the disclosure shall be in understandable language and syntax. Nothing contrary to, inconsistent with, or in mitigation of the disclosure shall be used in any advertisement or promotion.

D. "Consumer credit" shall mean credit offered or extended to a consumer primarily for personal, family, or household purposes, as set forth in Section 226.2(a)(12) of Regulation Z, 12 C.F.R. § 226.2(a)(12), as amended.

E. "Lease inception" shall mean prior to or at consummation of the lease or by delivery, if delivery occurs after consummation.

F. "Material" shall mean likely to affect a person's choice of, or conduct regarding, goods or services.

G. "Motor vehicle" or "vehicle" shall mean:

1. Any self-propelled vehicle designed for transporting persons or property on a street, highway, or other road;

2. Recreational boats and marine equipment;

3. Motorcycles;

4. Motor homes, recreational vehicle trailers, and slide-in campers; and

5. Other vehicles that are titled and sold through dealers.

I.

IT IS HEREBY ORDERED that respondent and its officers, agents, representatives, and employees, directly or indirectly, in connection with any advertisement for the purchase, financing, or leasing of motor vehicles, shall not, in any manner, expressly or by implication:

A. Misrepresent the cost of:

1. Purchasing a vehicle with financing, including but not necessarily limited to, the amount or percentage of the down payment, the number of

payments or period of repayment, the amount of any payment, and the repayment obligation over the full term of the loan, including any balloon payment; or

2. Leasing a vehicle, including but not necessarily limited to, the total amount due at lease inception, the down payment, amount down, acquisition fee, capitalized cost reduction, any other amount required to be paid at lease inception, and the amounts of all monthly or other periodic payments; or

B. Misrepresent any other material fact about the price, sale, financing, or leasing of any vehicle.

II.

IT IS FURTHER ORDERED that respondent and its officers, agents, representatives, and employees, directly or indirectly, in connection with any advertisement for any extension of consumer credit, shall not in any manner, expressly or by implication:

A. State the amount or percentage of any down payment, the number of payments or period of repayment, the amount of any payment, or the amount of any finance charge, without disclosing clearly and conspicuously all of the following terms:

1. The amount or percentage of the down payment;

2. The terms of repayment; and

3. The annual percentage rate, using the term "annual percentage rate" or the abbreviation "APR." If the annual percentage rate may be increased after consummation of the credit transaction, that fact must also be disclosed; or

B. State a rate of finance charge without stating the rate as an "annual percentage rate" or the abbreviation "APR," using that term; or

C. Fail to comply in any respect with Regulation Z, 12 C.F.R. Part 226, as amended, and the Truth in Lending Act, as amended, 15 U.S.C. §§ 1601-1667.

III.

IT IS FURTHER ORDERED that respondent 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;

C. All evidence in its possession or control that contradicts, qualifies, or calls 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. Any documents reasonably necessary to demonstrate full compliance with each provision of this order, including but not limited to all documents obtained, created, generated, or that in any way relate to the requirements, provisions, or terms of this order, and all reports submitted to the Commission pursuant to this order.

IV.

IT IS FURTHER ORDERED that respondent shall deliver a copy of this order to all current and future principals, officers, directors, and managers, and to all current and future employees, agents, and representatives having responsibilities with respect to

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

V.

IT IS FURTHER ORDERED that respondent shall notify the Commission at least thirty (30) days prior to any change in the corporation(s) that may affect compliance obligations arising under this order, including but not limited to a dissolution, assignment, sale, merger, or other action that would result in the emergence of a successor corporation; the creation or dissolution of a subsidiary, parent, or affiliate that engages in any acts or practices subject to this order; the proposed filing of a bankruptcy petition; or a change in the corporate name or address. *Provided*, *however*, that, with respect to any proposed change in the corporation about which respondent learns less than thirty (30) days prior to the date such action is to take place, respondent shall notify the Commission as soon as is practicable after obtaining such knowledge. 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 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: **FTC v. NISSAN OF SOUTH ATLANTA, LLC, also d/b/a NISSAN SOUTH**.

VI.

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 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.

VII.

This order will terminate on February 28, 2034, 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;

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 ("FTC") has accepted, subject to final approval, an agreement containing a consent order from Nissan of South Atlanta, LLC, also d/b/a Nissan South. 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 FTC 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 respondent is a motor vehicle dealer. According to the FTC complaint, respondent has advertised that consumers can finance the purchase of vehicles by paying $99 per month with a $0 downpayment. The complaint alleges that, in fact, consumers will pay $99 per month for only the first two months of an 84-month period. The complaint further alleges that the advertisements fail to state the amount of each payment beyond the first two months of financing. The complaint alleges therefore that the respondent's representations are false or misleading in violation of Section 5 of the FTC Act. In addition, the complaint alleges that the respondent violated the Truth in Lending Act ("TILA") and Regulation Z for failing to clearly and conspicuously disclose required information concerning costs and credit terms.

The proposed order is designed to prevent the respondent from engaging in similar deceptive practices in the future. Part I.A prohibits the respondent from misrepresenting the cost of: (1) purchasing a vehicle with financing, including but not necessarily limited to the amount or percentage of the downpayment, the number of payments or period of repayment, the amount of any payment, and the repayment obligation over the full term of the loan, including any balloon payment; or (2) leasing a vehicle, including but not limited to the total amount due at lease inception, the downpayment, amount down, acquisition fee, capitalized cost reduction, any other amount required to be paid at lease inception, and the amounts of all monthly or other periodic payments. Part I.B prohibits the respondent from misrepresenting any other material fact about the price, sale, financing, or leasing of any vehicle.

Part II of the proposed order addresses the TILA allegations. It requires clear and conspicuous TILA and Regulation Z disclosures when advertising any of the relevant triggering terms with regard to issuing consumer credit. It also requires that if any finance charge is advertised, the rate be stated as an "annual

percentage rate" using that term or the abbreviation "APR." In addition, Part II prohibits any other violation of TILA or Regulation Z.

Part III of the proposed order requires respondent to keep copies of relevant advertisements and materials substantiating claims made in the advertisements. Part IV requires that respondent provide copies of the order to certain of its personnel. Part V requires notification to the Commission regarding changes in corporate structure that might affect compliance obligations under the order. Part VI requires the respondent to file compliance reports with the Commission. Finally, Part VII 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 complaint or proposed order, or to modify in any way the proposed order's terms.

Complaint

IN THE MATTER OF

FIDELITY NATIONAL FINANCIAL, INC.
AND
LENDER PROCESSING SERVICES, INC.

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

Docket No. C-4425; File No. 131 0159
Complaint, December 23, 2013 – Decision, March 4, 2014

This consent order addresses the $2.9 billion acquisition by Fidelity National Financial, Inc. of certain assets of Lender Processing Services, Inc. The complaint alleges that the acquisition agreement constitutes a violation of Section 5 of the Federal Trade Commission Act and, if consummated, would violate Section 7 of the Clayton Act and Section 5 of the Federal Trade Commission Act by eliminating actual, direct, and substantial competition between Respondents and by increasing the likelihood of collusion or coordinated interaction in the markets for the provision of title information services in seven relevant markets in Oregon. The consent order requires Respondents to divest a copy of LPS's title plants serving Clatsop, Columbia, Coos, Josephine, Polk, and Tillamook counties, Oregon, to a Commission-approved acquirer. The order also requires Respondents to divest an ownership interest equivalent to LPS's share in the joint title plant that serves the Portland, Oregon, metropolitan area to a Commission-approved buyer.

Participants

For the *Commission*: *Jessica S. Drake.*

For the *Respondents*: *Joe Simons* and *Aidan Synnott*, *Paul, Weiss, Rifkind, Wharton & Garrison LLP* and *Peter Barbur*, *Cravath, Swaine & Moore LLP.*

COMPLAINT

Pursuant to the provisions of the Federal Trade Commission Act, and by virtue of the authority vested in it by the Act, the Federal Trade Commission ("Commission"), having reason to believe that Respondents Fidelity National Financial, Inc. ("Fidelity") and Lender Processing Services, Inc. ("LPS") have entered into an acquisition agreement that constitutes a violation of Section 5 of the Federal Trade Commission Act, as amended,

15 U.S.C. § 45, and which, if consummated, would violate Section 7 of the Clayton Act, as amended, 15 U.S.C. § 18, and Section 5 of the Federal Trade Commission Act, 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. DEFINITIONS

1. "Title plant" means a privately-owned collection of records and/or indices regarding the ownership of and interests in real property. The term includes such collections that are regularly maintained and updated by obtaining information or documents from the public records, as well as such collections of information that are not regularly updated.

2. "Title information services" means providing selected information contained in a title plant to a customer or user or permitting a customer or user to have access to information contained in a title plant.

3. "Respondent Fidelity" or "Fidelity" means Fidelity National Financial, Inc., its directors, officers, employees, agents, representatives, successors, and assigns; and its subsidiaries, divisions, joint ventures, groups, and affiliates in each case controlled by Fidelity; and the respective directors, officers, employees, agents, representatives, successors, and assigns of each.

4. "Respondent LPS" or "LPS" means Lender Processing Services, Inc., its directors, officers, employees, agents, representatives, successors, and assigns; and its subsidiaries, divisions, joint ventures, groups, and affiliates in each case controlled by LPS; and the respective directors, officers, employees, agents, representatives, successors, and assigns of each.

II. RESPONDENTS

5. Respondent Fidelity is a corporation organized, existing and doing business under and by virtue of the laws of the State of Delaware, with its executive offices located at 601 Riverside

Avenue, Jacksonville, FL 32204. Fidelity, among other things, is engaged in the sale of title insurance and the provision of title information services.

6. Respondent LPS is a corporation organized, existing and doing business under and by virtue of the laws of the State of Delaware, with its executive offices located at 601 Riverside Avenue, Jacksonville, FL 32204. LPS, among other things, is engaged in the sale of title insurance and the provision of title information services.

7. Respondents and each of their relevant operating subsidiaries are, and at all relevant times have been, engaged in activities in or affecting "commerce" as defined in Section 1 of the Clayton Act, 15 U.S.C. § 12, and Section 4 of the Federal Trade Commission Act, 15 U.S.C. § 44.

III. THE PROPOSED ACQUISITION

8. Pursuant to an Agreement and Plan of Merger dated May 28, 2013, Fidelity proposes to acquire all of the outstanding common stock of LPS for a total equity value of approximately $2.9 billion.

IV. RELEVANT MARKETS

9. For the purposes of this Complaint, the relevant line of commerce in which to analyze the effects of the proposed acquisition is the provision of title information services.

10. For the purposes of this Complaint, the relevant geographic areas in which to analyze the effects of the proposed acquisition in the relevant line of commerce are the following jurisdictions in the state of Oregon: Clatsop, Columbia, Coos, Josephine, Polk, and Tillamook counties; and the tri-county Portland metropolitan area consisting of Clackamas, Multnomah, and Washington counties. Title information is generated and collected on a county level and because of the local character of the real estate markets in which the title information services are used, geographic markets for title information services are highly localized.

V. STRUCTURE OF THE MARKETS

11. Oregon law requires title insurers and title insurance producers, who are the only users of title information services, to own an interest in a title plant in each county in which they issue policies. Oregon's regulatory requirement prevents third-party information providers from offering title information services in the relevant geographic areas listed under Paragraph 10.

12. Four independent title plants provide title information services in Josephine and Polk counties, Oregon. Three independent title plants provide title information services in Clatsop, Columbia, Coos, and Tillamook counties, Oregon. Each independent title plant in these counties has a single owner, a title insurer or title insurance producer, who is the plant's sole user. Both Respondents own title plants in each of these counties.

13. A single jointly-owned title plant provides title information services in the tri-county Portland metropolitan area consisting of Clackamas, Multnomah, and Washington counties. The jointly-owned title plant is governed by an agreement permitting each owner to use the title plant. The agreement sets forth the terms under which the owners can vote to expel other owners from the joint title plant. Both Respondents own interests in the joint title plant.

14. The markets for title information services in the geographic areas listed under Paragraph 10 are highly concentrated. The proposed acquisition significantly increases concentration in the relevant markets.

VI. BARRIERS TO ENTRY

15. Entry into the market for providing title information services is unlikely and would not occur in a timely manner to deter or counteract the adverse anticompetitive effects described in Paragraph 16, because of, among other things, the time and expense necessary to collect, compile, and index historical real property records.

VII. EFFECTS OF THE ACQUISITION

16. The effects of the proposed acquisition, if consummated, may be substantially to lessen competition in the relevant markets in the following ways, among others:

a. by eliminating actual, direct, and substantial competition between Respondents Fidelity and LPS in the relevant markets;

b. by increasing the likelihood of collusion or coordinated interaction in Clatsop, Columbia, Coos, and Tillamook counties, Oregon, where the proposed acquisition reduces the number of independent title plants from three to two;

c. by increasing the likelihood of collusion or coordinated interaction in Josephine and Polk counties, Oregon, where the proposed acquisition reduces the number of independent title plants from four to three; and

d. by increasing the likelihood of collusion or coordinated interaction in the tri-county Portland metropolitan area consisting of Clackamas, Multnomah, and Washington counties, Oregon, where the proposed acquisition reduces the number of joint title plant owners necessary to expel other owners from the joint title plant.

VIII. VIOLATIONS CHARGED

17. The agreement described in Paragraph 8 constitutes a violation of Section 5 of the Federal Trade Commission Act, as amended, 15 U.S.C. § 45.

18. 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 Federal Trade Commission Act, as amended, 15 U.S.C. § 45.

WHEREFORE, THE PREMISES CONSIDERED, the Federal Trade Commission on this twenty-third day of December, 2013 issues its Complaint against Respondents.

By the Commission, Commissioner Wright dissenting.

ORDER TO MAINTAIN ASSETS

The Federal Trade Commission ("Commission"), having initiated an investigation of the acquisition by Respondent Fidelity National Financial, Inc. ("Fidelity"), of Respondent Lender Processing Services, Inc. ("LPS"), and Respondents having been furnished thereafter with a copy of a draft of Complaint that the Bureau of Competition proposed to present to the Commission for its consideration and which, if issued by the Commission, would charge Respondents with violations of Section 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

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

The Commission having thereafter considered the matter and having determined that it had reason to believe that Respondents have violated the said Acts, and that a Complaint should issue stating its charges in that respect, and having 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 Complaint and Order to Maintain Assets ("Order"):

1. Respondent Fidelity 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 601 Riverside Avenue, Jacksonville, FL 32204.

2. Respondent LPS 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 601 Riverside Avenue, Jacksonville, FL 32204.

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

ORDER

I.

IT IS ORDERED that, as used in this Order, the definitions in the Decision and Order issued in this matter shall apply as well as the following definition:

A. "Decision and Order" means the:

1. Proposed Decision and Order contained in the Consent Agreement in this matter until issuance and service of a final Decision and Order by the Commission; and

2. Final Decision and Order issued and served by the Commission.

II.

IT IS FURTHER ORDERED that, until Respondents fully comply with Paragraphs II.A., II.B, III.A., and III.B. (and Paragraph IV., if applicable) of the Decision and Order, Respondents shall:

A. Take such actions as are necessary to maintain the viability and marketability of the Divestiture Assets and the Tri-County Title Plant and to prevent the destruction, removal, wasting, deterioration, or impairment of the Divestiture Assets and the Tri-County Title Plant except for ordinary wear and tear;

B. Not sell, transfer, encumber, or otherwise impair the Divestiture Assets (other than as required by this Order) and the Tri-County Title Plant nor take any action that lessens their viability, marketability, or competitiveness; and

C. Maintain the Divestiture Assets and the Tri-County Title Plant in the regular and ordinary course of business and in accordance with past practice, and/or as may be necessary to preserve the marketability, viability, and competitiveness of the Divestiture Assets and the Tri-County Title Plant to the extent and in the manner maintained prior to the Acquisition, including, but not limited to, updating the records and/or indices contained in the Divestiture Assets and the Tri-County Title Plant and not compromising the ability and suitability of the Title Plant Assets and the Tri-County Title Plant to meet Oregon state requirements for title insurers and title insurance producers.

III.

IT IS FURTHER ORDERED that within thirty (30) days after the date this Order is issued and every thirty (30) days thereafter until Respondents have fully complied with the provisions of Paragraph II. of this Order and with Paragraphs II.A., II.B, III.A., and III.B. (and Paragraph IV., if applicable) of the Decision and Order, Respondents shall submit to the

Commission a verified written report setting forth in detail the manner and form in which they intend to comply, are complying, and have complied with this Order.

IV.

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.

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 and five (5) days notice to a Respondent, such Respondent shall, without restraint or interference, permit any duly authorized representative of the Commission:

A. Access, during business office hours and in the presence of counsel, to all facilities and to inspect and copy all books, ledgers, accounts, correspondence, memoranda, and all other records and documents in the possession or under the control of such Respondent relating to compliance with this Order, which copying services shall be provided by such Respondent at its expense; and

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

VI.

IT IS FURTHER ORDERED that this Order shall terminate after the last of the divestitures required by the Decision and Order is completed.

By the Commission, Commissioner Wright dissenting.

DECISION AND ORDER

The Federal Trade Commission ("Commission"), having initiated an investigation of the acquisition by Respondent Fidelity National Financial, Inc. ("Fidelity"), of Respondent Lender Processing Services, Inc. ("LPS"), and Respondents having been furnished thereafter with a copy of a draft of Complaint that the Bureau of Competition proposed to present to the Commission for its consideration and which, if issued by the Commission, would charge Respondents with violations of Section 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

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

The Commission having thereafter considered the matter and having determined that it had reason to believe that Respondents have violated the said Acts, and that a Complaint should issue stating its charges in that respect, and having thereupon issued its

Complaint and 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 Fidelity 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 601 Riverside Avenue, Jacksonville, FL 32204.

2. Respondent LPS 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 601 Riverside Avenue, Jacksonville, FL 32204.

3. The Federal Trade Commission has jurisdiction over the subject matter of this proceeding and over 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. "Fidelity" means Fidelity National Financial, Inc., its directors, officers, employees, agents, representatives, successors, and assigns; and its subsidiaries, divisions, joint ventures, groups, and affiliates in each case controlled by Fidelity; and the respective directors, officers, employees, agents, representatives, successors, and assigns of each. After the Acquisition, Fidelity shall include LPS.

B. "LPS" means Lender Processing Services, Inc., its directors, officers, employees, agents, representatives, successors, and assigns; and its subsidiaries, divisions, joint ventures, groups, and affiliates in each case controlled by LPS; and the respective directors, officers, employees, agents, representatives, successors, and assigns of each.

C. "Commission" means the Federal Trade Commission.

D. "Acquirer" means any and all Persons approved by the Commission pursuant to Paragraphs II. and/or III. (or Paragraph IV., if applicable) of this Order.

E. "Acquisition" means the acquisition by Fidelity of all of the outstanding common stock of LPS pursuant to the Agreement and Plan of Merger dated May 28, 2013.

F. "Copy" means a reproduction of a Title Plant that will enable an Acquirer to use the reproduction in a qualitatively similar way to the Title Plant. A Copy will reproduce all of the records, indices, documents, and other information contained in the Title Plant, as of the Divestiture Date, and enable such information to be accessed no less quickly and no less conveniently than it could be using the Title Plant.

G. "Divestiture Agreement" means any and all agreements between the Respondents (or between a Divestiture Trustee appointed pursuant to Paragraph IV. of this Order) and an Acquirer, and all amendments, exhibits, attachments, agreements, and schedules thereto, that have been approved by the Commission pursuant to Paragraphs II. and/or III. (or Paragraph IV., if applicable) of this Order.

H. "Divestiture Assets" means:

1. Portland Title Agency Interest, and

2. Title Plant Assets.

I. "Divestiture Date" means each date on which Respondents (or a Divestiture Trustee) fully complete the divestiture of each of the Divestiture Assets, as applicable, as required by Paragraphs II. and/or III. (or Paragraph IV., if applicable) of this Order.

J. "Divestiture Trustee" means a trustee appointed by the Commission pursuant to Paragraph IV. of this Order.

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

L. "Portland Title Agency" means Portland Title Agency, LLC, a wholly-owned subsidiary of Fidelity.

M. "Portland Title Agency Interest" means the Title Plant Interest held by Portland Title Agency in the Tri-County Title Plant.

N. "Respondents" means Fidelity and LPS, individually and collectively.

O. "Third Party" means any non-governmental Person other than the Respondents or each Acquirer.

P. "Title Information Services" means providing selected information contained in a Title Plant to a customer or user or permitting a customer or user to have access to information contained in a Title Plant.

Q. "Title Plant" means a privately-owned collection of records and/or indices regarding the ownership of and interests in real property. Title Plants include such collections that are regularly maintained and updated by obtaining information or documents from the public records, as well as such collections of information that are not regularly updated.

R. "Title Plant Assets" means a Copy of each Title Plant, and all rights associated with each Copy, owned or otherwise held by LPS prior to the Acquisition, covering each of the Oregon counties listed below:

1. Clatsop,

2. Columbia,

3. Coos,

4. Josephine,

5. Polk, and

6. Tillamook.

S. "Title Plant Interest" means any and all rights, present or contingent, of a Person to hold any membership or partnership share, voting or nonvoting stock, share capital, equity or other interests, and/or beneficial ownership of a Title Plant.

T. "Tri-County Title Plant" means the joint venture Title Plant established pursuant to the Tri-County Title Plant Partnership Agreement, effective as of October 15, 1992, and all amendments, exhibits, and attachments thereto, which covers records and/or indices regarding the ownership of and interests in real property located in the tri-county Portland metropolitan area consisting of Clackamas, Multnomah, and Washington counties, Oregon.

II.

IT IS FURTHER ORDERED that:

A. Not later than five (5) months after the date this Order is issued, Respondents shall divest the Portland Title Agency Interest, absolutely and in good faith, at no minimum price, to an Acquirer that receives the prior approval of the Commission and in a manner

(including a Divestiture Agreement) that receives the prior approval of the Commission; *provided, however,* that no proposed divestiture of the Portland Title Agency Interest to a Person that owns or controls a Title Plant Interest in the Tri-County Title Plant at the time of the divestiture will be approved if that Person's Title Plant Interest, when combined with the Portland Title Agency Interest and the Respondents' Title Plant Interests in the Tri-County Title Plant, would equal or exceed 70% of the outstanding Title Plant Interests in the Tri-County Title Plant.

B. Prior to the Divestiture Date, Respondents shall obtain all consents, approvals, and waivers from all Third Parties that are necessary to permit Respondents to divest the Portland Title Agency Interest and transfer all associated rights to the Acquirer.

C. Respondents shall not, directly or indirectly, through subsidiaries, partnerships, or otherwise, exercise any of their voting rights, or influence any other partners to exercise any of their voting rights, under Section 11.01(f) of the Tri-County Title Plant Partnership Agreement (as reflected in the version of the agreement in effect as of the date Respondents execute the Agreement Containing Consent Orders), to expel the Acquirer of the Portland Title Agency Interest.

D. The purpose of the divestiture of the Portland Title Agency Interest is to ensure the continuation of the Portland Title Agency Interest as an independent interest in the Tri-County Title Plant and to remedy the lessening of competition in Title Information Services resulting from the Acquisition as alleged in the Commission's Complaint.

III.

IT IS FURTHER ORDERED that:

A. Not later than five (5) months after the date this Order is issued, Respondents shall divest the Title Plant

Assets, absolutely and in good faith, at no minimum price, to an Acquirer or Acquirers that receive the prior approval of the Commission and in a manner (including a Divestiture Agreement) that receives the prior approval of the Commission.

B. Prior to the Divestiture Date, Respondents shall obtain all consents, approvals, and waivers from all Third Parties that are necessary to permit Respondents to divest each of the Title Plant Assets and transfer all associated rights to each Acquirer.

C. The purpose of the divestiture of the Title Plant Assets is to remedy the lessening of competition in Title Information Services resulting from the Acquisition as alleged in the Commission's Complaint.

IV.

IT IS FURTHER ORDERED that:

A. If Respondents have not fully complied with the obligations of Paragraphs II. and III. to divest all of the Divestiture Assets, the Commission may appoint a trustee ("Divestiture Trustee") to complete the divestiture of any remaining Divestiture Assets in a manner that satisfies the requirements of this Order. In the event that the Commission or the Attorney General brings an action pursuant to § 5(*l*) of the Federal Trade Commission Act, 15 U.S.C. § 45(*l*), or any other statute enforced by the Commission, Respondents shall consent to the appointment of a Divestiture Trustee in such action. Neither the appointment of a Divestiture Trustee nor a decision not to appoint a Divestiture Trustee under this Paragraph shall preclude the Commission or the Attorney General from seeking civil penalties or any other relief available to it, including a court-appointed Divestiture Trustee, pursuant to § 5(*l*) of the Federal Trade Commission Act, or any other statute enforced by the Commission, for any failure by Respondents to comply with this Order.

B. The Commission shall select the Divestiture Trustee, subject to the consent of Respondents, which consent shall not be unreasonably withheld. The Divestiture Trustee shall be a Person with experience and expertise in acquisitions and divestitures. If Respondents have not opposed, in writing, including the reasons for opposing, the selection of any proposed Divestiture Trustee within ten (10) days after notice by the staff of the Commission to Respondents of the identity of any proposed Divestiture Trustee, Respondents shall be deemed to have consented to the selection of the proposed Divestiture Trustee.

C. Not later than ten (10) days after the appointment of a Divestiture Trustee, Respondents shall execute a trust agreement that, subject to the prior approval of the Commission, transfers to the Divestiture Trustee all rights and powers necessary to permit the Divestiture Trustee to effectuate the divestitures required by, and satisfy the additional obligations imposed by, Paragraphs and II. and III. of this Order.

D. If a Divestiture Trustee is appointed by the Commission or a court pursuant to this Paragraph, Respondents shall consent to the following terms and conditions regarding the Divestiture Trustee's powers, duties, authority, and responsibilities:

1. Subject to the prior approval of the Commission, the Divestiture Trustee shall have the exclusive power and authority to effectuate the divestitures required by, and satisfy the additional obligations imposed by, Paragraphs II. and III. of this Order.

2. The Divestiture Trustee shall have one (1) year after the date the Commission approves the trust agreement described herein to effectuate the required divestitures, 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 divest or believes the divestitures can be achieved within a

reasonable time, the divestiture period may be extended by the Commission, or, in the case of a court-appointed Divestiture Trustee, by the court; *provided, however,* the Commission may extend the divestiture period only two (2) times.

3. Subject to any demonstrated legally recognized privilege, the Divestiture Trustee shall have full and complete access to the personnel, books, records, and facilities related to the Divestiture Assets that are required to be divested by this Order and to any other relevant information, as the Divestiture Trustee may request. Respondents shall develop such financial or other information as the Divestiture Trustee may request and shall cooperate with the Divestiture Trustee. Respondents shall take no action to interfere with or impede the Divestiture Trustee's accomplishment of the divestitures. Any delays caused by Respondents shall extend the time for divestiture under this Paragraph for a time period equal to the delay, as determined by the Commission or, for a court-appointed Divestiture Trustee, by the court.

4. The Divestiture Trustee shall use commercially reasonable efforts to negotiate the most favorable price and terms available in each contract that is submitted to the Commission, subject to Respondents' absolute and unconditional obligation to divest expeditiously and at no minimum price. The divestiture shall be made in the manner and to each Acquirer as required by this Order; *provided, however,* if the Divestiture Trustee receives bona fide offers from more than one acquiring Person, and if the Commission determines to approve more than one such acquiring Person, the Divestiture Trustee shall divest to the acquiring Person selected by Respondents from among those approved by the Commission; *provided further, however,* that Respondents shall select such Person within five

(5) days after receiving notification of the Commission's approval.

5. The Divestiture Trustee shall serve, without bond or other security, at the cost and expense of Respondents, on such reasonable and customary terms and conditions as the Commission or a court may set. The Divestiture Trustee shall have the authority to employ, at the cost and expense of Respondents, such consultants, accountants, attorneys, investment bankers, business brokers, appraisers, and other representatives and assistants as are necessary to carry out the Divestiture Trustee's duties and responsibilities. The Divestiture Trustee shall account for all monies derived from the divestiture and all expenses incurred. After approval by the Commission of the account of the Divestiture Trustee, including fees for the Divestiture Trustee's services, all remaining monies shall be paid at the direction of Respondents, and the Divestiture Trustee's power shall be terminated. The compensation of the Divestiture Trustee shall be based at least in significant part on a commission arrangement contingent on the divestiture of all of the relevant assets that are required to be divested by this Order.

6. Respondents shall indemnify the Divestiture Trustee and hold the Divestiture Trustee harmless against any losses, claims, damages, liabilities, or expenses arising out of, or in connection with, the performance of the Divestiture Trustee's duties, including all reasonable fees of counsel and other expenses incurred in connection with the preparation for, or defense of, any claim, whether or not resulting in any liability, except to the extent that such losses, claims, damages, liabilities, or expenses result from gross negligence, 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 report in writing to Respondents and to the Commission every sixty (60) days concerning the Divestiture Trustee's efforts to accomplish the specified 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.

10. The Commission may, among other things, require the Divestiture Trustee and each of the Divestiture Trustee's consultants, accountants, attorneys, 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 and responsibilities.

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 each of the divestitures required by this Order.

V.

IT IS FURTHER ORDERED that, until Respondents fully comply with Paragraphs II.A., II.B, III.A., and III.B. (and Paragraph IV., if applicable) of the Decision and Order, Respondents shall:

A. Take such actions as are necessary to maintain the viability and marketability of the Divestiture Assets and the Tri-County Title Plant and to prevent the destruction, removal, wasting, deterioration, or impairment of the Divestiture Assets and the Tri-County Title Plant except for ordinary wear and tear;

B. Not sell, transfer, encumber, or otherwise impair the Divestiture Assets (other than as required by this Order) and the Tri-County Title Plant nor take any action that lessens their viability, marketability, or competitiveness; and

C. Maintain the Divestiture Assets and the Tri-County Title Plant in the regular and ordinary course of business and in accordance with past practice, and/or as may be necessary to preserve the marketability, viability, and competitiveness of the Divestiture Assets and the Tri-County Title Plant to the extent and in the manner maintained prior to the Acquisition, including, but not limited to, updating the records and/or indices contained in the Divestiture Assets and the Tri-County Title Plant and not compromising the ability and suitability of the Title Plant Assets and the Tri-County Title Plant to meet Oregon state requirements for title insurers and title insurance producers.

VI.

IT IS FURTHER ORDERED that:

A. No Divestiture Agreement shall limit or contradict, or be construed to limit or contradict, the terms of this Order, it being understood that nothing in this Order shall be construed to reduce any rights or benefits of

any Acquirer or to reduce any obligations of Respondents under such agreements.

B. Each Divestiture Agreement shall be incorporated by reference into this Order and made a part hereof.

C. Respondents shall comply with all terms of each Divestiture Agreement, and any breach by Respondents of any term of a Divestiture Agreement shall constitute a failure to comply with this Order. If any term of a Divestiture Agreement varies from the terms of this Order ("Order Term"), then to the extent that Respondents cannot fully comply with both terms, the Order Term shall determine Respondents' obligations under this Order.

VII.

IT IS FURTHER ORDERED that:

A. For a period of ten (10) years from the date this Order becomes final, Respondents shall not, directly or indirectly, through subsidiaries, partnerships, or otherwise, without providing advance written notification to the Commission, acquire any:

1. Title Plant covering any county in Oregon, if, as a result of such acquisition, there would be three (3) or fewer independent Title Plants covering the county;

2. Title Plant Interest of any Title Plant covering any county in Oregon:

   a. if, as a result of such acquisition, when aggregated with any and all Title Plant Interests already owned or otherwise held by Respondents in such Title Plant, Respondents would own or otherwise hold an interest of fifty (50) percent or more in such Title Plant; or

b. if, as a result of such acquisition, there would be three (3) or fewer independent Title Plant Interest holders in such Title Plant.

B. The prior notification required by this Paragraph VII. shall be given on the Notification and Report Form set forth in the Appendix to Part 803 of Title 16 of the Code of Federal Regulations, as amended (hereinafter referred to as "the Notification"), and shall be prepared and transmitted in accordance with the requirements of that part, except that no filing fee will be required for any such notification, notification shall be filed with the Secretary of the Commission, 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. In addition to the information required to be supplied on such Notification and Report Form pursuant to the above-referenced regulation, Respondents shall submit the following supplemental information in Respondents' possession or reasonably available to Respondents:

1. The name of each county to which the terms of Paragraph VII.A. are applicable;

2. A description of the Title Plant or Title Plant Interest that is being acquired; and

3. With respect to each Title Plant covering each county to which the terms of Paragraph VII.A. are applicable (including all Title Plants in which the Respondents own or otherwise hold a direct or indirect Title Plant Interest, as well as other Title Plants known to the Respondents), the names of all Persons that own or otherwise hold any direct or indirect Title Plant Interest in the Title Plant and the percentage interest held by each Person; the time period covered by each category of title records contained in the Title Plant; whether the respective categories of title records are regularly being updated; the indexing system or systems used with respect to each category of title records;

and the names of all Persons, including, but not limited to, title insurers or title insurance producers, who have access to the Title Plant.

C. Respondents shall provide the Notification to the Commission at least thirty (30) days prior to consummating the transaction (hereinafter referred to as the "first waiting period"). If, within the first waiting period, representatives of the Commission make a written request for additional information or documentary material (within the meaning of 16 C.F.R. § 803.20), Respondents shall not consummate the transaction until thirty (30) days after submitting such additional information or documentary material. Early termination of the waiting periods in this Paragraph VII. 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.

VIII.

IT IS FURTHER ORDERED that:

A. Within thirty (30) days after the date this Order is issued and every thirty (30) days thereafter until Respondents have fully complied with the provisions of Paragraphs II. and III. (and Paragraph IV., if applicable) of this Order, Respondents shall submit to the Commission a verified written report setting forth in detail the manner and form in which they intend to comply, are complying, and have complied with this Order. Respondents shall include in their compliance reports, among other things that are required from time to time, a full description of the efforts being made to comply with Paragraphs II. and III. (and Paragraph IV., if applicable) of this Order, including a description of all substantive contacts or negotiations for accomplishing the specified actions and the identity of

all parties contacted. Respondents shall include in their compliance reports copies of all written communications to and from such parties, all internal memoranda, and all reports and recommendations concerning the accomplishment of the specified actions and obligations.

B. One (1) year from the date this Order is issued, annually for the next nine (9) years on the anniversary of the date this Order is issued, and at other times as the Commission may require, Respondents shall file a verified written report with the Commission setting forth in detail the manner and form in which they have complied and are complying with this Order.

IX.

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.

X.

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

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

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

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

XI.

IT IS FURTHER ORDERED that this Order shall terminate on March 4, 2024.

By the Commission, Commissioner Wright dissenting.

ANALYSIS OF CONSENT ORDER TO AID PUBLIC COMMENT

I. Introduction

The Federal Trade Commission ("Commission" or "FTC") has accepted, subject to final approval, an Agreement Containing Consent Order ("Consent Agreement") from Fidelity National Financial, Inc. ("Fidelity") and Lender Processing Services, Inc. ("LPS") (collectively, "Respondents"). Fidelity proposes to acquire LPS, a combination that would reduce competition in seven relevant markets in Oregon where Respondents own overlapping title plant assets. The proposed Consent Agreement remedies the competitive concerns arising from the acquisition. The proposed Consent Agreement requires, among other things, that Respondents divest: a copy of LPS's title plants covering Clatsop, Columbia, Coos, Josephine, Polk, and Tillamook counties in Oregon; and an ownership interest equivalent to LPS's share in a joint title plant serving the Portland, Oregon, metropolitan area.

On May 28, 2013, Respondents entered into an acquisition agreement under which Fidelity would acquire all of the outstanding common stock of LPS for approximately $2.9 billion (the "Acquisition"). The Commission's Complaint alleges that the acquisition agreement constitutes a violation of Section 5 of the Federal Trade Commission Act, as amended, 15 U.S.C. § 45, and, if consummated, would violate Section 7 of the Clayton Act, as amended, 15 U.S.C. § 18, and Section 5 of the Federal Trade Commission Act by eliminating actual, direct, and substantial competition between Respondents and by increasing the likelihood of collusion or coordinated interaction in the relevant geographic markets.

II. The Parties

Fidelity, a publicly-traded company headquartered in Jacksonville, Florida, provides title insurance, transaction services, and technology solutions to the mortgage industry. Fidelity is the nation's largest title insurance company, operating six underwriting subsidiaries.

LPS, a publicly-traded company headquartered in Jacksonville, Florida, provides transaction services and technology solutions to the mortgage industry. LPS's transaction services include title insurance underwriting provided by its National Title Insurance of New York, Inc. ("NTNY") subsidiary.

Respondents own overlapping title plants in Clatsop, Columbia, Coos, Josephine, Polk, and Tillamook counties, Oregon. Fidelity and LPS are also partners in a title plant serving the tri-county Portland, Oregon, metropolitan area, consisting of Clackamas, Multnomah, and Washington counties.

III. Title Information Services

Lenders require assurance of title before issuing a mortgage loan, typically in the form of title insurance. Title insurance protects against the risk that a sale of real property fails to result in the transfer of clear title. Before a title insurance policy can issue, a title agent or abstractor must first conduct a title search. Title search is the due diligence process that enables title insurance underwriters to assess (and mitigate, if necessary) the

risk of subsequent title challenges. The title agent or abstractor examines property-specific records to establish the chain of title and to identify any potential obstacles – such as liens or encumbrances – that might impair the transfer of title.

To facilitate the title search process, title agents and underwriters often utilize title plants. Title plants are privately-owned (either individually or jointly) databases of information detailing the title status of real property parcels. Title plants compile, normalize, and re-index county-level property records, which are often difficult to access or inefficient to search directly. Oregon law requires title insurers and title insurance producers, who are the sole users of title information services, to own an interest in a title plant in each county in which they issue policies. This law means that there are no alternatives to title plants in Oregon counties.

IV. The Complaint

The Commission's Complaint alleges that the acquisition agreement between Fidelity and LPS constitutes a violation of Section 5 of the Federal Trade Commission Act, as amended, 15 U.S.C. § 45. The Complaint further alleges that consummation of the agreement may substantially lessen competition in the provision of title information services in seven relevant markets in Oregon, 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.

The Complaint alleges that a relevant product market in which to analyze the effects of the Acquisition is the provision of title information services. "Title information services" means the provision of selected information, or access to information, contained in a title plant to a customer or user.

The Complaint alleges that the relevant geographic markets are local in nature. Title information is generated, collected, and used on a county (or county-equivalent) level. Therefore, geographic markets for title information services are highly localized and consist of each of the counties or other local jurisdictions covered by the title plants at issue. The geographic areas of concern outlined in the Complaint are Clatsop, Columbia,

Coos, Josephine, Polk, and Tillamook counties, Oregon; and the tri-county Portland, Oregon, metropolitan area, consisting of Clackamas, Multnomah, and Washington counties.

The Complaint alleges, absent the proposed relief, that the Acquisition would increase the risk of coordinated anticompetitive effects in the relevant markets. In Clatsop, Columbia, Coos, and Tillamook counties, the Acquisition would reduce the number of independent title plant owners to two. In Josephine and Polk counties, the Acquisition would leave only three independent title plant owners. In each of these six counties, each title plant has a single owner that is also the title plant's sole user. In contrast, one jointly-owned title plant serves the Portland, Oregon, metropolitan area; each co-owner has full access to this title plant. The Acquisition would leave five joint owners of that joint title plant, but would reduce the number of owners necessary to expel other owners from the joint title plant.

The Complaint alleges that entry would not be timely, likely, or sufficient to deter or counteract the anticompetitive effects of the Acquisition. De novo entry would be costly and time-consuming, requiring any potential entrant to assemble a complete and accurate index of historical property records.

V. The Proposed Consent Agreement

The proposed Consent Agreement will remedy the Commission's competitive concerns resulting from the Acquisition in each of the relevant markets discussed above. Pursuant to the proposed Consent Agreement, Respondents must divest a copy of LPS's title plants serving Clatsop, Columbia, Coos, Josephine, Polk, and Tillamook counties, Oregon, to a Commission-approved acquirer. Respondents must complete these divestitures within five (5) months of the closing date of the Acquisition. The required divestitures will eliminate the competitive harm that otherwise would have resulted in these counties by restoring the number of independent title plant owners within each county to the pre-acquisition level.

The proposed Consent Agreement also requires Respondents to divest an ownership interest equivalent to LPS's share in the joint title plant that serves the Portland, Oregon, metropolitan area

to a Commission-approved buyer. Respondents must complete this divestiture within five (5) months of the closing date of the Acquisition. The proposed Consent Agreement requires that the divestiture purchaser's interest in the joint title plant, when combined with Fidelity's post-merger interest, must not equal or exceed 70 percent. The divestiture will ensure that no two joint owners of the plant could coordinate to expel other members of the joint title plant in this relevant market. The proposed Consent Agreement further prohibits Fidelity from exercising its voting rights, or influencing others to exercise their voting rights, to expel the divestiture buyer from the joint title plant for failure to conduct an active title business for a period of three (3) months.

In addition to the required divestitures, the proposed Consent Agreement obligates Respondents to provide the Commission with prior written notice of title plant acquisitions in any county in Oregon in three sets of circumstances: (1) if the acquisition would result in three or fewer title plants covering the county; (2) if the acquisition would result in three or fewer owners of a joint plant; and (3) if the acquisition would result in Fidelity controlling a 50 percent or greater share in a joint plant. Each of these circumstances would raise competitive concerns in the market for title information services, and could reduce competition in the market for title insurance underwriting in Oregon. These transactions likely would not come to the Commission's attention without the prior notification provision.

VI. The Order to Maintain Assets

The Decision and Order and the Order to Maintain Assets obligate Fidelity to continue to update and maintain the individual title plants, the Portland Tri-County Plant interest, and the Portland Tri-County Plant until the required divestitures are complete. This will ensure that the divested assets remain viable sources of title information to support the title insurance underwriting operations of the acquirer or acquirers. The Order to Maintain Assets explicitly requires Fidelity not to compromise these assets' ability and suitability to meet Oregon's requirements for title insurers and title insurance producers.

VII. Opportunity for Public Comment

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

By accepting the proposed Consent Agreement subject to final approval, the Commission anticipates that the competitive problems alleged in the Complaint will be resolved. The purpose of this analysis is to invite and inform public comment on the Consent Agreement, including the proposed divestitures. This analysis is not intended to constitute an official interpretation of the Consent Agreement, nor is it intended to modify the terms of the Consent Agreement in any way.

Statement of the Federal Trade Commission

Today the Commission is taking remedial action with respect to the proposed acquisition of Lender Processing Services, Inc. by Fidelity National Financial, Inc. We believe Fidelity's acquisition of LPS, which would combine the two firms' title plants, among other assets, is likely to reduce competition that benefits title insurance consumers in nine counties in the state of Oregon. Our proposed remedy is tailored to counteract the likely anticompetitive effects of the proposed acquisition without eliminating any efficiencies that might arise from the combination of the two companies.

Fidelity is a leading provider of mortgage and other services to the mortgage industry and is the largest title insurance underwriter in the United States. LPS's underwriting activity is small by comparison, a complementary operation to LPS's key business as a leading provider of technology solutions, transaction

services, and data and analytics to the mortgage and real estate industries.

Our competitive concerns arise from a limited aspect of the $2.9 billion combination of Fidelity and LPS: the title plant assets each company uses to support its title insurance underwriting activities in certain Oregon counties. Both Fidelity and LPS own title plants covering Oregon's Clatsop, Columbia, Coos, Josephine, Polk, and Tillamook counties. Both firms are also joint owners of a title plant covering the tri-county Portland metropolitan area.

Title insurance underwriters require access to county-level title information contained in title plant databases. In Oregon, state law requires title insurance underwriters or their agents to own a title plant in each county in which they issue policies. As a result, any firm offering title insurance underwriting in Oregon must obtain an ownership interest in an existing title plant or build one from scratch. Fidelity and LPS compete for title insurance customers in the nine Oregon counties of concern. The proposed acquisition will eliminate one of only a few underwriters available in each relevant market,[1] and the Commission has reason to believe that no timely entrant is likely to replace the competition lost in these counties.

Although price competition in title insurance underwriting occurs at the state level, underwriters compete on the basis of service as well. For example, underwriters compete on the turnaround time from title order to settlement, enabling consumers to close on mortgage transactions more quickly. Moreover, the costs of entering the title insurance underwriting business are higher in Oregon because of the requirement that underwriters operating in the state own an interest in a title plant rather than merely purchase title information from a third-party provider. No

1 In Clatsop, Coos, Columbia, and Tillamook counties, only two title insurance underwriters will remain post-acquisition. In Josephine and Polk counties, three underwriters will remain. In the Portland tri-county area, the proposed acquisition will leave five competing title insurance underwriters as joint owners of the only title plant serving the Portland area. However, the transaction would reduce to two the number of joint owners with the ability to exclude all others from the plant.

other states where both Fidelity and LPS compete have a similar requirement. For these reasons, we have reason to believe that the proposed acquisition is likely to result in a loss of competition and harm title insurance customers.[2]

We respectfully disagree with Commissioner Wright that our action is based solely on the fact that the merger will decrease the number of underwriters operating in the relevant markets and that it is inconsistent with the 2010 Horizontal Merger Guidelines. Substantial increases in concentration caused by a merger play an important role in our analysis under the Guidelines because highly concentrated markets with two or three large firms are conducive to anticompetitive outcomes. The lens we apply to the evidence in a merger that reduces the number of firms in a market to two or three is, and should be, different than the lens we apply to a merger that reduces the number of firms to six or seven. In the former case, as in the merger here, a presumption of competitive harm is justified, under both the express language of the Guidelines and well-established case law.[3]

However, we did not end our analysis there. We also considered whether other market factors, such as the possibility of entry, might alleviate our competitive concerns. In most of the markets we considered, even where the merger would reduce the number of title plant operators from three to two, we concluded that the transaction was unlikely to lessen competition because the evidence demonstrated that alternative sources of title information

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2 We note that, in deciding whether to issue a complaint, the relevant standard for the Commission is whether we have "reason to believe" a merger violates Section 7 of the Clayton Act, not whether a violation has in fact been established. 15 U.S.C. § 45(b).

3 2010 HORIZONTAL MERGER GUIDELINES § 2.1.3 ("Mergers that cause a significant increase in concentration and result in highly concentrated markets are presumed to be likely to enhance market power, but this presumption can be rebutted by persuasive evidence showing that the merger is unlikely to enhance market power."); *see also Chicago Bridge & Iron Co. v. FTC*, 534 F.3d 410, 423 (5th Cir. 2008) ("Typically, the Government establishes a *prima facie* case by showing that the transaction in question will significantly increase market concentration, thereby creating a presumption that the transaction is likely to substantially lessen competition."); *FTC v. H.J. Heinz Co.*, 246 F.3d 708, 716 (D.C. Cir. 2001) (merger to duopoly creates a rebuttable presumption of anticompetitive harm through direct or tacit coordination).

beyond proprietary title plants existed. That is not the case in Oregon. We are also not persuaded that price regulation in Oregon is sufficient to address our concerns about potential competitive harm. The evidence showed that competition between underwriters occurs on nonprice dimensions, supporting our view that the transaction was likely to harm competition in the identified nine counties.

Consistent with the approach the Commission has taken in previous merger enforcement actions involving title plants,[4] the proposed consent order addresses these competitive concerns by requiring divestiture of a copy of LPS's title plants in each of the affected counties and an ownership interest equivalent to that of LPS in the tri-county Portland-area joint plant. With the divested assets, the acquirer or acquirers will have the title plant ownership interest necessary to overcome the most significant legal impediment to compete in underwriting, thereby preserving the competition that would be lost as a result of the acquisition. There is no evidence that the proposed consent order would eliminate any efficiencies resulting from the transaction or otherwise burden the parties.

Merger analysis is necessarily predictive and requires us to make a determination as to the likely effects of a transaction. Where, as here, we have reason to believe that consumers are likely to suffer a loss of competition, and there are no countervailing efficiencies weighing against the remedy, we believe the public interest is best served by remedying the competitive concerns.

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4 *See, e.g.*, Complaint, *Fidelity Nat'l Fin., Inc.*, FTC Dkt. No. C-4300 (Sept. 16, 2010), *available at* http://www.ftc.gov/sites/default/files/documents/cases/2010/09/100916fidelitycmpt.pdf; Complaint, *Fidelity Nat'l Fin., Inc.*, FTC Dkt. No. C-3929 (Feb. 25, 2000), *available at* http://www.ftc.gov/sites/default/files/documents/cases/2000/02/fidelitycmp.pdf; Complaint, *Commonwealth Land Title Ins. Co.*, FTC Dkt. No. C-3835 (Nov. 12, 1998), *available at* http://www.ftc.gov/sites/default/files/documents/cases/1998/11/ftc.gov-9810127cmp.htm; Complaint, *LandAmerica Fin. Grp., Inc.*, FTC Dkt. No. C-3808 (May 27, 1998), *available at* http://www.ftc.gov/sites/default/files/documents/cases/1998/05/ftc.gov-9710115.cmp_.htm.

Dissenting Statement of Commissioner Joshua D. Wright

The Commission has voted to issue a Complaint and Decision & Order against Fidelity National Financial, Inc. ("FNF") to remedy the allegedly anticompetitive effects of FNF's proposed acquisition of Lender Processing Services, Inc. ("LPS"). I dissented from the Commission's decision because the evidence is insufficient to provide reason to believe FNF's acquisition will substantially lessen competition for title information services in the Oregon counties identified in the Complaint in violation of Section 7 of the Clayton Act. I commend staff for their hard work in this matter. Staff has worked diligently to collect and analyze a substantial quantity of evidence related to numerous product and geographic markets within the U.S. mortgage lending industry. Based upon this evidence, I concluded there is no reason to believe the proposed transaction is likely to lessen competition in the Oregon counties identified in the Complaint. It follows, in my view, that the Commission should close the investigation and allow the parties to complete the merger without imposing a remedy.

I. Mortgage Lending Industry Background

Title insurance protects against the risk that a sale of real property fails to result in the transfer of clear title. Before a title insurance policy can issue, a title insurance underwriter must evaluate the risk that a subsequent title challenge will be made against the property. Title plants are privately owned repositories of real estate records that help underwriters examine property-specific title information in order to establish chain of title and identify any potential obstacles—such as liens or encumbrances—that could impair the transfer of title. In recent years, third-party title information services have begun to offer an alternative to title plants by providing access to the necessary data and records on a transactional or subscription basis. However, in Oregon, state law requires all title insurance underwriters to own an interest in a title plant in each county in which it issues policies. This law therefore effectively precludes a market in third-party provision of title information services.[1]

1 It is important to note at the outset that Oregon's vertical integration requirement creates a scenario in which there is no relevant market for title

II. Coordinated Effects Analysis Under the Horizontal Merger Guidelines

The Commission's theory of anticompetitive harm in this matter is based solely upon a structural analysis. In other words, the Commission seeks to satisfy its prima facie burden of production to demonstrate the merger will substantially lessen competition based exclusively upon a tenuous logical link between the reduction in the number of firms that own title plants in each of the Oregon counties identified in the Complaint and a presumption that the merger between FNF and LPS will increase the likelihood of collusion or coordinated interaction among the remaining competitors for the sale of title information services.[2]

It is of course true that a reduction in the number of firms in a relevant market, all else equal, makes it easier for the remaining firms to coordinate or collude.[3] However, this is true of any reduction of firms, whether it be from seven to six or three to two, and therefore that proposition alone would have us condemn all mergers. The pertinent question is whether and when a reduction

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information services in Oregon. As a result, any competitive concerns arising from increased concentration in title plant ownership must be based upon anticompetitive effects in the downstream title insurance underwriting market in Oregon. The Commission does not allege, and there is no evidence to support the conclusion, that the merger will result in a substantial lessening of competition in the title insurance underwriting market in Oregon.

2 The Complaint appears to allege that the proposed transaction also may result in unilateral effects by stating the proposed merger will substantially lessen competition "by eliminating actual, direct, and substantial competition between Respondents Fidelity and LPS in the relevant markets." Complaint ¶ 16(a), Fidelity National Financial, Inc., FTC File No. 131-0159 (Dec. 23, 2013). I have seen no evidence to support a unilateral effects theory of harm in either the title insurance services or title insurance underwriting markets. Nor does the Commission's Analysis to Aid Public Comment discuss the potential for a unilateral effects theory in this matter. *See* Analysis of the Agreement Containing Consent Order to Aid Public Comment § 4, Fidelity National Financial, Inc., FTC File No. 131-0159 (Dec. 23, 2013). Moreover, the merger cannot possibly result in unilateral effects in the title insurance services market because no such market exists in Oregon as a result of the state's vertical integration requirement.

3 *See generally* George J. Stigler, *A Theory of Oligopoly*, 72 J. POL. ECON. 44 (1964).

in the number of firms, without more, gives reason to believe an acquisition violates the Clayton Act.[4] The Horizontal Merger Guidelines ("Guidelines") clarify that the focus of modern coordinated effects analysis is not merely upon the number of firms but rather "whether a merger is likely to change the manner in which market participants interact, inducing substantially more coordinated interaction."[5] The key economic issue underlying coordinated effects analysis is to understand how the merger changes incentives to coordinate, or, as the Guidelines explain, to examine "how a merger might significantly weaken competitive incentives through an increase in the strength, extent, or likelihood of coordinated conduct."[6] Consistent with the focus on changes in post-merger incentives to coordinate rather than mere structural analysis, the Guidelines declare the federal antitrust agencies are not likely to challenge a merger based upon a coordinated effects theory of harm unless the following three conditions are satisfied: (1) "the merger would increase concentration and lead to a moderately or highly concentrated market"; (2) "the market shows signs of vulnerability to coordinated conduct"; and (3) "the Agencies have a credible basis on which to conclude that the merger may enhance that vulnerability."[7]

Although market structure is relevant to assessing the first and second conditions, the Guidelines require more than the observation that the merger has decreased the number of firms to satisfy the third condition. This is the correct approach. And it is no less correct for mergers that reduce the number of firms from three to two. Of what relevance is market structure if the Commission does not allege or otherwise describe the relevance

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4 One reason to disfavor an approach that assesses the likelihood of anticompetitive effects based solely upon the number of firms in a market is that the approach is sensitive to the market definition exercise and requires great faith that we have defined the relevant market correctly.

5 U.S. DEP'T OF JUSTICE & FED. TRADE COMM'N, HORIZONTAL MERGER GUIDELINES § 7.1 (2010) [hereinafter 2010 Guidelines], *available at* http://www.justice.gov/atr/public/guidelines/hmg-2010.pdf.

6 *Id*.

7 *Id.*

of the reduction in the number of firms to post-merger incentives to coordinate? There is no basis in modern economics to conclude with any modicum of reliability that increased concentration -- without more -- will increase post-merger incentives to coordinate.[8] Thus, the Guidelines require the federal antitrust agencies to develop additional evidence that supports the theory of coordination and, in particular, an inference that the merger increases incentives to coordinate.

For example, the Guidelines observe that "an acquisition eliminating a maverick firm . . . in a market vulnerable to coordinated conduct is likely to cause adverse coordinated effects."[9] In short, the Guidelines correctly, and consistent with

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8 The Commission touts legal authority rooted in a long ago established legal presumption that disfavors mergers that create concentrated markets. Statement of the Commission, Fidelity National Financial, Inc., FTC File No. 131-0159, n. 2. (Dec. 23, 2013) (citing to authority); *see also* United States v. Philadelphia Nat'l Bank, 374 U.S. 321 (1963) (creating the so-called "structural presumption" that shifts the burden of proof away from the federal antitrust agencies and towards defendants in cases where the government challenges certain mergers resulting in concentrated markets). Significantly, however, modern economic learning and evidence no longer supports the foundations for the structural presumption upon which the Commission relies today. *See* Joshua D. Wright, Comm'r, Fed. Trade Comm'n, The FTC's Role in Shaping Antitrust Doctrine: Recent Successes and Future Targets, Remarks at the 2013 Georgetown Global Antitrust Symposium Dinner (Sept. 24, 2013), *available at* http://www.ftc.gov/sites/default/files/documents/public_statements/ftc%E2%80%99s-role-shaping-antitrust-doctrine-recent-successes-and-future-targets/130924globalantitrustsymposium.pdf. And although *Philadelphia National Bank* remains good law in that it has not been overruled by the Supreme Court, it should not be the basis for the Commission's decision if the economic foundations upon which the legal proposition was built no longer hold. The Commission has correctly taken a similar approach with other disavowed but not yet overturned precedent, such as, for instance, *United States v. Von's Grocery Co.*, 385 U.S. 270 (1966).

9 *See* 2010 Guidelines, *supra* note 5, § 7.1. The Guidelines define a maverick as a firm "that plays a disruptive role in the market to the benefit of customers," and provide a number of examples. *See id.* § 2.1.5. Each example has in common the acquisition of a firm that imposes a particularized constraint upon successful coordination before the merger. *See* Jonathan B. Baker, *Mavericks, Mergers and Exclusion: Proving Coordinated Competitive Effects Under the Antitrust Laws*, 77 N.Y.U.L. REV. 135 (2002); Taylor M. Owings, *Identifying a Maverick: When Antitrust Law Should Protect a Low-Cost Competitor*, 66 VAND. L. REV. 323 (2013).

the modern economics of collusion, require the Commission to do more than point to a reduction in the number of firms to generate inferences of likely competitive harm. Although the acquisition of a maverick is not necessary for a coordinated effects theory, a theory consistent with the Guidelines must include a specific economic rationale explaining why—above the mere reduction in the number of firms attendant to all mergers—the acquisition of this rival is likely to eliminate or reduce a constraint upon successful coordination and thus lead to increased incentives to coordinate, or alternatively, some evidence supporting structural inferences in the context of the specific transaction.

III. Insufficient Evidence to Conclude an Increased Likelihood of Coordination Exists Post-Merger

In my view, the Commission's coordinated effects theory and the evidence to support it do not provide a credible basis for concluding the merger between FNF and LPS will enhance incentives to coordinate. There is no evidence beyond the mere increase in the concentration of title plants in the Oregon counties identified in the Complaint that provides a reason to believe that the merger will increase the likelihood or coordination or collusion for title insurance underwriting and thereby substantially reduce competition for the same.

Significantly, because insurance rates are generally set at the state level and also because Oregon is a "prior approval" state in which underwriters must request specific rates that the regulator then approves or amends, it is unlikely that concentration in title plant ownership at the county level can increase the likelihood of collusion or coordinated interaction and thereby result in an increase in price.[10] There also is no evidence that FNF's acquisition of LPS will eliminate a maverick that is currently a constraint upon successful coordination. Furthermore, there is no

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10 Notably absent from the Commission's statement is any explanation of how the proposed transaction will increase the parties' incentives to coordinate on non-price terms post-merger. Such analysis is fundamental to modern merger analysis under the Guidelines. *See* 2010 Guidelines, *supra* note 5, § 7.1 ("The Agencies examine whether a merger is likely to change the manner in which market participants interact, inducing substantially more coordinated interaction.").

evidence that title insurance underwriters can effectively coordinate on non-price factors, such as service and turnaround time. Lastly, there is no empirical evidence demonstrating that similar levels and changes in concentration in other title information service markets have resulted in a reduction in price or non-price competition.

Section 7 of the Clayton Act requires that the Commission first find that a merger likely will substantially lessen competition prior to agreeing to enter into a consent agreement with merging parties. Because there is insufficient evidence to conclude that the proposed transaction will substantially lessen competition, I respectfully dissent and believe the Commission should close the investigation and allow the parties to complete the merger without imposing a remedy.

* * * * *

Complaint

IN THE MATTER OF

AARON'S, INC.

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

Docket No. C-4442; File No. 122 3264
Complaint, March 10, 2014 – Decision, March 10, 2014

This consent order addresses Aaron's, Inc.'s use of PC Rental Agent, a privacy-invasive software that many of its franchisees installed on computers rented to consumers. The complaint alleges that Aaron's knowingly assisted its franchisees by allowing them to access DesignerWare's website, which was necessary in order for them to use PC Rental Agent to activate Detective Mode and secretly monitored consumers' activities on rented computers. Second, Aaron's corporate server was used to transmit and store a voluminous number of emails containing Detective Mode content. The complaint further alleges that Aaron's knew the data being gathered by Detective Mode could be highly intrusive and invaded consumers' privacy; and that, as a result of Aaron's practices, consumers were substantially harmed. The consent order requires the destruction of any data using monitoring or tracking technology without the requisite notice and consent or obtained under false pretenses, and mandates the encryption of any properly collected data when it is transmitted. The order also requires Aaron's to oversee and monitor its franchisees to ensure that their conduct complies with the core constraints imposed on Aaron's, which prohibits the deceptive gathering of consumer information such as using fake software registration notices or similar deceptive tactics.

Participants

For the *Commission*: *Julie K. Mayer* and *Tracy S. Thorleifson.*

For the *Respondent*: *Kristy Brown* and *Jim Harvey, Alston & Bird LLP.*

COMPLAINT

The Federal Trade Commission, having reason to believe that Aaron's, 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 Aaron's, Inc., ("Aaron's" or "respondent"), is a Georgia corporation with its principal office or place of business at 309 E. Paces Ferry Road, N.E., Atlanta, Georgia 30305.

Aaron's is a national "rent-to-own" ("RTO") retailer of consumer electronics, residential furniture, and household appliances. RTO retailers allow consumers to rent goods with an option to purchase them.

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. Aaron's does business through a network of more than 1,300 company-owned stores and 700 independently owned franchised stores that operate across the United States. Since at least 2009 through January 2012, some Aaron's franchisees licensed a software product known as PC Rental Agent from DesignerWare, LLC ("DesignerWare") and installed it on computers rented to consumers. Aaron's knew that some of its franchisees had installed PC Rental Agent on computers rented to consumers because, among other things, Aaron's provided these stores with the technical capacity to access and use PC Rental Agent, as detailed below. Company-owned Aaron's stores did not license or use PC Rental Agent.

4. When installed on a rented computer, PC Rental Agent enabled Aaron's franchisees to disable a computer remotely. PC Rental Agent also enabled Aaron's franchisees to remotely install and activate an add-on program called Detective Mode. Using Detective Mode, Aaron's franchisees could – and did – surreptitiously monitor the activities of computer users, including by logging keystrokes, capturing screenshots, and using the computer's webcam. Through Detective Mode, Aaron's franchisees could – and did – secretly gather consumers' personal information using fake software registration windows. In addition, using a different PC Rental Agent feature, Aaron's franchisees tracked the physical location of rented computers using WiFi hotspot location information. Aaron's franchisees used this illicitly gathered data to assist in collecting past-due payments and recovering computers after default.

5. Detective Mode data sent to Aaron's franchisees revealed private, confidential, and personal details about consumers using rented computers. Keystroke logs displayed usernames and passwords for access to email accounts, social media websites, and financial institutions. Screenshots captured additional confidential details, including medical information, applications containing Social Security numbers, and bank and credit card statements. Webcams operating secretly inside computer users' homes took photographs of computer users and anyone else within view of the camera. These included images of minor children as well as individuals not fully clothed and engaged in intimate conduct. The presence of PC Rental Agent was not detectible to computer users and computer renters could not uninstall it. In numerous instances, Aaron's franchisees did not obtain consent from their rental customers and did not disclose to them or the rental computers' users that PC Rental Agent was installed and could be used to track consumers' physical locations and remotely spy on their activities.

6. To use PC Rental Agent and activate Detective Mode, Aaron's franchisees needed to access DesignerWare's website and direct PC Rental Agent to take the desired action. Aaron's franchisees also needed to provide DesignerWare with an email address to which DesignerWare could send data captured by Detective Mode. DesignerWare forwarded immediately all data collected by Detective Mode to the email address provided by the Aaron's franchisee. Because at one activation level Detective Mode would capture screen shots, log keystrokes, and take webcam pictures every two minutes that the computer was connected to the Internet until directed to stop, and because this data was contemporaneously emailed to the Aaron's franchisees requesting it, Detective Mode activations often generated an enormous volume of data.

7. Aaron's requires its franchisees to have company-provided, Aarons.com email addresses. Aaron's also provides these franchisees with email accounts and server space to store email messages. Such email messages are routed through Aaron's corporate headquarters and stored on computer servers owned, controlled, and maintained by Aaron's. Under the franchise agreement that governs each Aaron's franchisee, Aaron's may terminate a franchisee that breaches any Aaron's policy or

practice or that violates federal, state, or local laws, regulations, or ordinances. In addition, Aaron's policies and training materials for franchisees prohibit "unlawful" computer and Internet use, and set standards for fair collection practices.

8. Aaron's protects its computer network with certain security features. DesignerWare's website, through which Aaron's franchisees needed to access PC Rental Agent and activate Detective Mode, did not interface smoothly with Aaron's network configurations. In numerous instances, Aaron's franchisees had to seek written permission from Aaron's to access the DesignerWare website so that they could use PC Rental Agent. Senior Aaron's management approved these requests and authorized franchisees to access the DesignerWare website using the Aaron's network. Absent this permission, many Aaron's franchisees could not have used PC Rental Agent, activated Detective Mode, and surreptitiously monitored consumers' activities on rented computers.

9. Aaron's also provided its franchisees with trouble-shooting advice relating to installation of PC Rental Agent software on rental computers. Technical conflicts between PC Rental Agent and the antivirus program already installed on computers in rental inventory prevented franchisees from readily installing PC Rental Agent. Aaron's published step-by-step instructions for installing PC Rental Agent on Aaron's rental computers in a newsletter for franchisees and posted those instructions on its website.

10. In numerous instances, Aaron's franchisees used the Aaron's computer network to access the DesignerWare website, and then, often using instructions provided by Aaron's, installed PC Rental Agent on computers rented to consumers. Aaron's franchisees directed DesignerWare to send Detective Mode data to the email accounts provided to them by Aaron's. Aaron's computer network was used to receive, store, and access upwards of 100,000 Detective Mode messages, including messages containing private and confidential consumer information about consumers who rented computers from Aaron's franchisees. Aaron's has stored such messages on its computer network since at least 2009.

11. Aaron's knew that Detective Mode captured confidential and personal information from consumer computer users without notice to those users. Aaron's IT personnel were aware that company server space was being used to store Detective Mode emails and knew what data those emails contained. One IT employee who reviewed Detective Mode images sent to a franchisee described the program as "very intrusive" in an email to Aaron's chief information officer.

12. Aaron's employees responsible for franchisee development and oversight, "franchise representatives," also knew that Aaron's franchisees were installing PC Rental Agent and using Detective Mode without notice to consumers. Franchise representatives discussed PC Rental Agent with franchisee employees, via email and in-person, including at Aaron's-sponsored conferences attended by franchisee employees where PC Rental Agent was an agenda item. Some franchisee employees first heard about PC Rental Agent from Aaron's franchise representatives. Through these communications, Aaron's employees also learned about the privacy-invasive capabilities of Detective Mode. For example, one franchisee owner suggested to an Aaron's franchise representative that PC Rental Agent use be put on the agenda for an upcoming meeting in part because he said he was "a little uncomfortable with the ability to see the customer through the webcam."

13. Beginning at least in 2010 and throughout 2011, Aaron's senior corporate management not only knew that its franchisees were using PC Rental Agent and activating Detective Mode without notice to computer users, they also knew that data and information gathered by Detective Mode could be highly intrusive and invaded consumers' privacy. Aaron's managers specifically discussed whether to purchase PC Rental Agent for installation on Aaron's corporate-owned stores. As part of that discussion, Aaron's reviewed the use of PC Rental Agent by some of its franchisees, as well as Detective Mode's capabilities. Among other things, managers received email communications that included examples of images captured by Detective Mode. Ultimately, Aaron's decided not to purchase PC Rental Agent for its corporate stores.

14. Aaron's management learned even more about PC Rental Agent and Detective Mode when, in May 2011, Aaron's was sued by a franchisee customer who alleged that an Aaron's franchisee's use of Detective Mode invaded her privacy and violated state and federal law. The lawsuit, which also named the Aaron's franchisee and DesignerWare, was styled as a class action. The complaint described, inter alia, the alleged properties of Detective Mode, including its capacity to capture computer users' keystrokes, screenshots of their computer activities, and webcam images.

15. Aaron's did not close its web portal and revoke franchisee access to the DesignerWare website and Detective Mode emails until December 2011. Following that action by Aaron's, its franchisees that used Aaron's network could no longer receive and view emails from DesignerWare containing Detective Mode-captured data about their customers. Aaron's computer servers received the last Detective Mode email in January 2012. Aaron's failed to act earlier despite clear authority to control its franchisees' access to and use of Aaron's computer network.

16. Aaron's conduct in permitting and participating in the gathering and storage of private and confidential information about individuals caused or was likely to cause substantial harm to consumers. Because of Aaron's actions, private and confidential information was captured, stored on Aaron's computer system, and revealed to Aaron's franchisees. This conduct placed consumers at risk from the exposure of their personal, financial account access, and medical information. Consumers also were injured by the unwarranted invasion into the peaceful enjoyment of their homes. Detective Mode's surreptitious capture of the private details of individual and family life – including images of visitors, children, family interactions, partially undressed individuals, and people engaged in intimate conduct – caused actual consumer harm. Because Detective Mode functioned secretly, consumers were unable to reasonably avoid this harm, which was neither trivial nor speculative. Further, the harm caused by the knowing and unauthorized gathering and storage of private and confidential information is not outweighed by countervailing benefits to consumers or to competition.

VIOLATION OF THE FTC ACT

17. Through the means described in Paragraphs 3 through 16, respondent's actions 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. Therefore, respondent's practices constitute unfair acts or practices in violation of Section 5 of the FTC Act, 15 U.S.C. § 45(a).

THEREFORE, the Federal Trade Commission, this tenth day of March, 2014, has issued this complaint against respondent.

By the Commission.

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 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 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 Commission Rule 2.34, 16 C.F.R. § 2.34, now in further conformity with the procedure prescribed in Commission Rule 2.34, the Commission hereby issues its complaint, makes the following jurisdictional findings and enters the following order:

1. Respondent Aaron, Inc. ("Aaron's"), is a Georgia corporation with its principal office or place of business at 309 E. Paces Ferry Road, N.E., Atlanta, Georgia 30305.

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:

A. Unless otherwise specified, "respondent" shall mean Aaron's and its successors and assigns.

B. "Commerce" shall be defined as it is defined in Section 4 of the Federal Trade Commission Act, 15 U.S.C. § 44.

C. "Computer" shall mean any desktop or laptop computer, handheld device, tablet, smartphone, 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.

D. "Clear(ly) and prominent(ly)" shall mean:

1. In textual communications (e.g., printed publications or words displayed on the screen of a computer or mobile device), the required disclosures are of a type, size, and location sufficiently noticeable for an ordinary consumer to read and comprehend them, in print that contrasts highly with the background on which they appear;

2. In communications disseminated orally or through audible means (e.g., radio or streaming audio), the required disclosures are delivered in a volume and cadence sufficient for an ordinary consumer to hear and comprehend them;

3. In communications disseminated through video means (e.g., television or streaming video), the required disclosures are in writing in a form 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;

4. In communications made through interactive media, such as the Internet, online services, and software, the required disclosures are unavoidable and presented in a form consistent with subpart (a) of this definition, in addition to any audio or video presentation of them; and

5. In all instances, the required disclosures are presented in an understandable language and syntax; 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.

E. "Consumer product" shall mean any item that is primarily for personal, family, or household use.

F. "Covered rent-to-own transaction" shall mean any transaction where a consumer enters into an agreement for the purchase or rental of any consumer product where the consumer's contract or rental agreement provides for payments over time with options to purchase the product.

G. "Franchisee" shall mean an independently owned business that operates under a franchise agreement with respondent.

H. "Geophysical location tracking technology" shall mean any hardware, software, or application that collects and reports data or information that identifies the precise geophysical location of an item. Geophysical location tracking technologies include, but are not limited to, technologies that report the GPS coordinates of a computer or other item; 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 or information through geolocation lookup services; or any information derived from any combination of the foregoing.

I. "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:

1. Recording keystrokes, clicks, or other user-generated actions;

2. Capturing screenshots of the information displayed on a computer monitor or screen; or

3. 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.

INJUNCTION

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 them 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. Using any monitoring technology to gather data or information from or about a consumer from any computer rented to a consumer; or

B. Receiving, storing, or communicating any data or information from or about a consumer that was gathered from a computer rented to a consumer using any monitoring technology.

Provided that this Part does not apply to respondent's use of any monitoring technology to gather data or information from or about a consumer from any computer rented to a consumer, with notice to and consent from the consumer, in connection with a request for technical assistance initiated by the consumer, where respondent only uses the information to provide, or attempt to provide, the requested technical assistance and for no other purpose.

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 them 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 data or information from any consumer product via any geophysical location tracking technology without providing clear and prominent notice to the consumer who rented the product at the time it is rented and also obtaining affirmative express consent from the consumer at the time the consumer product is rented;

B. Failing to provide clear and prominent notice to consumers and obtaining affirmative express consent from consumers at the time any consumer product is rented, to the extent that such notice and consent are required by 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 rented consumer product; (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 consumer can contact someone for additional information; and

2. Affirmative Express Consent: respondent shall obtain affirmative express consent by giving the 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 renter provides affirmative express consent. Notwithstanding the foregoing, nothing in this Section shall require respondent to rent an item to a consumer who declines to consent to installation or activation of any geophysical tracking technology; and

C. In connection with the rental of computers, 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, as clear and prominent is defined above, and 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 consumer reports that a rented consumer product has been stolen or respondent otherwise has a reasonable basis to believe that a rented consumer product has been stolen, and b) either the consumer or respondent has filed a police report stating that the consumer product 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 consumer's or respondent's complaint with the police department in any form recognized in the jurisdiction.

Provided further that this Part does not apply to respondent's use of geophysical location tracking technology, with notice to and consent from a consumer to the extent that such notice and consent are required by subpart A, to gather data or information in connection with a request for technical assistance initiated by a consumer, where respondent only uses the information to provide, or attempt to provide, the requested technical assistance and for no other purpose.

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 them 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, or assisting others in 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 data or information from or about a consumer.

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 them 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 data or information from or about a consumer 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 them who receive actual notice of this Order, by personal service or otherwise, shall:

A. Delete or destroy data or information from or about a consumer previously gathered or stored 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 after the expiration of any such court order or other legal obligation the information is deleted or destroyed; and

B. Only transfer any data or information from or about a consumer that was 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, 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 data or information from or about a consumer.

VII.
OVERSIGHT AND MONITORING OF FRANCHISEES

IT IS FURTHER ORDERED that respondent shall:

A. Require its franchisees to delete or destroy data or information from or about a consumer previously gathered or stored 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, in which case, after the expiration of any such court order or other legal obligation, respondent shall require its franchisees to delete or destroy the data or information;

B. Within thirty (30) days after the date of service of this Order, prohibit each of its franchisees from, in connection with a covered rent-to-own transaction:

1. Using any monitoring technology to gather data or information from or about a consumer from any computer rented to a consumer;

2. Receiving, storing, or communicating any data or information from or about a consumer that was gathered from a computer rented to a consumer using any monitoring technology;

3. Gathering any data or information from any consumer product via any geophysical location tracking technology in a manner that:

   a. does not comply with Part II of this Order; and

   b. that respondent has not approved in advance of the franchisee's use of such technology;

4. Using, in connection with collecting or attempting to collect a debt, money, or property pursuant to a covered rent-to-own transaction, any data or information from or about a consumer obtained in

a manner that does not comply with Parts I, II, and III of this Order; and

5. 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 data or information from or about a consumer;

C. Monitor compliance by each franchisee with the requirements of Parts VII.A and VII.B, including but not limited to by annually reviewing each franchisee's compliance with Parts VII.A. and VII.B.; and

D. When respondent knows, or has reason to know, whether as a result of monitoring required by Part VII.C. or otherwise, that a franchisee has violated any requirement imposed on that franchisee by respondent in compliance with Parts VII.A. or VII.B.:

1. Immediately take action to ensure that the franchisee corrects its practices; and

2. Terminate any such franchisee that fails to make such correction.

VIII.
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 franchisee principals. Delivery must occur within thirty (30) days after the date of service of the Order for current personnel and franchisee principals. For new personnel and franchisee principals, 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.

IX.
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; and

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 *In re Aaron's, Inc*., File No. 1223264. *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.

X.
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 – VII 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 consumer privacy, specifically including complaints or inquiries related to any monitoring or geophysical tracking technologies 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 VIII.

XI.
TERMINATION OF ORDER

This Order will terminate on March 10, 2034, 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; and

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

Provided, further, that, if such complaint is dismissed or a federal court rules that respondent did not violate any provision of the Order, and the dismissal or ruling is either not appealed or upheld on appeal, then the Order will terminate according to this Part as though the complaint had never been filed, except that 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, an agreement containing a consent order from Aaron's, Inc.

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

The Commission's administrative complaint alleges that respondent Aaron's engaged in unfair practices that caused, or are

likely to cause, substantial injury to consumers that cannot be reasonably avoided and are not outweighed by countervailing benefits to consumers or competition.

Aaron's, an operator and franchisor of more than 1,300 corporate and nearly 750 franchisee rent-to-own ("RTO") stores across the country and Canada, played an important role in the use of PC Rental Agent, a privacy-invasive software that many of its franchisees installed on computers rented to consumers. PC Rental Agent surreptitiously collected private, confidential, and personal information about consumers who used rented computers. RTO stores that licensed PC Rental Agent from its manufacturer, DesignerWare, could use this illicitly gathered data about their customers to assist in collecting on past-due accounts and recovering computers after default. When in its "Detective Mode," PC Rental Agent could log keystrokes, capture screenshots, and activate a computer's webcam. Detective Mode also allowed users to deceptively gather consumers' personal information through fake software registration notices. Information that Detective Mode collected was transmitted from rented computers to DesignerWare, which in turn would email it to its licensees, including Aaron's franchisees. Another feature of PC Rental Agent allowed RTO stores to track the physical location of rented computers using WiFi hotspot information, which RTO store licensees could access by logging onto DesignerWare's website.

According to the Commission's complaint, Aaron's knowingly assisted its franchisees in using PC Rental Agent in a variety of ways. First, Aaron's specifically allowed its franchisees to access DesignerWare's website, which was necessary in order for them to use PC Rental Agent. Without this permission from Aaron's, many of its franchisees could not have activated Detective Mode and secretly monitored consumers' activities on rented computers. Second, Aaron's corporate server was used to transmit and store a voluminous number of emails containing Detective Mode content. Aaron's provided email accounts to its franchisees that many of them used to receive messages sent from DesignerWare containing Detective Mode-captured information. Emails sent to and from these accounts were routed through Aaron's corporate headquarters and stored on computer servers owned, controlled, and maintained by Aaron's.

Analysis to Aid Public Comment

As a result, Aaron's maintained on its corporate server upwards of 100,000 Detective Mode messages containing covertly gathered consumer information. Finally, Aaron's provided franchisees with vital technical support about PC Rental Agent. For example, Aaron's published trouble-shooting advice about installing the program on rented computers and avoiding conflicts with antivirus software.

The proposed complaint alleges that, as a result of Aaron's practices, consumers were substantially harmed. It further alleges that Aaron's knew the data being gathered by Detective Mode could be highly intrusive and invaded consumers' privacy. This knowing support of franchisees' use of Detective Mode without notice to computer users placed those consumers at risk from exposure of their personal, financial account access, and medical information. Consumers were also injured by the unwarranted invasion into the peaceful enjoyment of their homes. Detective Mode's surreptitious capture of the private details of individual and family life – including images of visitors, children, family interactions, partially undressed individuals, and people engaged in intimate conduct – caused actual consumer harm. Because Detective Mode functioned secretly, consumers were unable to reasonably avoid this harm, which was neither trivial nor speculative. Further, there were no countervailing benefits to consumers or to Aaron's that outweighed this harm.

The proposed consent order contains provisions designed to prevent Aaron's and its franchisees from engaging in the challenged practices and similar future conduct. Section I of the order prohibits Aaron's from using monitoring technology on computers and from receiving, storing, or communicating information about consumers collected with such technology. Section II prohibits Aaron's use of geophysical location tracking technology on any consumer product without notifying and obtaining consent from renters. Aaron's must also notify a user of a rented computer immediately prior to activating tracking technology on that device, unless Aaron's has a reasonable basis to believe that the computer has been stolen and a police report filed. Both Sections I and II also contain provisos that permit Aaron's to use monitoring or geophysical location tracking technology for purposes of providing requested customer assistance, where the consumer has consented to the use of the

technology and any information collected is used only to provide the requested assistance.

Section III of the proposed order prohibits the deceptive gathering of consumer information, which will bar Aaron's from using fake software registration notices or similar deceptive tactics. Section IV will prevent Aaron's from using any consumer information to collect on rental contracts that was improperly obtained through monitoring technology, tracking technology, or deceptive notices that appear on computer screens. Section V requires the destruction of any data using monitoring or tracking technology without the requisite notice and consent or obtained under false pretenses, and mandates the encryption of any properly collected data when it is transmitted. Section VI prohibits Aaron's from making any misrepresentations about the privacy or security of consumer information it collects.

The order also contains provisions that require Aaron's to oversee and monitor its franchisees to ensure that their conduct complies with the core constraints imposed on Aaron's. Section VII mandates that Aaron's require its franchisees to delete or destroy any consumer information improperly gathered via monitoring technology, tracking technology, or deceptive notices that appear on computer screens. Under that section, Aaron's must also prohibit its franchisees from: 1) using any monitoring technology to gather consumer information from a leased computer; 2) receiving, storing, or communicating any data gathered using monitoring technology; 3) using any geophysical location tracking technology that Aaron's has not approved in advance; 4) gathering any data from any consumer product using geophysical location tracking technology without providing notice and consent; 5) using any improperly gathered consumer information to collect a debt; and 6) making a false representation to a consumer through the use of fake software registration notices or other deceptive statements that appear on the screen of a computer. Aaron's must also monitor, on an annual basis or more frequently, its franchisees' compliance with these requirements and, if Aaron's learns through this process or otherwise has reason to know that a franchisee has violated Section VII of the order, it must take immediate action to ensure that the franchisee corrects its practices. If it does not, Aaron's must terminate that franchisee.

Analysis to Aid Public Comment

Sections VIII – XI of the proposed order contain order distribution, compliance reporting, and recordkeeping provisions. Section VIII requires Aaron's to disseminate the order to persons with responsibilities related to the subject matter of the order, including franchisee principals. It also requires Aaron's to secure a signed and dated statement acknowledging receipt of the order from all persons who receive a copy. Section IX imposes standard reporting requirements, requiring Aaron's to file compliance reports to the Commission within sixty (60) days and periodically thereafter upon request. This section also requires that Aaron's notify the Commission of any changes in corporate status. Section X mandates that, for five (5) years, Aaron's retain documents relating to its compliance with the order and about complaints or inquiries concerning consumer privacy. Finally, Section XI 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 order or to modify its terms in any way.

Complaint

IN THE MATTER OF

DOWN TO EARTH DESIGNS, INC.

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

Docket No. C-4443; File No. 122 3268
Complaint, March 18, 2014 – Decision, March 18, 2014

This consent order addresses Down to Earth Designs, Inc. d/b/a gDiapers' marketing, sale, and distribution of diapers and baby wipes with claims of various environmental benefits. The complaint alleges that respondent represented that its diapers and wipes are biodegradable, "certified 100% biodegradable," garbage free when trashed or flushed, and plastic free. The complaint further alleges that respondent failed to disclose adequately that consumers can safely compost only wet used inserts and wipes. The consent order requires respondent to clearly and prominently disclose the time to complete decomposition or the rate and extent of decomposition with a further disclosure that the stated rate and extent of decomposition does not mean that the item will continue to decompose, if the item does not completely decompose within one year after customary disposal. The order also prohibits respondent from making specific environmental claims about any product or package unless the claim is true, not misleading, and substantiated by competent and reliable scientific evidence.

Participants

For the *Commission*: *Matthew Wilshire* and *Boris Yankilovich.*

For the *Respondent*: *Ann M. Begley* and *Zachary A. Rothstein, Morgan, Lewis & Bockius LLP.*

COMPLAINT

The Federal Trade Commission, having reason to believe that Down to Earth Designs, Inc., d/b/a gDiapers ("Respondent") has violated the provisions of the Federal Trade Commission Act, and it appearing to the Commission that this proceeding is in the public interest, alleges:

1. Respondent is an Oregon corporation with its principal place of business at 2808 NE Martin Luther King Jr. Boulevard, Portland, Oregon, 97212.

2. Respondent has advertised, labeled, offered for sale, sold, and distributed the following products throughout the United States:

a. gDiapers: A diaper system that consists of two components: (i) a reusable outer shell (gPants), and (ii) an inner liner, either a disposable pad (gRefills) or a reusable cloth insert. Respondent has offered for sale and sold gPants and gRefills separately and in combination with each other.

b. gWipes: Moist wipes for use on babies' skin.

3. Respondent has advertised, offered for sale, and sold gRefills and gWipes as disposable products on its website, www.gdiapers.com, and through other online media, including but not limited to advertisements on third-party websites, social media advertisements, and email advertisements sent to potential customers. Additionally, Respondent has advertised, offered for sale, sold, and distributed these products through various retailers and distributors throughout the United States.

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

5. Respondent disseminates, has disseminated, or has caused the dissemination of promotional materials relating to its gDiapers and gWipes products to retailers and consumers. In numerous instances, including but not limited to the promotional materials shown in Exhibits 1-19, Respondent has represented that:

a. gRefills and gWipes are biodegradable:

100% ecodorable*
***cute & biodegradable.**

Ex. 1 (gDiapers website).

100% biodegradable

Exs. 2, 3 (gDiapers website). *See also* Exs. 4, 5 (online advertising).

100% biodegradable for a happy planet.
Ex. 4 (online advertising).

disposable.
biodegradable.
adorable.

Exs. 6, 7 (online advertising).

biodegradable* gRefills

Ex. 8 (packaging).

biodegradable gWipes

Ex. 9 (packaging).

b. gRefills and gWipes biodegrade when trashed:

100% biodegradable
disposable diaper inserts
So gentle on the earth you can flush, compost, or toss.

Ex. 1 (gDiapers website).

Flush.
Compost.
Toss.
gDiapers. No garbage.

Ex. 10 (online advertising). *See also* Ex. 11 (online advertising).

a diaper shouldn't last forever.
50 million diapers enter the landfill every day. Each one takes up to 500 years to break down.

gDiapers are the only earth-friendly diapers that are 100% biodegradable. gDiapers biodegradable gRefills can be flushed, home composted, or tossed.

Ex. 3 (gDiapers website).

Put the poop in the toilet and toss the baby wipe. You can breathe easier knowing that a gWipe will break down much faster than other disposable baby wipes on the market.

Ex. 12 (gDiapers website).

toss
a plastic-free option that's easier on the planet

Ex. 13 (gDiapers website). *See also* Ex. 8 (packaging).

no landfill necessary.

Ex. 15 (online advertising).

c. gRefills biodegrade when flushed:

100% Biodegradable
So gentle on the earth you can flush, compost, or toss.

Ex. 1 (gDiapers website).

gDiapers biodegradable gRefills can be flushed, home composted, or tossed.

Ex. 3 (gDiapers website). *See also* Ex. 2 (gDiapers website).

d. gRefills are "certified" biodegradable:

gRefills are certified 100% biodegradable.

Exs. 13 (gDiapers website), 16 (email advertising), 8 (packaging).

e. gRefills and gWipes are compostable, including in home composts:

gRefills can be . . . home composted

Exs. 2, 3 (gDiapers website).

gWipes can be home composted

Ex. 12 (gDiapers website).

Flush.
Compost.
Toss.
gDiapers. No garbage.

Ex. 10 (online advertising).

Flush, compost, or throw them away!

Ex. 11 (online advertising).

gRefills in your own backyard.
*** * ***
Collect your yard waste, your fruit and veggie scraps from the kitchen, your coffee grounds and your baby's wet gRefills and watch how they work together to break down into useful and valuable compost.

Ex. 14 (gDiapers website).

f. gRefills offer an environmental benefit because they can be flushed:

Earth-friendly diapers
Flush your diapers.

Ex. 17 (online advertising).

Eco-friendly diapers.
*** * ***
Flush, compost, or throw them away!

Ex. 11 (online advertising).

Flush
You're putting poop where it belongs

Exs. 13 (website); *see also* 8 (packaging).

g. gDiapers are plastic free:

plastic free, naturally.

Ex. 18 (online advertising).

No plastic, chlorine, or guilt!

Ex. 11 (online advertising).

End plastic diaper use.

Ex. 19 (online social media advertising).

6. In numerous instances, no disclaimers accompanied the representations listed in Paragraph 5. *See*, *e.g.*, Exs. 9, 10, 11. In other instances, Respondent made qualifying statements – *e.g.*, disclaimers that only wet gRefills or gWipes can be composted, or that gRefills and gWipes are biodegradable only in composting environments – but in numerous instances those qualifiers were not clear and conspicuous or proximate to the claim. For example, while Respondent's home page advertised gRefills with unqualified compostable claims, *see* Ex. 1, it disclosed that only "wet ones" (*i.e.*, wet gRefills) can be composted on different web pages. *See*, *e.g.*, Exs. 3, 13. Similarly, in contrast to the unqualified biodegradable claims on the front of gRefills and

gWipes packaging, Respondent revealed on back and side panels that the products biodegrade in only "home and commercially-approved composts." *See*, *e.g.*, Exs. 8, 9.

7. Consumers likely interpret unqualified degradable claims to mean that the entire product or package will completely decompose into elements found in nature within a reasonably short period of time after customary disposal. For items entering the solid waste stream, consumers likely interpret unqualified degradable claims to mean that the item will completely decompose within one year after customary disposal. 16 C.F.R. § 260.8(b),(c).

8. Consumers likely interpret unqualified compostable claims to mean that all the materials in the item will break down into, or otherwise become part of, usable compost (*e.g.*, soil-conditioning material, mulch) in a safe and timely manner (*i.e.*, in approximately the same time as the materials with which it is composted) in an appropriate composting facility, or in a home compost pile or device. 16 C.F.R. § 260.7(b).

9. Approximately 92 percent of total municipal solid waste in the United States is disposed of in landfills, incinerators, or recycling facilities. Landfills, incinerators, and recycling facilities do not present conditions for biodegradation or composting within a reasonably short period of time.

10. Consumers of gRefills dispose of the majority of used gRefills by throwing them away in the trash ("trashing"). Trashing gRefills and gWipes leads to their final disposal in a landfill or incinerator.

11. In fact, gRefills and gWipes do not biodegrade in landfills or incinerators in a reasonably short period of time.

12. Municipal wastewater facilities filter out a portion of flushed gRefills and send that material to landfills. Of the material that is not filtered out, only a part may degrade in the wastewater stream during the treatment process. Of the remainder, a portion is landfilled or incinerated. As a result, a significant portion of flushed gRefills do not biodegrade.

13. Only wet used gRefills and gWipes are safe to compost.

14. Respondent has not obtained any independent, third-party certification that gRefills are biodegradable.

15. gDiapers are not plastic free. The gPants component of the gDiapers system contains, among other things, plastic.

VIOLATIONS OF SECTION 5 OF THE FTC ACT

COUNT I: FALSE OR MISLEADING REPRESENTATIONS

16. Through the means described in Paragraph 5, Respondent has represented, expressly or by implication, that:

a. gRefills and gWipes are biodegradable—*i.e.*, will completely break down and decompose into elements found in nature within one year after customary disposal;

b. gRefills and gWipes will biodegrade when trashed;

c. gRefills will biodegrade when flushed;

d. gRefills are "certified" biodegradable;

e. No part of used gRefills will end up in a landfill or incinerator after disposal by trashing or flushing; and/or

f. gDiapers are plastic free.

17. In truth and in fact:

a. gRefills and gWipes will not completely break down and decompose into elements found in nature within one year after customary disposal;

b. gRefills and gWipes will not biodegrade when trashed;

c. gRefills will not biodegrade when flushed;

d. gRefills are not "certified" biodegradable;

e. Part of used gRefills will end up in a landfill or incinerator after disposal by trashing or flushing; and/or

f. gDiapers are not plastic free.

18. Therefore, the representations set forth in Paragraph 16 were, and are, false or misleading.

19. Respondent's false or misleading representations constitute deceptive acts or practices in or affecting commerce, in violation of Section 5(a) of the Federal Trade Commission Act, 15 U.S.C. § 45(a).

COUNT II: FAILURE TO DISCLOSE, OR FAILURE TO DISCLOSE CLEARLY AND CONSPICUOUSLY, THAT COMPOSTABILITY IS LIMITED TO WET GREFILLS AND GWIPES

20. Through the means described in Paragraph 5, Respondent has represented, expressly or by implication, that used gRefills and gWipes are home compostable – *i.e.*, will break down into, or otherwise become part of, usable compost in a safe and timely manner in a home compost pile or device.

21. Respondent has failed to disclose that gRefills and gWipes soiled with solid waste will not break down into, or otherwise become part of, usable compost in a safe and timely manner in a home compost pile or device. Where Respondent has made such disclosures, in numerous instances they have not appeared in a clear and conspicuous manner.

22. This additional information, described in Paragraph 21, would be material to consumers in deciding whether to purchase gDiapers' products.

23. Respondent's failure to disclose the material information in Paragraph 21, in light of the representations made in Paragraph 20, constitutes a deceptive act and practice in violation of Section 5(a) of the Federal Trade Commission Act, 15 U.S.C. § 45(a).

COUNT III: UNSUBSTANTIATED REPRESENTATIONS

24. Through the means described in Paragraph 5, Respondent has represented, expressly or by implication, that:

a. gRefills and gWipes will biodegrade when trashed;

b. gRefills will biodegrade when flushed;

c. gRefills offer an environmental benefit because they can be flushed; and/or

d. gWipes are home compostable.

25. Through the means described in Paragraph 5, Respondent has represented, expressly or by implication, that it possessed and relied upon a reasonable basis that substantiated the representations set forth in Paragraph 24 at the time the representations were made.

26. In truth and in fact, Respondent did not possess and rely upon a reasonable basis that substantiated the representations set forth in Paragraph 24, at the time the representations were made. Therefore, the representation set forth in Paragraph 25 was, and is, false or misleading.

27. Respondent's practices constitute deceptive acts or practices in or affecting commerce, in violation of Section 5(a) of the Federal Trade Commission Act, 15 U.S.C. § 45(a).

IN WITNESS THEREOF, the Federal Trade Commission has issued this Complaint against Respondent and has caused it to be signed by its Secretary and its official seal to be hereto affixed, at Washington, D.C. this eighteenth day of March, 2014.

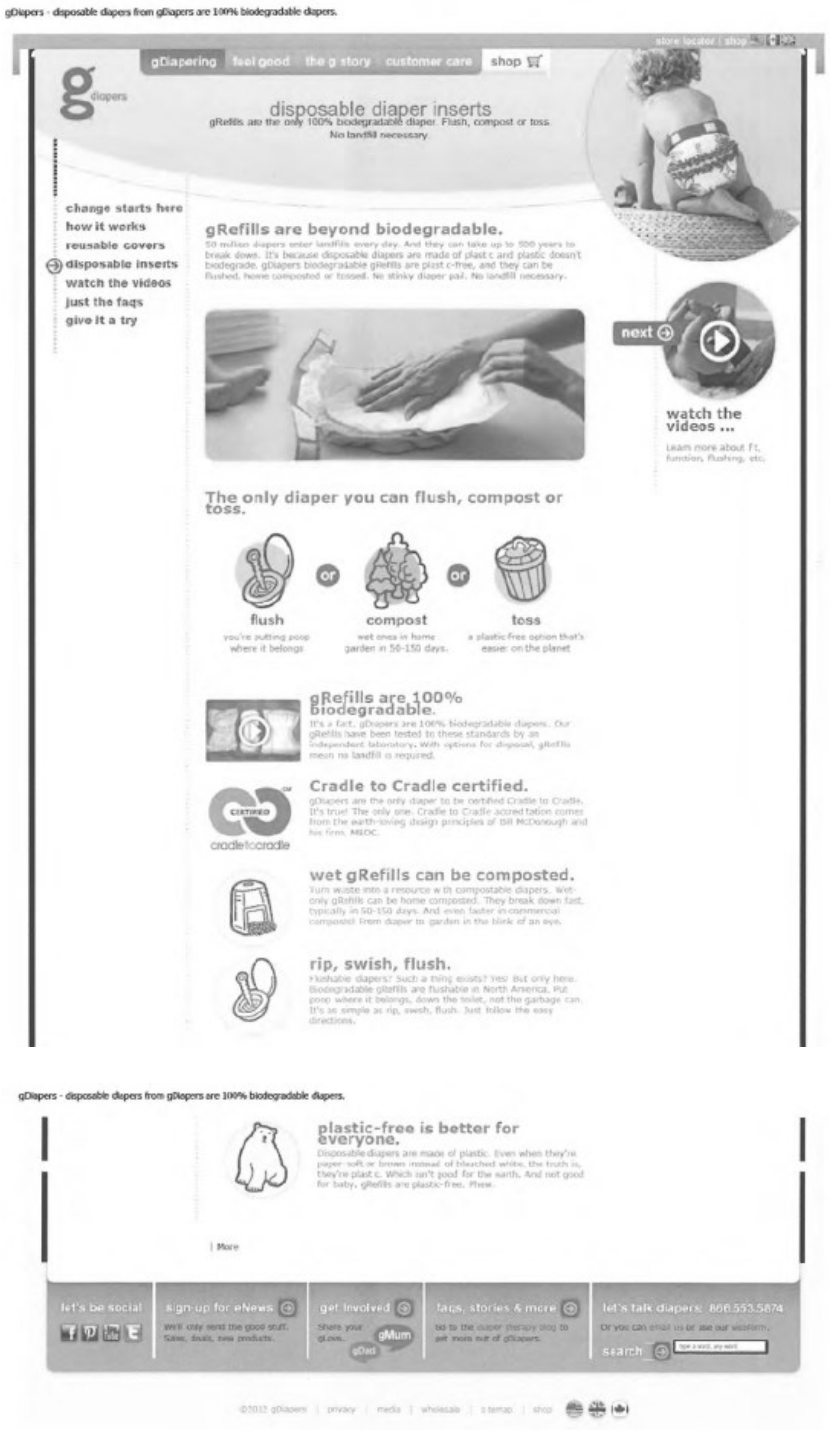
By the Commission.

Complaint

Exhibit 1

Complaint

Exhibit 2



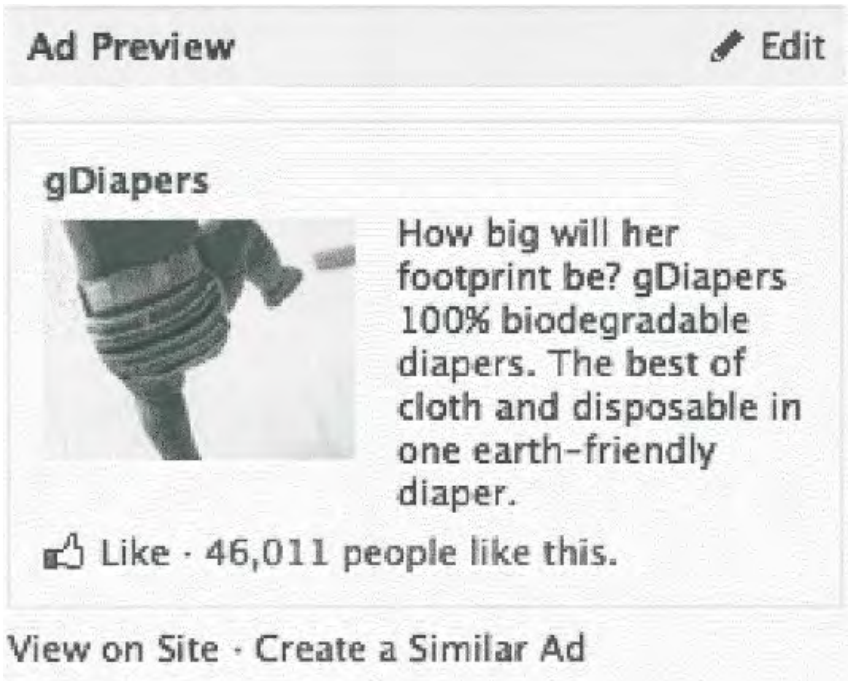
Complaint

Exhibit 3

Complaint

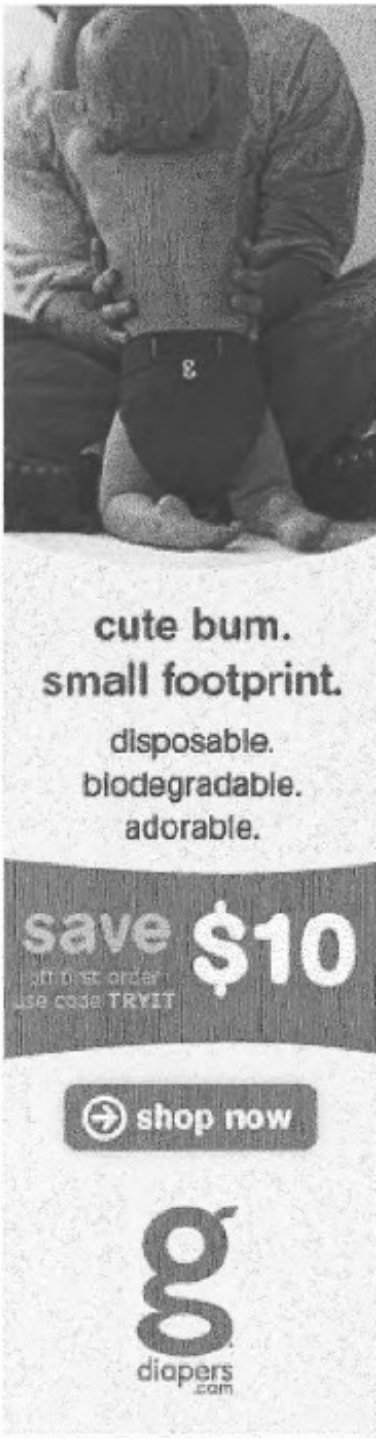
Exhibit 4

Exhibit 5


Ad Preview
Edit
gDiapers
How big will her footprint be? gDiapers 100% biodegradable diapers. The best of cloth and disposable in one earth-friendly diaper.
Like · 46,011 people like this.
View on Site · Create a Similar Ad

Complaint

Exhibit 6

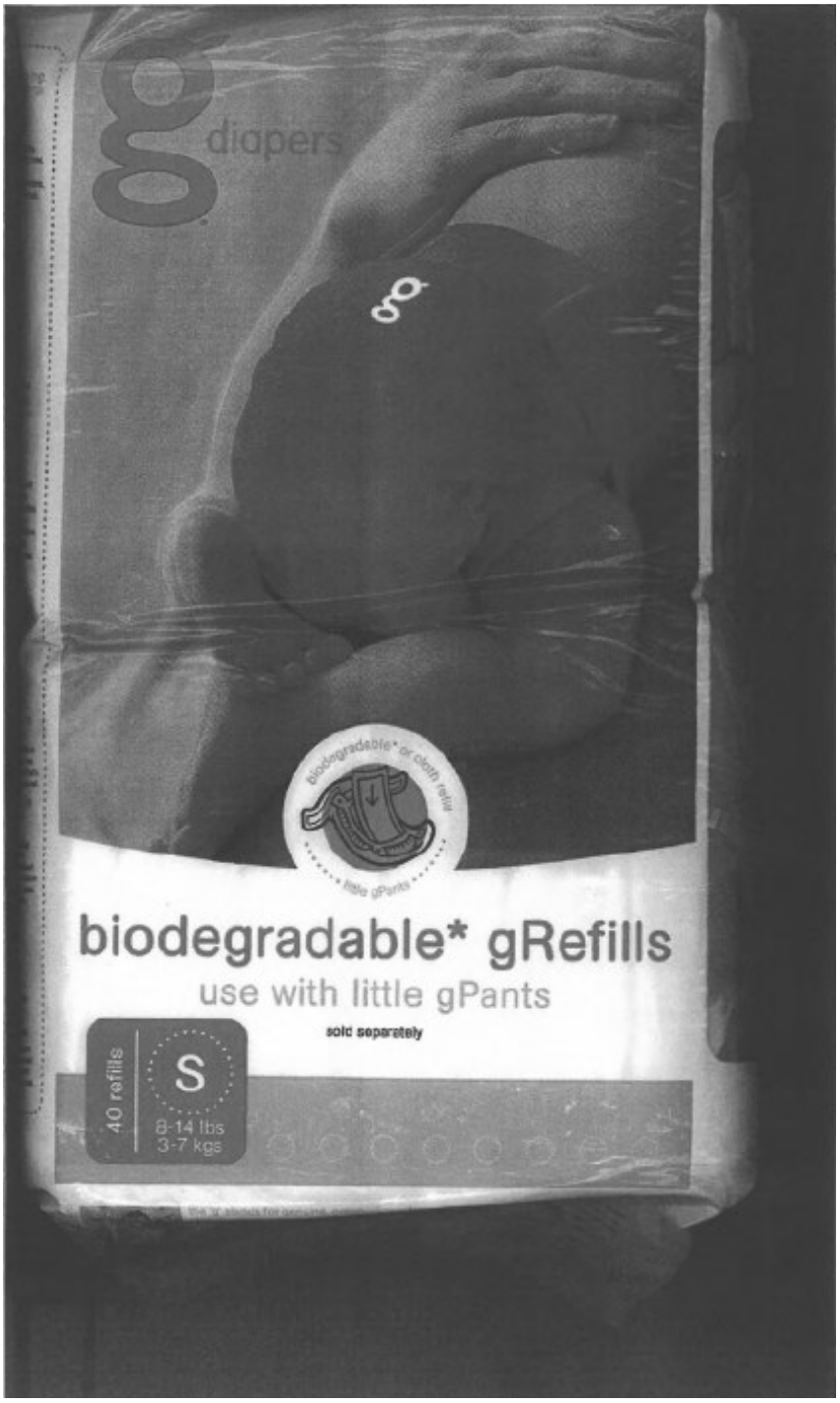


Complaint

Exhibit7

Complaint

Exhibit 8



Complaint


little gPant + biodegradable* gRefill = one cute bum
Petite culotte « g » + couche biodégradable* = de jolies fourounes
diapers

Complaint

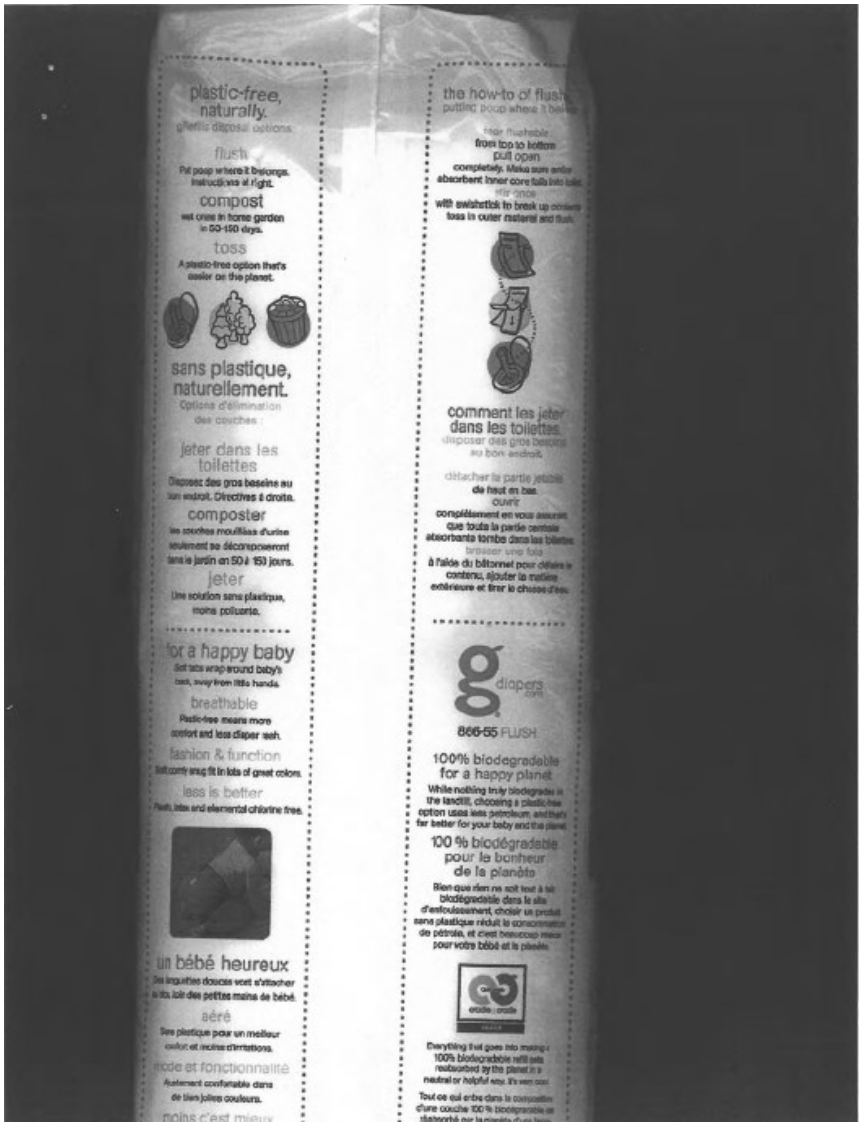

plastic-free, naturally.
flush
Put poop where it belongs. Instructions at right.
compost
toss
A plastic-free option that's easier on the planet.
sans plastique, naturellement.
jeter dans les toilettes
composter
jeter
Une solution sans plastique, moins polluante.
for a happy baby
breathable
Plastic-free means more comfort and less diaper rash.
fashion & function
less is better
un bébé heureux
aéré
Sans plastique pour un meilleur confort et moins d'irritations.
mode et fonctionnalité
Agréablement confortable dans de bien jolies couleurs.
the how-to of flush
comment les jeter dans les toilettes
diapers
866-55 FLUSH
100% biodegradable for a happy planet
100 % biodégradable pour le bonheur de la planète

Exhibit 9


biodegradable gWipes*
Une douceur de la tête aux pieds, naturellement.
entièrement naturelles • sans chlore • sans fragrance
70
diapers
GDFTC0003000x

Complaint

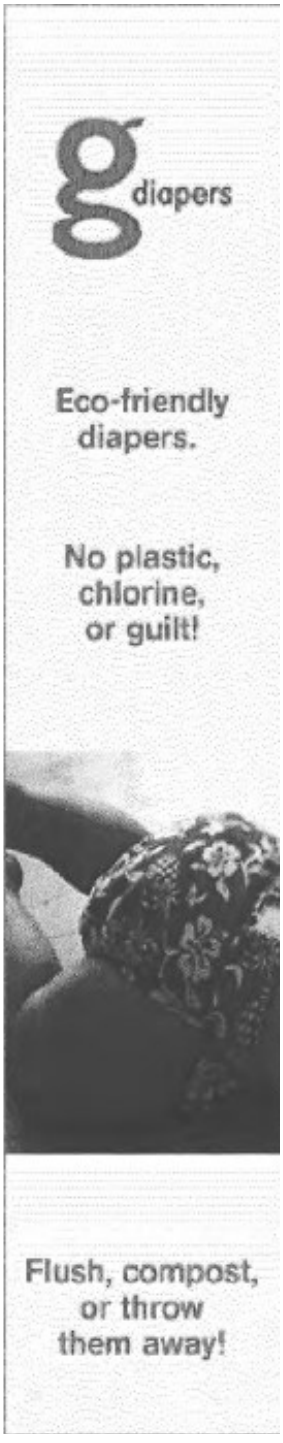

nettoient naturellement
1515 12249A
clean up naturally.
PET

Exhibit 10


Flush.
Compost.
Toss.
gDiapers. No garbage.
Try gDiapers
shop now
diapers.com

Complaint

Exhibit 11



Complaint

Exhibit 12

Complaint

Exhibit 13

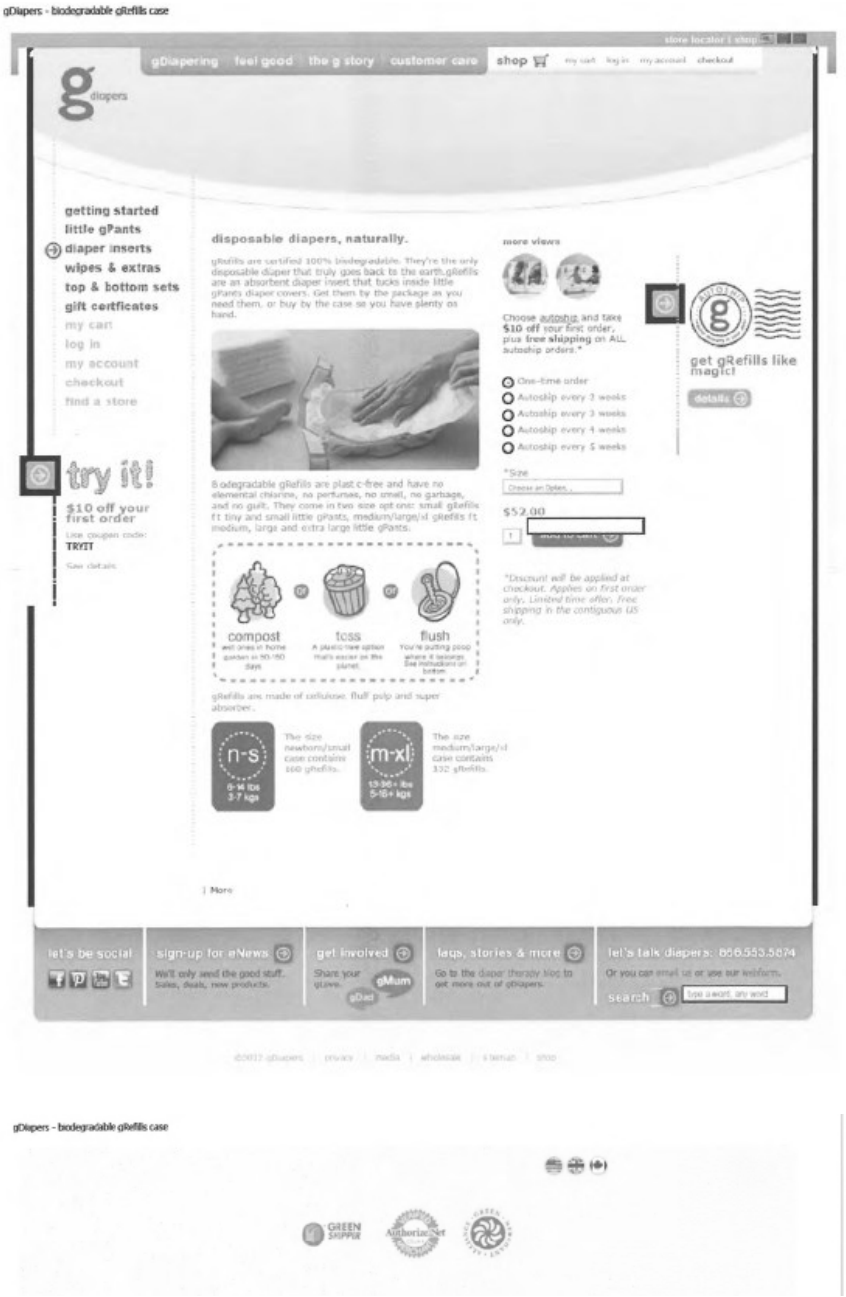


Exhibit 14

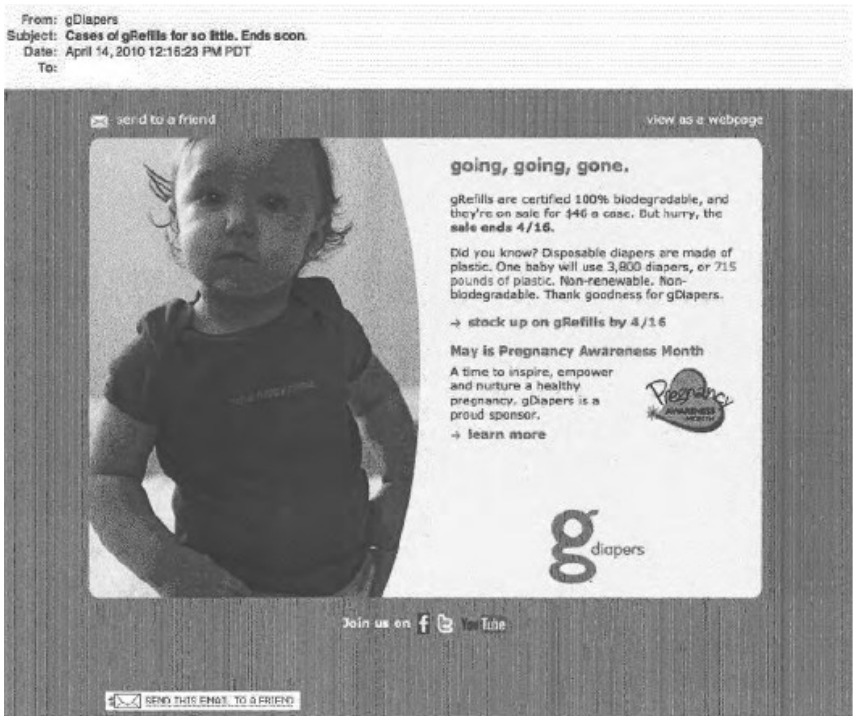

gDiapers - Compostable diapers from gDiapers are 100% biodegradable
gDiapering
feel good
the g story
customer care
shop
take those diapers outside.
gRefills break down quickly in home compost. So waste becomes resource. In your own backyard.
real life with g's
good for earth
cradle to cradle
100% biodegradable
compostable
flushable
plastic-free
global good
good friends
gMum/gDad
learn how to compost gRefills.
let's make dirt.
how does your garden grow?
"Thanks!
gRefills in your own backyard.
let's be social
sign-up for eNews
get involved
faqs, stories & more
let's talk diapers 866.553.5874
search

Complaint

Exhibit 15

Complaint

Exhibit 16



Complaint

Exhibit 17

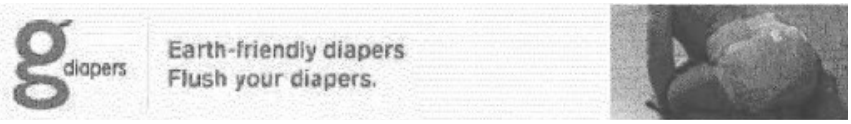


Exhibit 18

Exhibit 19

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 violations of the Federal Trade Commission Act; and

The respondent, its 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 had reason to believe that the respondent has violated the Federal Trade Commission Act, and that a complaint should issue stating its charges in that respect, and having thereupon accepted the executed consent agreement and placed such agreement on the public record for a period of thirty (30) days for the receipt and consideration of public comments, now in further conformity with the procedure prescribed in Commission Rule 2.34, 16 C.F.R. § 2.34, the Commission hereby issues its complaint, makes the following jurisdictional findings, and enters the following order:

1. Respondent is an Oregon Corporation with its principal office or place of business at 2808 NE Martin Luther King Jr. Boulevard, Portland, Oregon, 97212.

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

ORDER
DEFINITIONS

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

A. "Clearly and prominently" means as follows:

   1. 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;

2. 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

3. 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.

B. "Close proximity" means on the same print page, web page, online service page, or other electronic page, and proximate to the triggering representation, and not accessed or displayed through hyperlinks, pop-ups, interstitials, or other means.

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

D. "Competent and reliable scientific evidence" means 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. Specifically:

1. For unqualified biodegradability claims, any scientific technical protocol (or combination of protocols) substantiating such claims must assure complete decomposition within one year and replicate, *i.e.*, simulate, the physical conditions found in landfills, where most trash is disposed.

2. For qualified biodegradability claims, any scientific technical protocol (or combination of protocols) substantiating such claims must both:

   a. assure the entire product will (1) completely decompose into elements found in nature in the stated timeframe or, if not qualified by time, within one year; or (2) decompose into elements found in nature at the rate and to the extent stated in the representation; and

   b. replicate, *i.e.*, simulate, the physical conditions found in the type of disposal facility or method stated in the representation or, if not qualified by disposal facility or method, the conditions found in landfills, where most trash is disposed.

E. "Customary disposal" means any disposal method whereby respondent's products ultimately will be disposed of in a landfill, in an incinerator, or in a recycling facility.

F. "Degradable" includes biodegradable, oxo-biodegradable, oxo-degradable, or photodegradable, or any variation thereof.

G. "Landfill" means a municipal solid waste landfill that receives household waste. "Landfill" does not include landfills that are operated as bioreactors or those that are actively managed to enhance decomposition.

H. Unless otherwise specified, "respondent" means Down to Earth Designs, Inc., a corporation, and its successors and assigns.

I.

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

A. That any product or package is degradable, unless

1. the entire item will completely decompose into elements found in nature within one year after customary disposal; or

2. the representation is clearly and prominently and in close proximity qualified by:

   a. Either (1) the time to complete decomposition into elements found in nature; or (2) the rate and extent of decomposition into elements found in nature, provided that such qualification must disclose that the stated rate and extent of decomposition does not mean that the product or package will continue to decompose; and

   b. If the product will not decompose in a customary disposal facility or by a customary method of disposal, both (1) the type of non-customary disposal facility or method and (2) the availability of such disposal facility or

method to consumers where the product or package is marketed or sold

and such 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.

B. That any product or package is compostable, unless all materials in the item will break down into, or otherwise become part of, usable compost (*e.g.*, soil-conditioning material, mulch) in a safe and timely manner (*i.e.*, in the same time as the materials with which it is composted):

1. in a home composting pile or device;

2. in a municipal or institutional composting facility that is available to a substantial majority of consumers or communities where the item is sold, and respondent discloses clearly and prominently and in close proximity to the representation that the item is only compostable in such a facility; or

3. in a municipal or institutional composting facility that is not available to a substantial majority of consumers or communities, and respondent discloses clearly and prominently and in close proximity to the representation: (a) that the item is only compostable in such a facility and (b) the limited availability of municipal or institutional composting facilities that compost the item, such as by disclosing the percentage of consumers or communities that have access to such facilities,

and such 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.

C. That any product respondent markets in whole or in part as capable of handling human waste, including,

but not limited to, any disposable diaper product or disposable wipe, is compostable, unless respondent discloses clearly and prominently and in close proximity to the representation that the product cannot be composted if soiled with anything other than urine.

D. That any product or package is free of, or does not contain or use, a substance, 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; and

1. the product or package does not contain or use substances that pose the same or similar environmental risks as the substance that is not present; and

2. the substance has been associated with the product category.

Provided, however, that this order shall not enjoin respondent from representing that any product or package is free of, or does not contain or use, a substance where: 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.

E. That any product, package, or service offers a general environmental benefit, unless respondent discloses, clearly and prominently and in close proximity to the representation, a specific environmental benefit or benefits, and, taking into account any such disclosure, all reasonable interpretations of the representation are true, not misleading, and at the time it is made, respondent possesses and relies upon competent and reliable evidence, which when appropriate must be competent and reliable scientific evidence, that

substantiates each reasonable interpretation of the representation.

F. That any product, package, or service offers any environmental benefit, unless the representation is true, not misleading, and, at the time it is made, respondent possesses and relies upon competent and reliable evidence, which when appropriate must be competent and reliable scientific evidence, that substantiates the representation.

II.

IT IS FURTHER ORDERED that respondent, and its officers, agents, representatives, and employees, directly or through any corporation, partnership, subsidiary, division, or other device, in connection with the manufacturing, labeling, advertising, promotion, offering for sale, sale, or distribution of any product, package, or service, in or affecting commerce, is permanently restrained and enjoined from making or assisting others in making, expressly or by implication, orally or in writing, any misrepresentation regarding certifications, including:

A. The fact that, or degree to which, an independent third-party certifier or organization with appropriate expertise has evaluated a product, package, or service based on its environmental benefits or attributes; or

B. That an independent third-party certifier or organization with appropriate expertise has evaluated the environmental benefits or attributes of any product, package, or service based on the application of objective standards.

III.

IT IS FURTHER ORDERED that respondent shall, for five (5) years after the last date of dissemination of any representation covered by this order, maintain and upon request make available to the Commission for inspection and copying:

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

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

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

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

IV.

IT IS FURTHER ORDERED that 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 secure from each such person a signed and dated statement acknowledging receipt of the order, with any electronic signatures complying with the requirements of the E-Sign Act, 15 U.S.C. § 7001 *et seq*. Respondent shall deliver this order to current personnel within thirty (30) days after the date of service of this order, and to future personnel within thirty (30) days after the person assumes such position or responsibilities.

V.

IT IS FURTHER ORDERED that respondent shall notify the Commission at least thirty (30) days prior to any change in the corporation that may affect compliance obligations arising under this order, including, but not limited to, a dissolution, assignment, sale, merger, or other action that would result in the emergence of a successor 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 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, Mail Stop M-8102B, Washington, DC 20580. The subject line must begin: "gDiapers, File No. 122 3268."

VI.

IT IS FURTHER ORDERED that respondent shall, within sixty (60) days after the date of service of this order, file with the Commission a true and accurate report, in writing, setting forth in detail the manner and form in which respondent has complied with this order. Within ten (10) days of receipt of written notice from a representative of the Commission, respondent shall submit additional true and accurate written reports. Unless otherwise directed by a representative of the Commission 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, Mail Stop 8102-B, Washington, DC 20580. The subject line must begin: "gDiapers, File No. 122 3268."

VII.

This order will terminate on March 18, 2034, or twenty (20) years from the most recent date that the United States or the Commission files a complaint (with or without an accompanying consent decree) in federal court alleging any violation of the order, whichever comes later; *provided, however*, that the filing of such a complaint will not affect the duration of:

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

B. This order's application to any respondent that is not named as a defendant in such complaint; and

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

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

By the Commission.

ANALYSIS 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 Down to Earth Designs, Inc. d/b/a gDiapers, a corporation ("respondent").

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

Analysis to Aid Public Comment

This matter involves respondent's marketing, sale, and distribution of diapers and baby wipes with claims of various environmental benefits. According to the FTC's complaint, respondent represented that its diapers and wipes are biodegradable, "certified 100% biodegradable," garbage free when trashed or flushed, and plastic free. The complaint alleges that these claims were false and misleading. The complaint also alleges that respondent failed to disclose adequately that consumers can safely compost only wet used inserts and wipes. Finally, the complaint alleges that respondent did not possess and rely upon a reasonable basis to substantiate its claims that its products biodegrade when trashed or flushed, offer an environmental benefit because they can be flushed, and that its wipes are home compostable. Accordingly, the complaint alleges that respondent engaged in deceptive acts or practices in violation of Section 5(a) of the FTC Act.

The proposed consent order contains provisions designed to prevent respondent from engaging in similar acts and practices in the future. As detailed below, Part I prohibits respondent from making specific environmental claims about any product or package unless the claim is true, not misleading, and substantiated by competent and reliable scientific evidence. Part I.A forbids respondent from making unqualified degradable claims about a product or package unless the item completely decomposes into elements found in nature within one year after customary disposal. Consistent with the FTC's Green Guides, the proposed order limits "customary disposal" to landfills, incinerators, or recycling facilities. If the item does not completely decompose within one year after customary disposal, Part I.A requires respondent to clearly and prominently disclose: (1) either the time to complete decomposition or the rate and extent of decomposition with a further disclosure that the stated rate and extent of decomposition does not mean that the item will continue to decompose; and (2) if the item does not decompose in (or by) a customary disposal facility or method, the type of non-customary disposal facility or method, and the availability of such facility or method to consumers where the item is marketed or sold.

Part I.A also requires that, at the time of any such representation, respondent must possess and rely upon competent and reliable scientific evidence substantiating the representation.

If respondent relies on a scientific technical protocol for substantiation, that protocol must do two things. First, it must assure that the entire product will either completely decompose in one year or the stated timeframe, or that it will decompose at the rate and to the extent stated in the representation. Second, such protocol must replicate (*i.e.*, simulate) the physical conditions found in a landfill or the disposal facility or method stated in the representation.

Part I.B prohibits respondent from making unqualified compostable claims unless all materials in the item will break down into, or otherwise become part of, usable compost in a safe and timely manner (*i.e.*, in the same time as the materials with which it is composted) in a home compost, or in a municipal or institutional composting facility, in which case respondent must clearly and prominently disclose that fact and the limited availability of such facilities.

Under Part I.C, if respondent claims that a disposable diaper or wipe is compostable, it must clearly and prominently disclose that the product cannot be composted if soiled with human waste other than urine.

Part I.D prohibits respondent from representing that any product or package is "free of" any substance unless the representation is true and not misleading, and substantiated, and unless the product or package advertised does not contain substances that pose the same or similar environmental risks and the "free of" substance has been associated with the product category.

Part I.E prohibits respondent from making general environmental benefit representations unless it discloses the product, package, or service's specific environmental benefit, and each reasonable interpretation of the representation is true and substantiated.

Part I.F prohibits the respondent from representing that any product, package, or service offers any environmental benefit unless the representation is true, not misleading, and substantiated, which when appropriate must be competent and reliable scientific evidence.

Analysis to Aid Public Comment

Part II of the proposed consent order prohibits respondent from making misrepresentations about certifications, including misrepresentations that a third-party certifier has evaluated a product, package, or service based on its environmental benefits or attributes, or that the third-party certifier has done so using objective standards.

Parts III through VI are reporting and compliance provisions. Part III requires respondent to keep and, upon request, make available to the Commission for copying: advertisements, labeling, packaging, and promotional materials containing the representations identified in Part I; materials relied upon in disseminating those representations; evidence that contradicts, qualifies, or calls into question the representations, or the basis relied upon for the representations; and all acknowledgments of receipt of the order. Part IV requires respondent to disseminate the order to subsidiaries, principals, officers, directors, and managers, and to all current and future employees, agents, and representatives having supervisory responsibilities relating to the subject matter of the order. Part V requires notification to the FTC of changes in respondent's corporate status. Part VI requires respondent to submit an initial compliance report to the FTC within sixty (60) days of service and subsequent reports upon request.

Finally, Part VII is a "sunset" provision, which provides that the order terminates 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.

Complaint

IN THE MATTER OF

ENDO HEALTH SOLUTIONS INC.; BOCA LIFE SCIENCE HOLDINGS, LLC; AND BOCA PHARMACAL, LLC

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

Docket No. C-4430; File No. 131 0225
Complaint, January 29, 2014 – Decision, March 19, 2014

This consent order addresses the $225 million acquisition by Endo Health Solutions Inc. of certain assets of Boca Pharmacal, LLC from Boca Life Science Holdings, LLC. The complaint alleges that the acquisition, if consummated, would violate Section 7 of the Clayton Act and Section 5 of the Federal Trade Commission Act by lessening current and future competition in U.S. markets for (1) generic PolyViFlor 0.25mg multivitamin drops; (2) generic PolyViFlor 0.5mg multivitamin drops; (3) generic PolyViFlor 0.25mg multivitamin drops with iron; (4) generic TriViFlor 0.25mg multivitamin drops; (5) generic Bromfed-DM; (6) generic Zamicet; and (7) generic Vosol HC. The consent order requires Boca to return to Sonar all of Boca's rights related to the four prescription fluoride multivitamin drops and to continue to distribute the multivitamin drops for Sonar for a period of up to six months in order to allow Sonar time to establish itself with a new marketing and distribution partner. Further, Endo is required to divest to Rhodes all of its rights and interests in generic Bromfed-DM and generic Zamicet as well as all of Boca's rights and interests in generic Vosol HC.

Participants

For the *Commission*: *David L. Inglefield, Jacqueline K. Mendel, David von Nirschl*, and *Elyssa L. Wenzel*.

For the *Respondents*: *Robert Skitol* and *Joanne Lewers, Drinker Biddle & Reath LLP*; *David Pearl, Ryan Thomas*, and *David Wales, Jones Day*.

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 Endo

Health Solutions Inc. ("Endo"), a corporation subject to the jurisdiction of the Commission, has agreed to acquire Boca Pharmacal, LLC, an entity subject to the jurisdiction of the Commission, from Boca Life Science Holdings, LLC ("Boca") in violation of Section 5 of the FTC Act, as amended, 15 U.S.C. § 45, and that such acquisition, if consummated, would violate Section 7 of the Clayton Act, as amended, 15 U.S.C. § 18, and Section 5 of the FTC Act, as amended, 15 U.S.C. § 45, and it appearing to the Commission that a proceeding in respect thereof would be in the public interest, hereby issues its Complaint, stating its charges as follows:

I. RESPONDENTS

1. Respondent Endo is a corporation organized, existing, and doing business under and by virtue of the laws of the State of Pennsylvania, with its corporate office and principal place of business located at 1400 Atwater Drive, Malvern, Pennsylvania 19355. Qualitest, a part of Endo based in Huntsville, Alabama, manufactures and markets all of Endo's generic pharmaceutical products.

2. Respondent Boca and Respondent Boca Pharmacal, LLC are limited liability companies organized, existing, and doing business under and by virtue of the laws of the State of Florida, with their corporate offices and principal places of business located at 3550 NW 126th Avenue, Coral Springs, Florida 33065.

3. Each 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 FTC Act, as amended, 15 U.S.C. § 44.

II. THE PROPOSED ACQUISITION

4. Pursuant to a Membership Purchase and Sale Agreement dated August 27, 2013 ("Agreement"), Endo proposes to acquire all of the non-corporate interests of Boca Pharmacal, LLC from its parent entity, Boca, for approximately $225 million (the

"Acquisition"). The Acquisition is subject to Section 7 of the Clayton Act, as amended, 15 U.S.C. § 18.

III. THE RELEVANT PRODUCT MARKETS

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

a. generic multivitamin drops containing 0.25mg fluoride ("generic PolyViFlor 0.25mg drops");

b. generic multivitamin drops containing 0.5mg fluoride ("generic PolyViFlor 0.5mg drops");

c. generic multivitamin drops with 0.25mg fluoride and iron ("generic PolyViFlor 0.25mg drops with iron");

d. generic multivitamin drops with 0.25mg fluoride and folate ("generic TriViFlor 0.25mg drops");

e. generic oral syrup containing brompheniramine maleate (2mg/5ml), dextromethorphan hydrobromide (10mg/5ml), and pseudoephedrine hydrochloride (30mg/5ml) ("generic Bromfed-DM");

f. generic oral solution containing hydrocodone (10mg/15ml) and acetaminophen (325mg/15ml) ("generic Zamicet"); and

g. generic acetic acid, glacial (2%) with hydrocortisone (1%) ear drops ("generic Vosol HC").

IV. THE RELEVANT GEOGRAPHIC MARKET

6. For the purposes of this Complaint, the United States is the relevant geographic market in which to assess the competitive effects of the Acquisition in each of the relevant lines of commerce.

V. THE STRUCTURE OF THE MARKETS

7. Each of the multivitamin drops described herein ((1) generic PolyViFlor 0.25mg drops; (2) generic PolyViFlor 0.5mg drops; (3) generic PolyViFlor 0.25mg drops with iron; and (4) generic TriViFlor 0.25mg drops), are prescribed for children who do not have access to fluoridated water. The market for generic PolyViFlor 0.25mg drops is highly concentrated with only three current suppliers for the drug: Endo, Boca, and Libertas Pharma Inc. ("Libertas"). Endo has a market share of approximately 59%, Boca has a market share of approximately 36%, and Libertas has a market share of approximately 5%. Thus, the Acquisition would reduce the number of suppliers of generic PolyViFlor 0.25mg drops from three to two and the merged entity would have a market share in excess of 90%. The Acquisition would increase the Herfindahl-Hirschman Index concentration ("HHI") by 4,248 for a post-merger total of 6,918.

8. Only Endo and Boca market generic PolyViFlor 0.5mg drops. Endo has a market share of approximately 61% and Boca has the remaining 39% share of the market. Thus, the Acquisition would create a monopoly in the generic PolyViFlor 0.5mg drops market and would increase the HHI by 4,758 to a total of 10,000.

9. The market for generic PolyViFlor 0.25mg drops with iron is highly concentrated with only three current suppliers: Endo, Boca, and Libertas. Endo has a market share of approximately 56%, Boca has a market share of approximately 38%, and Libertas has a market share of approximately 6%. Thus, the Acquisition would substantially increase concentration in the market by consolidating the number of suppliers of generic PolyViFlor 0.25mg drops with iron from three to two and the merged entity would have a market share in excess of 90%. The Acquisition would increase the HHI concentration by 4,256 for a post-merger total of 8,872.

10. The market for generic TriViFlor 0.25mg drops has four suppliers: Endo, Boca, Libertas, and Sancilio & Company, Inc. ("Sancilio"). Endo has a market share of approximately 51%, Boca has a market share of approximately 22%, Libertas has a market share of approximately 26%, and Sancilio has a market share of approximately 1%. Thus, the Acquisition would

substantially increase concentration in the market by consolidating the number of suppliers of generic TriViFlor 0.25mg drops from four to three. The Acquisition would increase the HHI concentration by 2,244 for a post-merger total of 6,006.

11. Generic Bromfed-DM is a product used for the treatment of symptoms caused by the common cold, flu, hay fever, sinusitis, bronchitis, and other respiratory illnesses. No company currently markets a generic version of Bromfed-DM in the United States. Endo and Boca are among a limited number of firms that have generic Bromfed-DM products in development. Therefore, the Acquisition would be likely to substantially increase concentration in the market by reducing the number of likely future suppliers of generic Bromfed-DM.

12. Generic Zamicet is prescribed for the relief of moderate to moderately severe pain. No company currently markets generic Zamicet in the United States. Endo and Boca are among a limited number of firms that have generic Zamicet products in development. Thus, the Acquisition would be likely to substantially increase concentration in the market by reducing the number of likely future suppliers of generic Zamicet.

13. Generic Vosol HC is a product used to treat Swimmer's Ear. The market for generic Vosol HC has three suppliers: Actavis plc ("Actavis"), the Taro Pharmaceuticals Industries Ltd. unit of Sun Pharma Industries ("Sun"), and Endo. Boca is one of a limited number of firms that has a generic Vosol HC product in development. Therefore, the Acquisition would be likely to substantially increase concentration in the market by reducing the number of likely future suppliers of generic Vosol HC.

VI. ENTRY CONDITIONS

14. Entry into the relevant markets described in Paragraphs 5 and 6 would not be timely, likely, or sufficient in magnitude, character, and scope to deter or counteract the anticompetitive effects of the Acquisition. De novo entry would not take place in a timely manner because the combination of drug development times and FDA approval requirements would be lengthy. Entry into the markets for generic PolyViFlor 0.25mg drops, generic PolyViFlor 0.5mg drops, generic PolyViFlor 0.25mg drops with

iron, and generic TriViFlor 0.25mg drops is particularly unlikely because new firms, unlike existing manufacturers whose facilities pre-date the FDA's current regulatory approval process, would be required to invest in filing Abbreviated New Drug Applications ("ANDAs") and wait for approvals for relatively small market opportunities. In addition, no other entry by firms for which the FDA approval process is already underway would be timely and sufficient to deter or counteract the competitive harm likely to result from the Acquisition.

VII. EFFECTS OF THE ACQUISITION

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

a. by eliminating actual, direct, and substantial competition between Endo and Boca and reducing the number of competitors in the markets for (1) generic PolyViFlor 0.25mg drops; (2) generic PolyViFlor 0.5mg drops; (3) generic PolyViFlor 0.25mg drops with iron; and (4) generic TriViFlor 0.25mg drops, thereby: (a) increasing the likelihood that Endo will be able to unilaterally exercise market power in these markets; (b) increasing the likelihood and degree of coordinated interaction between or among the remaining competitors; and (c) increasing the likelihood that customers would be forced to pay higher prices; and

b. by eliminating future competition between Endo and Boca and reducing the number of generic competitors in the markets for (1) generic oral syrup containing brompheniramine maleate (2mg/5ml), dextromethorphan hydrobromide (10mg/5ml), and pseudoephedrine hydrochloride (30mg/5ml); (2) generic oral solution containing hydrocodone (10mg/15ml) and acetaminophen (325mg/15ml); and (3) generic acetic acid, glacial (2%) with hydrocortisone (1%) ear drops, thereby: (a) increasing

the likelihood that the combined entity would forego or delay the launch of these products, and (b) increasing the likelihood that the combined entity would delay, eliminate, or otherwise reduce the substantial additional price competition that would have resulted from an additional supplier of these products.

VIII. VIOLATIONS CHARGED

16. The Agreement described in Paragraph 4 constitutes a violation of Section 5 of the FTC Act, as amended, 15 U.S.C. § 45.

17. The Acquisition described in Paragraph 4, if consummated, would constitute a violation of Section 7 of the Clayton Act, as amended, 15 U.S.C. § 18, and Section 5 of the FTC Act, as amended, 15 U.S.C. § 45.

WHEREFORE, THE PREMISES CONSIDERED, the Federal Trade Commission on this twenty-ninth day of January 2014, issues its Complaint against said Respondents.

By the Commission.

ORDER TO MAINTAIN ASSETS

The Federal Trade Commission ("Commission"), having initiated an investigation of the proposed acquisition by Respondent Endo Health Solutions Inc. ("Endo") of the limited liability company membership interests (referred to as membership interests in certain documents related to this proposed acquisition) of Respondent Boca Pharmacal, LLC ("Boca Pharma"), a wholly-owned affiliate of Respondent Boca Life Science Holdings, LLC ("Boca Life"), collectively "Respondents", and Respondents having been furnished thereafter with a copy of a draft of Complaint that the Bureau of

Competition proposed to present to the Commission for its consideration and which, if issued by the Commission, would charge Respondents with violations of Section 7 of the Clayton Act, as amended, 15 U.S.C. § 18, and Section 5 of the Federal Trade Commission Act, as amended, 15 U.S.C. § 45; and

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

The Commission having thereafter considered the matter and having determined 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 Endo 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 1400 Atwater Drive, Malvern, Pennsylvania 19355.

2. Respondent Boca Life is a limited liability company organized, existing and doing business under and by virtue of the laws of the State of Florida with its headquarters address located at 3550 NW 126th Avenue, Coral Springs, Florida 33065.

3. Respondent Boca Pharma is a limited liability company organized, existing and doing business under and by virtue of the laws of the State of Florida with its headquarters address located at 3550 NW 126th Avenue, Coral Springs, Florida 33065.

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

ORDER

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

A. "Endo" means Endo Health Solutions Inc., its directors, officers, employees, agents, representatives, successors, and assigns; and its joint ventures, subsidiaries, divisions, groups and affiliates in each case controlled by Endo Health Solutions Inc. (including, without limitation, Generics International (US) Inc.), and the respective directors, officers, employees, agents, representatives, successors, and assigns of each. After the Acquisition, Endo shall include Boca Pharma.

B. "Boca Life" means: Boca Life Science Holdings, LLC, its directors, officers, employees, agents, representatives, successors, and assigns; and its joint ventures, subsidiaries, divisions, groups and affiliates in each case controlled by Boca Life Science Holdings, LLC, and the respective directors, officers, employees, agents, representatives, successors, and assigns of each.

C. "Boca Pharma" means: Boca Pharmacal, LLC, its directors, officers, employees, agents, representatives, successors, and assigns; and its joint ventures, subsidiaries, divisions, groups and affiliates in each case controlled by Boca Pharmacal, LLC, and the respective directors, officers, employees, agents, representatives, successors, and assigns of each.

D. "Respondents" means Endo, Boca Life and Boca Pharma, individually and collectively. After the Acquisition, "Respondents" means Endo and Boca Pharma, individually and collectively.

E. "Commission" means the Federal Trade Commission.

F. "Decision and Order" means the:

1. Proposed Decision and Order contained in the Consent Agreement in this matter until the issuance of a final and effective Decision and Order by the Commission; and

2. Final Decision and Order issued by the Commission following the issuance and service of a final Decision and Order by the Commission in this matter.

G. "Divestiture Product Business(es)" means the Business of Respondents within the Geographic Territory specified in the Decision and Order related to each of the Divestiture Products to the extent that such Business is owned, controlled, or managed by the Respondents and the assets related to such Business to the extent such assets are owned by, controlled by, managed by, or licensed to, the Respondents.

H. "Interim Monitor" means any monitor appointed pursuant to Paragraph III of this Order to Maintain Assets or Paragraph III of the Decision and Order

I. "New Marketing Partner" means any Third Party(ies) designated by Sonar to market, distribute or sell the Vitamin Products.

J. "Orders" means the Decision and Order and this Order to Maintain Assets.

K. "Transition Period for the Vitamin Products" means for each Vitamin Product, the period beginning on the date the Order to Maintain Assets in this matter is

issued by the Commission and ending, with respect to each Vitamin Product, on the earlier of the following dates: (i) the date thirty (30) days from a termination notice by Sonar and the New Marketing Partner as provided for in the Vitamin Product Divestiture Agreements; or (ii) the date six (6) months from the Order Date.

I.

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

A. Until Respondents fully transfer and deliver each of the respective Divestiture Product Assets to an Acquirer, Respondents shall take such actions as are necessary to maintain the full economic viability, marketability and competitiveness of each of the related Divestiture Product Businesses, to minimize any risk of loss of competitive potential for such Divestiture Product Businesses, and to prevent the destruction, removal, wasting, deterioration, or impairment of such Divestiture Product Assets except for ordinary wear and tear. Respondents shall not sell, transfer, encumber or otherwise impair the Divestiture Product Assets (other than in the manner prescribed in the Decision and Order) nor take any action that lessens the full economic viability, marketability or competitiveness of the related Divestiture Product Businesses.

B. Until Respondents fully transfer and deliver each of the respective Divestiture Product Assets to an Acquirer, Respondents shall maintain the operations of the related Divestiture Product Businesses in the regular and ordinary course of business and in accordance with past practice (including regular repair and maintenance of the assets of such business) and/or as may be necessary to preserve the full economic marketability, viability, and competitiveness of such Divestiture Product Businesses and shall use their best efforts to preserve the existing relationships with the

following: suppliers; vendors and distributors; High Volume Accounts; end-use customers; Agencies; employees; and others having business relations with each of the respective Divestiture Product Businesses. Respondents' responsibilities shall include, but are not limited to, the following:

1. providing each of the respective Divestiture Product Businesses with sufficient working capital to operate at least at current rates of operation, to meet all capital calls with respect to such business and to carry on, at least at their scheduled pace, all capital projects, business plans and promotional activities for such Divestiture Product Business;

2. continuing, at least at their scheduled pace, any additional expenditures for each of the respective Divestiture Product Businesses authorized prior to the date the Consent Agreement was signed by Respondents including, but not limited to, all research, Development, manufacturing, distribution, marketing and sales expenditures;

3. providing such resources as may be necessary to respond to competition against each of the Divestiture Products and/or to prevent any diminution in sales of each of the Divestiture Products during and after the Acquisition process and prior to the complete transfer and delivery of the related Divestiture Product Assets to an Acquirer;

4. providing such resources as may be necessary to maintain the competitive strength and positioning of each of the Divestiture Products that were marketed or sold by Respondents prior to August 27, 2013, at the related High Volume Accounts;

5. making available for use by each of the respective Divestiture Product Businesses funds sufficient to perform all routine maintenance and all other maintenance as may be necessary to, and all

replacements of, the assets related to such business; and

6. providing such support services to each of the respective Divestiture Product Businesses as were being provided to such business by Respondents as of the date the Consent Agreement was signed by Respondents.

C. Until Respondents fully transfer and deliver each of the respective Divestiture Product Assets to an Acquirer, Respondents shall maintain a work force that is (i) at least as large in size (as measured in full time equivalents) as, and (ii) comparable in training, and expertise to, what has been associated with the Divestiture Products for the relevant Divestiture Product's last fiscal year.

D. During the Transition Period for the Vitamin Products and with respect to the Vitamin Products, Respondents, in consultation with Sonar, for the purposes of ensuring an orderly transition to the New Marketing Partner, shall:

1. develop and implement a detailed transition plan to ensure that the commencement of the marketing, distribution and sale of the Marketed Divestiture Products by the New Marketing Partner is not delayed or impaired by the Respondent;

2. designate employee(s) of Respondents knowledgeable about the marketing, distribution and sale related to each of the Marketed Divestiture Products who will be responsible for communicating directly with Sonar and/or Sonar's New Marketing Partner, and the Interim Monitor (if one has been appointed), for the purpose of assisting in the transfer of the Divestiture Product Businesses to the New Marketing Partner;

3. subject to delivery of sufficient levels of supply by Sonar, maintain and manage inventory levels of the

Marketed Divestiture Products in consideration of the transition;

4. continue to permit Sonar to use Respondents' existing product packaging and/or labeling (including Respondents' corporate name(s) and logo(s)) in manufacturing each Vitamin Product for Respondents' distribution, marketing and sale for a period of time sufficient to allow Sonar and/or its New Marketing Partner to commence the distribution, marketing and sale of that Vitamin Product (including, without limitation, sufficient time for Sonar and/or its New Marketing Partner to obtain FDA Approval (if necessary) for any new product labeling and/or packaging for each of the Vitamin Products);

5. continue to market, distribute and sell the Marketed Divestiture Product on behalf of Sonar;

6. ensure that all Confidential Business Information is delivered to Sonar:

    a. in good faith;

    b. in a timely manner, *i.e.*, as soon as practicable, avoiding any delays in transmission of the respective information; and

    c. in a manner that ensures its completeness and accuracy and that fully preserves its usefulness;

7. allow Sonar access at reasonable business hours to all such Confidential Business Information and employees who possess or are able to locate such information for the purposes of identifying the books, records, and files directly related to the Divestiture Products that contain such Confidential Business Information pending the complete delivery of such Confidential Business Information to Sonar;

8. establish projected time lines for accomplishing all tasks necessary to effect the transition in an efficient and timely manner;

9. provide Sonar with a listing of the inventory levels (weeks of supply) for each customer on a regular basis and in a timely manner;

10. provide Sonar with anticipated reorder dates for each customer on a regular basis and in a timely manner; and

11. enter into any agreements with Sonar and/or its New Marketing Partner, on customary and commercially reasonable terms for the type of transaction or arrangement, to the extent such agreements are necessary to effectuate the foregoing.

E. For each Acquirer of a Divestiture Product, Respondent Endo shall:

1. for a period of six (6) months from the Closing Date or until the hiring of two (2) Divestiture Product Core Employees by that Acquirer or its Manufacturing Designee or its New Marketing Partner, whichever occurs earlier, provide that Acquirer, its Manufacturing Designee, or its New Marketing Partner with the opportunity to enter into employment contracts with the Divestiture Product Core Employees related to the Divestiture Products and assets acquired by that Acquirer. Each of these periods is hereinafter referred to as the "Divestiture Product Core Employee Access Period(s);"

2. not later than the earlier of the following dates: (i) ten (10) days after notice by staff of the Commission to Respondent Endo to provide the Product Employee Information; or (ii) ten (10) days after written request by an Acquirer, provide that Acquirer or Proposed Acquirer(s) with the

Product Employee Information related to the Divestiture Product Core Employees. Failure by Respondent Endo to provide the Product Employee Information for any Divestiture Product Core Employee within the time provided herein shall extend the Divestiture Product Core Employee Access Period(s) with respect to that employee in an amount equal to the delay; *provided, however*, that the provision of such information may be conditioned upon the Acquirer's or Proposed Acquirer's written confirmation that it will (i) treat the information as confidential and, more specifically, (ii) use the information solely in connection with considering whether to provide or providing to Divestiture Product Core Employees the opportunity to enter into employment contracts during a Divestiture Product Core Employee Access Period, (iii) restrict access to the information to such of the Acquirer's or Proposed Acquirer's employees who need such access in connection with the specified and permitted use, and (iv) destroy or return the information without retaining copies at such time as the specified and permitted use ends;

3. during the Divestiture Product Core Employee Access Period(s), not interfere with the hiring or employing by that Acquirer, its Manufacturing Designee, or its New Marketing Partner of the Divestiture Product Core Employees related to the Divestiture Products and assets acquired by that Acquirer, and remove any impediments within the control of Respondent Endo that may deter these employees from accepting employment with that Acquirer, its Manufacturing Designee or its New Marketing Partner, including, but not limited to, any noncompete or nondisclosure provision of employment with respect to a Divestiture Product or other contracts with Respondents Endo or Boca Pharma that would affect the ability or incentive of those individuals to be employed by that Acquirer, its Manufacturing Designee or its New Marketing

Partner. In addition, Respondents Endo or Boca Pharma shall not make any counteroffer to such a Divestiture Product Core Employee who has received a written offer of employment from that Acquirer, its Manufacturing Designee, or its New Marketing Partner;

provided, however, that, subject to the conditions of continued employment prescribed in this Order, this Paragraph shall not prohibit Respondents from continuing to employ any Divestiture Product Core Employee under the terms of that employee's employment with Respondents prior to the date of the written offer of employment from the Acquirer, its Manufacturing Designee or its New Marketing Partner to that employee;

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

5. for a period of one (1) year from the Closing Date, not, directly or indirectly, solicit or otherwise attempt to induce any employee of the Acquirer, its Manufacturing Designee or its New Marketing Partner with any amount of responsibility related to a Divestiture Product ("Divestiture Product Employee") to terminate his or her employment

relationship with the Acquirer, its Manufacturing Designee or its New Marketing Partner; or hire any Divestiture Product Employee;

provided, however, Respondents may hire any former Divestiture Product Employee whose employment has been terminated by the Acquirer, its Manufacturing Designee, or its New Marketing Partner or who independently applies for employment with a Respondent, as long as that employee was not solicited in violation of the nonsolicitation requirements contained herein;

provided further, however, that this Paragraph does not require nor shall be construed to require Respondents to terminate the employment of any employee or to prevent Respondents from continuing to employ the Divestiture Product Core Employees in connection with the Acquisition;

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

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

1. not use, directly or indirectly, any Confidential Business Information related to the Business of the Divestiture Products other than as necessary to comply with the following:

   a. the requirements of this Order;

b. Respondents' obligations to each respective Acquirer under the terms of any related Remedial Agreement; or

c. applicable Law;

2. not disclose or convey any such Confidential Business Information, directly or indirectly, to any Person except (i) the Acquirer of the particular Divestiture Assets, (ii) other Persons specifically authorized by such Acquirer to receive such information, (iii) the Commission, or (iv) the Interim Monitor (if any has been appointed);

3. not provide, disclose or otherwise make available, directly or indirectly, any such Confidential Business Information related to the marketing or sales of the Divestiture Products to the employees associated with the Business related to those Retained Products that are the therapeutic equivalent (as that term is defined by the FDA) of the Divestiture Products; and

4. institute procedures and requirements to ensure that the above-described employees:

a. do not provide, disclose or otherwise make available, directly or indirectly, any Confidential Business Information in contravention of this Order to Maintain Assets; and

b. do not solicit, access or use any Confidential Business Information that they are prohibited from receiving for any reason or purpose.

G. Not later than thirty (30) days from the earlier of (i) the Closing Date or (ii) the date this Order to Maintain Assets is issued by the Commission, Respondents shall provide written notification of the restrictions on the use and disclosure of the Confidential Business Information related to the

Divestiture Products by Respondents' personnel to all of their employees who (i) may be in possession of such Confidential Business Information or (ii) may have access to such Confidential Business Information.

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

I. Respondents shall monitor the implementation by its employees and other personnel of all applicable restrictions with respect to Confidential Business Information, and take corrective actions for the failure of such employees and personnel to comply with such restrictions or to furnish the written agreements and acknowledgments required by this Order to Maintain Assets.

J. The purpose of this Order to Maintain Assets is to maintain the full economic viability, marketability and competitiveness of the Divestiture Product Businesses within the Geographic Territory through their full transfer and delivery to an Acquirer, to minimize any risk of loss of competitive potential for the Divestiture Product Businesses within the Geographic Territory, and to prevent the destruction, removal, wasting, deterioration, or impairment of any of the Divestiture Product Assets except for ordinary wear and tear.

III.

IT IS FURTHER ORDERED that:

A. At any time after Respondents sign the Consent Agreement in this matter, the Commission may appoint a monitor ("Interim Monitor") to assure that Respondents expeditiously comply with all of their obligations and perform all of their responsibilities as required by the Orders and the Remedial Agreements.

B. The Commission shall select the Interim Monitor, subject to the consent of Respondents, which consent shall not be unreasonably withheld. If Respondent Endo 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 Endo of the identity of any proposed Interim Monitor, Respondents shall be deemed to have consented to the selection of the proposed Interim Monitor.

C. Not later than ten (10) days after the appointment of the Interim Monitor, Respondent Endo shall execute an agreement that, subject to the prior approval of the Commission, confers on the Interim Monitor all the rights and powers necessary to permit the Interim Monitor to monitor Respondents' compliance with the relevant requirements of the Orders in a manner consistent with the purposes of the Orders.

D. If an Interim Monitor is appointed, Respondents shall consent to the following terms and conditions regarding the powers, duties, authorities, and responsibilities of the Interim Monitor:

1. The Interim Monitor shall have the power and authority to monitor Respondents' compliance with the divestiture and asset maintenance obligations and related requirements of the Orders, and shall exercise such power and authority and carry out the duties and responsibilities of the Interim

Monitor in a manner consistent with the purposes of the Orders and in consultation with the Commission.

2. The Interim Monitor shall act in a fiduciary capacity for the benefit of the Commission.

3. The Interim Monitor shall serve until the date of completion by the Respondents of the divestiture of all Divestiture Product Assets and the transfer and delivery of the related Product Manufacturing Technology in a manner that fully satisfies the requirements of this Order and,

   a. with respect to each Divestiture Product that is a Contract Manufacture Product, until the earliest of: (i) the date the Acquirer of that Divestiture Product (or that Acquirer's Manufacturing Designee(s)) is approved by the FDA to manufacture that Divestiture Product and able to manufacture the Divestiture Product in commercial quantities, in a manner consistent with cGMP, independently of the Respondents; (ii) the date the Acquirer of that Divestiture Product notifies the Commission and Respondent Endo of its intention to abandon its efforts to manufacture such Divestiture Product; or (iii) the date of written notification from staff of the Commission that the Interim Monitor, in consultation with staff of the Commission, has determined that the relevant Acquirer has abandoned its efforts to manufacture such Divestiture Product;

   b. with respect to the Vitamin Products, until the end of the Transition Period for the Vitamin Products;

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

extend or modify this period as may be necessary or appropriate to accomplish the purposes of the Orders.

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 ordinary course of business, facilities and technical information, and such other relevant information as the Interim Monitor may reasonably request, related to Respondents' compliance with its obligations under the Orders, including, but not limited to, its obligations related to the relevant assets. Respondents shall cooperate with any reasonable request of the Interim Monitor and shall take no action to interfere with or impede the Interim Monitor's ability to monitor Respondents' compliance with the Orders.

F. The Interim Monitor shall serve, without bond or other security, at the expense of Respondents, on such reasonable and customary terms and conditions as the Commission may set. The Interim Monitor shall have authority to employ, at the expense of Respondents, such consultants, accountants, attorneys and other representatives and assistants as are reasonably necessary to carry out the Interim Monitor's duties and responsibilities.

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

H. Respondents shall report to the Interim Monitor in accordance with the requirements of the Orders and as otherwise provided in any agreement approved by the Commission. The Interim Monitor shall evaluate the reports submitted to the Interim Monitor by Respondents, and any reports submitted by each Acquirer with respect to the performance of Respondents' obligations under the Orders or the Remedial Agreement(s). Within thirty (30) days from the date the Interim Monitor receives these reports, the Interim Monitor shall report in writing to the Commission concerning performance by Respondents of their obligations under the Orders; *provided, however,* beginning ninety (90) days after Respondents have filed their final report pursuant to Paragraph VII.B. of the Decision and Order, and ninety (90) days thereafter, the Interim Monitor shall report in writing to the Commission concerning progress by each Acquirer toward obtaining FDA approval to manufacture each Divestiture Product and obtaining the ability to manufacture each Divestiture Product in commercial quantities, in a manner consistent with cGMP, independently of Respondents.

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.

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 Orders.

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

IV.

IT IS FURTHER ORDERED that within thirty (30) days after the date this Order to Maintain Assets is issued by the Commission, and every sixty (60) days thereafter until Respondents have fully complied with this Order to Maintain Assets and the Paragraphs that are enumerated in Paragraph VII.B. of the related Decision and Order, Respondents shall submit to the Commission a verified written report setting forth in detail the manner and form in which they intend to comply, are complying, and have complied with the Orders. Respondents shall submit at the same time a copy of their report concerning compliance with the Orders to the Interim Monitor, if any Interim Monitor has been appointed. Respondents shall include in their reports, among other things that are required from time to time, a detailed description of their efforts to comply with the relevant paragraphs of the Orders, including:

A. a detailed description of all substantive contacts, negotiations, or recommendations related to (i) the divestiture and transfer of all relevant assets and rights, (ii) transitional services being provided by the Respondents to the relevant Acquirer, and (iii) the agreement(s) to Contract Manufacture; and

B. a detailed description of the timing for the completion of such obligations.

provided, however, that, after the Decision and Order in this matter becomes final and effective, the reports due under this Order to Maintain Assets may be consolidated with, and submitted to the Commission at the same time as, the reports required to be submitted by Respondent pursuant to Paragraph VII of the Decision and Order.

V.

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

A. any proposed dissolution of a Respondent;

B. any proposed acquisition, merger or consolidation of a Respondent; or

C. any other change in a Respondent including, but not limited to, assignment and the creation or dissolution of subsidiaries, if such change might affect compliance obligations arising out of the Orders.

VI.

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

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

representative(s) of the Commission and at the expense of the Respondent; and

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

VII.

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

A. three (3) days after the Commission withdraws its acceptance of the Consent Agreement pursuant to the provisions of Commission Rule 2.34, 16 C.F.R. § 2.34; or

B. The day after the divestiture of all of the Divestiture Product Assets, as required by and described in the Decision and Order, has been completed and the Interim Monitor, in consultation with Commission staff and the Acquirer(s), notifies the Commission that all assignments, conveyances, deliveries, grants, licenses, transactions, transfers and other transitions related to such divestitures are complete, or the Commission otherwise directs that this Order to Maintain Assets is terminated.

DECISION AND ORDER
[Public Record Version]

The Federal Trade Commission ("Commission"), having initiated an investigation of the proposed acquisition by Respondent Endo Health Solutions Inc. ("Endo") of the limited liability company membership interests (referred to as membership interests in certain documents related to this proposed acquisition) of Respondent Boca Pharmacal, LLC

("Boca Pharma"), a wholly-owned affiliate of Respondent Boca Life Science Holdings, LLC ("Boca Life"), collectively "Respondents", and Respondents having been furnished thereafter with a copy of a draft of Complaint that the Bureau of Competition proposed to present to the Commission for its consideration and which, if issued by the Commission, would charge Respondents with violations of Section 7 of the Clayton Act, as amended, 15 U.S.C. § 18, and Section 5 of the Federal Trade Commission Act, as amended, 15 U.S.C. § 45; and

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

The Commission having thereafter considered the matter and having determined that it had reason to believe that Respondents have violated the said Acts, and that a Complaint should issue stating its charges in that respect, and having 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 Endo 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 1400 Atwater Drive, Malvern, Pennsylvania 19355.

2. Respondent Boca Life is a limited liability company organized, existing and doing business under and by

virtue of the laws of the State of Florida with its headquarters address located at 3550 NW 126th Avenue, Coral Springs, Florida 33065.

3. Respondent Boca Pharma is a limited liability company organized, existing and doing business under and by virtue of the laws of the State of Florida with its headquarters address located at 3550 NW 126th Avenue, Coral Springs, Florida 33065.

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

ORDER

I.

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

A. "Endo" means Endo Health Solutions Inc., its directors, officers, employees, agents, representatives, successors, and assigns; and its joint ventures, subsidiaries, divisions, groups and affiliates in each case controlled by Endo Health Solutions Inc. (including, without limitation, Generics International (US) Inc.), and the respective directors, officers, employees, agents, representatives, successors, and assigns of each. After the Acquisition, Endo shall include Boca Pharma.

B. "Boca Life" means: Boca Life Science Holdings, LLC, its directors, officers, employees, agents, representatives, successors, and assigns; and its joint ventures, subsidiaries, divisions, groups and affiliates in each case controlled by Boca Life Science Holdings, LLC, and the respective directors, officers, employees, agents, representatives, successors, and assigns of each.

C. "Boca Pharma" means: Boca Pharmacal, LLC, its directors, officers, employees, agents, representatives, successors, and assigns; and its joint ventures, subsidiaries, divisions, groups and affiliates in each case controlled by Boca Pharmacal, LLC, and the respective directors, officers, employees, agents, representatives, successors, and assigns of each.

D. "Respondents" means Endo, Boca Life and Boca Pharma, individually and collectively. After the Acquisition, "Respondents" means Endo and Boca Pharma, individually and collectively.

E. "Commission" means the Federal Trade Commission.

F. "Acetic Acid Products" means the generic 2% acetic acid, glacial, hydrocortisone otic solution drop Product in Development by Respondent Boca Pharma.

G. "Acquirer(s)" means the following:

1. a Person specified by name in this Order to acquire particular assets or rights that a Respondent(s) is required to assign, grant, license, divest, transfer, deliver, or otherwise convey pursuant to this Order and that has been approved by the Commission to accomplish the requirements of this Order in connection with the Commission's determination to make this Order final and effective; or

2. a Person approved by the Commission to acquire particular assets or rights that a Respondent(s) is required to assign, grant, license, divest, transfer, deliver, or otherwise convey pursuant to this Order.

H. "Acquisition" means Respondent Endo's acquisition of the limited liability company membership interest, a.k.a. membership interests, of Boca Pharma. The acquisition is contemplated pursuant to a *Membership Interest Purchase and Sale Agreement* by and among Generics International (US) Inc., Boca Life Science Holdings, LLC, Boca Pharmacal, LLC and certain

members of Boca Life Science Holdings, LLC, dated as of August 27, 2013, submitted to the Commission.

I. "Acquisition Date" means the date on which the Acquisition is consummated.

J. "Agency(ies)" means any government regulatory authority or authorities in the world responsible for granting approval(s), clearance(s), qualification(s), license(s), or permit(s) for any aspect of the research, Development, manufacture, marketing, distribution, or sale of a Product. The term "Agency" includes, without limitation, the United States Food and Drug Administration ("FDA").

K. "Application(s)" means all of the following: "New Drug Application" ("NDA"), "Abbreviated New Drug Application" ("ANDA"), "Supplemental New Drug Application" ("SNDA"), or "Marketing Authorization Application" ("MAA"), the applications for a Product filed or to be filed with the FDA pursuant to 21 C.F.R. Part 314 et seq., and all supplements, amendments, and revisions thereto, any preparatory work, registration dossier, drafts and data necessary for the preparation thereof, and all correspondence between the Respondent and the FDA related thereto. The term "Application" also includes an "Investigational New Drug Application" ("IND") filed or to be filed with the FDA pursuant to 21 C.F.R. Part 312, and all supplements, amendments, and revisions thereto, any preparatory work, registration dossier, drafts and data necessary for the preparation thereof, and all correspondence between the Respondent and the FDA related thereto.

L. "Business" means the research, Development, manufacture, commercialization, distribution, marketing, importation, advertisement and sale of a Product.

M. "Brompheniramine Products" means the following: the Products in Development, manufactured, marketed,

sold, owned or controlled by Respondent Endo pursuant to ANDA No. 202955, and any supplements, amendments, or revisions thereto.

N. "Categorized Assets" means the following assets and rights of the specified Respondent (as that Respondent is identified in the definition of the specified Divestiture Product), as such assets and rights are in existence as of the date the Respondent signs the Agreement Containing Consent Orders in this matter and as are maintained by the Respondent in accordance with the Asset Maintenance Order until the Closing Date:

1. all rights to all of the Applications related to the specified Divestiture Product;

2. all Product Intellectual Property related to the specified Divestiture Product that is not Product Licensed Intellectual Property;

3. all Product Approvals related to the specified Divestiture Product;

4. all Product Manufacturing Technology related to the specified Divestiture Product that is not Product Licensed Intellectual Property;

5. all Product Marketing Materials related to the specified Divestiture Product;

6. all Product Scientific and Regulatory Material related to the specified Divestiture Product;

7. all Website(s) related exclusively to the specified Divestiture Product;

8. the content related exclusively to the specified Divestiture Product that is displayed on any Website that is not dedicated exclusively to the specified Divestiture Product;

9. a list of all of the NDC Numbers related to the specified Divestiture Product, and rights, to the extent permitted by Law:

    a. to require Respondent to discontinue the use of those NDC Numbers in the sale or marketing of the specified Divestiture Product *except* for returns, rebates, allowances, and adjustments for such Product sold prior to the Closing Date and *except* as may be required by applicable Law and *except* as is necessary to give effect to the transactions contemplated under any applicable Remedial Agreement;

    b. to prohibit Respondent from seeking from any customer any type of cross- referencing of those NDC Numbers with any Retained Product(s) *except* for returns, rebates, allowances, and adjustments for such Product sold prior to the Closing Date and *except* as may be required by applicable Law;

    c. to seek to change any cross-referencing by a customer of those NDC Numbers with a Retained Product (including the right to receive notification from the Respondent of any such cross-referencing that is discovered by Respondent);

    d. to seek cross-referencing from a customer of the Respondent's NDC Numbers related to such Divestiture Product with the Acquirer's NDC Numbers related to such Divestiture Product;

    e. to approve the timing of Respondent's discontinued use of those NDC Numbers in the sale or marketing of such Divestiture Product *except* for returns, rebates, allowances, and adjustments for such Divestiture Product sold prior to the Closing Date and *except* as may be required by applicable Law and *except* as is

necessary to give effect to the transactions contemplated under any applicable Remedial Agreement; and

f. to approve any notification(s) from Respondent to any customer(s) regarding the use or discontinued use of such NDC numbers by the Respondent prior to such notification(s) being disseminated to the customer(s);

10. all Product Development Reports related to the specified Divestiture Product;

11. at the option of the Acquirer of the specified Divestiture Product, all Product Assumed Contracts related to the specified Divestiture Product (copies to be provided to that Acquirer on or before the Closing Date);

12. all patient registries related to the specified Divestiture Product, and any other systematic active post-marketing surveillance program to collect patient data, laboratory data and identification information required to be maintained by the FDA to facilitate the investigation of adverse effects related to the specified Divestiture Product (including, without limitation, any Risk Evaluation Mitigation Strategy as defined by the FDA);

13. for any specified Divestiture Product that has been marketed or sold by a Respondent prior to the Closing Date, a list of all customers and targeted customers for the specified Divestiture Product and a listing of the net sales (in either units or dollars) of the specified Divestiture Product to such customers on either an annual, quarterly, or monthly basis including, but not limited to, a separate list specifying the above-described information for the High Volume Accounts and including the name of the employee(s) for each High Volume Account that is or has been

responsible for the purchase of the specified Divestiture Product on behalf of the High Volume Account and his or her business contact information;

14. for each specified Divestiture Product that is a Contract Manufacture Product:

    a. a list of the inventory levels (weeks of supply) for each customer (*i.e.*, retailer, group purchasing organization, wholesaler or distributor) as of the Closing Date; and

    b. anticipated reorder dates for each customer as of the Closing Date;

15. at the option of the Acquirer of the specified Divestiture Product and to the extent approved by the Commission in the relevant Remedial Agreement, all inventory in existence as of the Closing Date including, but not limited to, raw materials, packaging materials, work-in-process and finished goods related to the specified Divestiture Product;

16. copies of all unfilled customer purchase orders for the specified Divestiture Product as of the Closing Date, to be provided to the Acquirer of the specified Divestiture Product not later than five (5) days after the Closing Date;

17. at the option of the Acquirer of the specified Divestiture Product, all unfilled customer purchase orders for the specified Divestiture Product; and

18. all of the Respondent's books, records, and files directly related to the foregoing;

provided, however, that "Categorized Assets" shall not include: (i) documents relating to any Respondent's general business strategies or practices relating to the conduct of its Business of

generic pharmaceutical Products, where such documents do not discuss with particularity the specified Divestiture Product; (ii) administrative, financial, and accounting records; (iii) quality control records that are determined not to be material to the manufacture of the specified Divestiture Product by the Interim Monitor or the Acquirer of the specified Divestiture Product; (iv) formulas used to determine the final pricing of any Divestiture Product and/or Retained Products to customers and competitively sensitive pricing information that is exclusively related to the Retained Products; (v) any real estate and the buildings and other permanent structures located on such real estate; and (vi) all Product Licensed Intellectual Property;

provided further, *however*, that in cases in which documents or other materials included in the assets to be divested contain information: (i) that relates both to the specified Divestiture Product and to Retained Products or Businesses of any Respondent and cannot be segregated in a manner that preserves the usefulness of the information as it relates to the specified Divestiture Product; or (ii) for which any Respondent has a legal obligation to retain the original copies, the specified Respondent shall be required to provide only copies or relevant excerpts of the documents and materials containing this information. In instances where such copies are provided to the Acquirer of the specified Divestiture Product, the specified Respondent shall provide that Acquirer access to original documents under circumstances where copies of documents are insufficient for evidentiary or regulatory purposes. The purpose of this provision is to ensure that the specified Respondent provides the Acquirer with the above-described information without requiring the Respondent completely to divest itself of information that, in content, also relates to Retained Product(s).

O. "cGMP" means current Good Manufacturing Practice as set forth in the United States Federal Food, Drug, and Cosmetic Act, as amended, and includes all rules and regulations promulgated by the FDA thereunder.

P. "Clinical Trial(s)" means a controlled study in humans of the safety or efficacy of a Product, and includes, without limitation, such clinical trials as are designed to support expanded labeling or to satisfy the requirements of an Agency in connection with any Product Approval and any other human study used in research and Development of a Product.

Q. "Closing Date" means, as to each Divestiture Product, the date on which a Respondent (or a Divestiture Trustee) consummates a transaction to assign, grant, license, divest, transfer, deliver, or otherwise convey assets related to such Divestiture Product to an Acquirer pursuant to this Order.

R. "Confidential Business Information" means all information owned by, or in the possession or control of, any Respondent that is not in the public domain and that is directly related to the conduct of the Business related to a Divestiture Product(s). The term "Confidential Business Information" *excludes* the following:

1. information relating to any Respondent's general business strategies or practices that does not discuss with particularity the Divestiture Products;

2. information specifically excluded from the Divestiture Product Assets conveyed to the Acquirer of the related Divestiture Product(s);

3. information that is contained in documents, records or books of any Respondent that is provided to an Acquirer by a Respondent that is unrelated to the Divestiture Products acquired by that Acquirer or that is exclusively related to Retained Product(s); and

4. information that is protected by the attorney work product, attorney-client, joint defense or other privilege prepared in connection with the Acquisition and relating to any United States, state, or foreign antitrust or competition Laws.

S. "Contract Manufacture" means, the following:

1. to manufacture, or to cause to be manufactured, a Contract Manufacture Product on behalf of an Acquirer;

2. to manufacture, or to cause to be manufactured, a Product that is the therapeutic equivalent (as that term is defined by the FDA) and in the identical dosage strength, formulation and presentation as a Contract Manufacture Product on behalf of an Acquirer;

3. to provide, or to cause to be provided, any part of the manufacturing process including, without limitation, the finish, fill, and/or packaging of a Contract Manufacture Product on behalf of an Acquirer.

T. "Contract Manufacture Product(s)" means:

1. the Brompheniramine Products; and

2. any ingredient, material, or component used in the manufacture of the foregoing Product including the active pharmaceutical ingredient, excipients or packaging materials;

provided however, that with the consent of the Acquirer of the specified Product, a Respondent may substitute a therapeutic equivalent (as that term is defined by the FDA) form of such Product in performance of that Respondent's agreement to Contract Manufacture.

U. "Development" means all preclinical and clinical drug development activities (including formulation), including test method development and stability testing, toxicology, formulation, process development, manufacturing scale-up, development-stage manufacturing, quality assurance/quality control development, statistical analysis and report writing, conducting Clinical Trials for the purpose of obtaining any and all approvals, licenses, registrations or authorizations from any Agency necessary for the manufacture, use, storage, import, export, transport, promotion, marketing, and sale of a Product (including any government price or reimbursement approvals), Product approval and registration, and regulatory affairs related to the foregoing. "Develop" means to engage in Development.

V. "Direct Cost" means a cost not to exceed the cost of labor, material, travel and other expenditures to the extent the costs are directly incurred to provide the relevant assistance or service. "Direct Cost" to the Acquirer for its use of any of a Respondent's employees' labor shall not exceed the average hourly wage rate for such employee;

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

W. "Divestiture Product(s)" means, the following, individually and collectively:

1. the Generic Divestiture Products; and

2. the Vitamin Products.

X. "Divestiture Product Assets" means, the following, individually and collectively:

1. the Generic Divestiture Product Assets; and

2. the Vitamin Product Divestiture Assets.

Y. "Divestiture Product Core Employees" means:

1. with respect to the Brompheniramine Products and the Hydrocodone/Acetaminophen Products, the Product Research and Development Employees and the Product Manufacturing Employees related to each Generic Divestiture Product; and

2. with respect to the Vitamin Products, the Vitamin Product Marketing Employees;

Z. "Divestiture Product License" means a perpetual, non-exclusive, fully paid-up and royalty-free license(s) under a Remedial Agreement with rights to sublicense to all Product Licensed Intellectual Property and all Product Manufacturing Technology related to general manufacturing know-how that was owned, licensed, or controlled by the specified Respondent (as that Respondent is identified in the definition of the specified Divestiture Product):

1. to research and Develop the specified Divestiture Products for marketing, distribution or sale within the Geographic Territory;

2. to use, make, have made, distribute, offer for sale, promote, advertise, or sell the specified Divestiture Products within the Geographic Territory;

3. to import or export the specified Divestiture Products to or from the Geographic Territory to the extent related to the marketing, distribution or sale of the specified Divestiture Products in the Geographic Territory; and

4. to have the specified Divestiture Products made anywhere in the World for distribution or sale within, or import into the Geographic Territory;

provided however, that for any Product Licensed Intellectual Property that is the subject of a license from a Third Party entered into by a Respondent prior to the Acquisition, the scope of the rights granted hereunder shall only be required to be equal to the scope of the rights granted by the Third Party to that Respondent.

AA. "Divestiture Product Releasee(s)" means the following Persons:

1. the Acquirer for the assets related to a particular Divestiture Product;

2. any Person controlled by or under common control with that Acquirer; and

3. any Manufacturing Designees, licensees, sublicensees, manufacturers, suppliers, distributors, and customers of that Acquirer, or of such Acquirer-affiliated entities.

BB. "Divestiture Trustee" means the trustee appointed by the Commission pursuant to Paragraph IV of this Order.

CC. "Domain Name" means the domain name(s) (universal resource locators), and registration(s) thereof, issued by any Person or authority that issues and maintains the domain name registration; *provided, however*, "Domain Name" shall not include any trademark or service mark rights to such domain names other than the rights to the Product Trademarks required to be divested.

DD. "Drug Master Files" means the information submitted to the FDA as described in 21 C.F.R. Part 314.420 related to a Product.

EE. "Generic Divestiture Product(s)" means the following:

1. Acetic Acid Products;

2. Brompheniramine Products; and

3. Hydrocodone/Acetaminophen Products.

FF. "Generic Divestiture Product Agreements" means, the following:

1. The Asset Purchase Agreement between Generics International (US) Inc. and Rhodes Pharmaceuticals, L.P., dated January 9, 2014;

2. The Assignment and Assumption Agreement between Generics International (US) Inc. and Rhodes Pharmaceuticals, L.P., dated January 9, 2014;

3. The Supply Agreement between Vintage Pharmaceuticals, a wholly-owned subsidiary of Generics International (US) Inc. and doing business as Qualitest Pharmaceuticals, and Rhodes Pharmaceuticals, L.P., dated January 9, 2014; and

all amendments, exhibits, attachments, agreements, and schedules thereto, related to the Generic Divestiture Product Assets that have been approved by the Commission to accomplish the requirements of this Order. The Generic Divestiture Product Agreements are contained in Non-Public Appendix I.

GG. "Generic Divestiture Product Assets" means all rights, title and interest in and to all assets related to the Business within the Geographic Territory of the specified Respondent (as that Respondent is identified in the definition of the respective Divestiture Product) related to each of the respective Generic Divestiture Products, to the extent legally transferable, including, without limitation, the Categorized Assets related to the Generic Divestiture Products.

HH. "Geographic Territory" shall mean the United States of America, including all of its territories and possessions, unless otherwise specified.

II. "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.

JJ. "High Volume Account(s)" means any retailer, wholesaler or distributor whose annual or projected annual aggregate purchase amounts (on a company-wide level), in units or in dollars, of a Divestiture Product in the United States of America from the Respondent was, or is projected to be among the top twenty highest of such purchase amounts by the Respondent's U.S. customers on any of the following dates: (i) the end of the last quarter that immediately preceded the date of the public announcement of the proposed Acquisition; (ii) the end of the last quarter that immediately preceded the Acquisition Date; (iii) the end of the last quarter that immediately preceded the Closing Date for the relevant assets; or (iv) the end of the last quarter following the Acquisition or the Closing Date.

KK. "Hydrocodone/Acetaminophen Products" means the generic Products that are both: (i) oral solutions comprised of 10 mg hydrocodone bitartrate/15ml and 325 mg acetaminophen/15 ml, and (ii) in Development, manufactured, marketed, sold, owned or controlled, by Respondent Endo pursuant to ANDA No. 203744, and any supplements, amendments, or revisions thereto.

LL. "Interim Monitor" means any monitor appointed pursuant to Paragraph III of this Order or Paragraph III of the related Order to Maintain Assets.

MM. "Law" means all laws, statutes, rules, regulations, ordinances, and other pronouncements by any Government Entity having the effect of law.

NN. "Manufacturing Designee" means any Person other than a Respondent that has been designated by an

Acquirer to manufacture a Divestiture Product for that Acquirer.

OO. "NDC Number(s)" means the National Drug Code number, including both the labeler code assigned by the FDA and the additional numbers assigned by the labeler as a product code for a specific Product.

PP. "New Marketing Partner" means any Third Party(ies) designated by Sonar to market, distribute or sell the Vitamin Products.

QQ. "Orders" means this Decision and Order and the related Order to Maintain Assets.

RR. "Order Date" means the date on which the final Decision and Order in this matter is issued by the Commission.

SS. "Order to Maintain Assets" means the Order to Maintain Assets incorporated into and made a part of the Agreement Containing Consent Orders.

TT. "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 filed, or in existence, on or before the Closing Date (*except* where this Order specifies a different time), and includes all reissues, additions, divisions, continuations, continuations-in-part, supplementary protection certificates, extensions and reexaminations thereof, all inventions disclosed therein, and all rights therein provided by international treaties and conventions.

UU. "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.

VV. "Product(s)" means any pharmaceutical, biological, or genetic composition containing any formulation or dosage of a compound referenced as its pharmaceutically, biologically, or genetically active ingredient and/or that is the subject of an Application.

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

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

1. that make specific reference to the specified Divestiture Product and pursuant to which any Third Party is obligated to purchase, or has the option to purchase without further negotiation of terms, the specified Divestiture Product from the Respondent unless such contract applies generally to the Respondent's sales of Products to that Third Party;

2. pursuant to which the Respondent had or has as of the Closing Date the ability to independently purchase the active pharmaceutical ingredient(s) or other necessary ingredient(s) or component(s) or had planned to purchase the active pharmaceutical ingredient(s) or other necessary ingredient(s) or component(s) from any Third Party for use in

connection with the manufacture of the specified Divestiture Product;

3. relating to any Clinical Trials involving the specified Divestiture Product;

4. with universities or other research institutions for the use of the specified Divestiture Product in scientific research;

5. relating to the particularized marketing of the specified Divestiture Product or educational matters relating solely to the specified Divestiture Product(s);

6. pursuant to which a Third Party manufactures the specified Divestiture Product on behalf of the Respondent;

7. pursuant to which a Third Party provides any part of the manufacturing process including, without limitation, the finish, fill, and/or packaging of the specified Divestiture Product on behalf of Respondent;

8. pursuant to which a Third Party provides the Product Manufacturing Technology related to the specified Divestiture Product to the Respondent;

9. pursuant to which a Third Party is licensed by the Respondent to use the Product Manufacturing Technology;

10. constituting confidentiality agreements involving the specified Divestiture Product;

11. involving any royalty, licensing, covenant not to sue, or similar arrangement involving the specified Divestiture Product;

12. pursuant to which a Third Party provides any specialized services necessary to the research,

Development, manufacture or distribution of the specified Divestiture Product to the Respondent including, but not limited to, consultation arrangements; and/or

13. pursuant to which any Third Party collaborates with the Respondent in the performance of research, Development, marketing, distribution or selling of the specified Divestiture Product or the Business related to such Divestiture Product;

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

YY. "Product Copyrights" means rights to all original works of authorship of any kind directly related to a Divestiture Product and any registrations and applications for registrations thereof within the Geographic Territory, including, but not limited to, the following: all such rights with respect to all promotional materials for healthcare providers, all promotional materials for patients, and educational materials for the sales force; copyrights in all preclinical, clinical and process development data and reports relating to the research and Development of that Product or of any materials used in the research, Development, manufacture, marketing or sale of that Product, including all copyrights in raw data relating to Clinical Trials of that Product, all case report forms relating thereto and all statistical programs developed (or modified in a manner material to the use or function thereof (other than through user references)) to analyze clinical data, all market research data, market intelligence reports and statistical programs (if any) used for marketing and sales research; all copyrights in customer information, promotional and marketing materials, that Product's sales forecasting

models, medical education materials, sales training materials, and advertising and display materials; all records relating to employees of a Respondent who accept employment with an Acquirer (excluding any personnel records the transfer of which is prohibited by applicable Law); all copyrights in records, including customer lists, sales force call activity reports, vendor lists, sales data, reimbursement data, speaker lists, manufacturing records, manufacturing processes, and supplier lists; all copyrights in data contained in laboratory notebooks relating to that Product or relating to its biology; all copyrights in adverse experience reports and files related thereto (including source documentation) and all copyrights in periodic adverse experience reports and all data contained in electronic databases relating to adverse experience reports and periodic adverse experience reports; all copyrights in analytical and quality control data; and all correspondence with the FDA or any other Agency.

ZZ. "Product Development Reports" means:

1. Pharmacokinetic study reports related to the specified Divestiture Product;

2. Bioavailability study reports (including reference listed drug information) related to the specified Divestiture Product;

3. Bioequivalence study reports (including reference listed drug information) related to the specified Divestiture Product;

4. all correspondence, submissions, notifications, communications, registrations or other filings made to, received from or otherwise conducted with the FDA relating to the Application(s) related to the specified Divestiture Product;

5. annual and periodic reports related to the above-described Application(s), including any safety update reports;

6. FDA approved Product labeling related to the specified Divestiture Product;

7. currently used or planned product package inserts (including historical change of controls summaries) related to the specified Divestiture Product;

8. FDA approved patient circulars and information related to the specified Divestiture Product;

9. adverse event reports, adverse experience information, descriptions of material events and matters concerning safety or lack of efficacy related to the specified Divestiture Product;

10. summary of Product complaints from physicians related to the specified Divestiture Product;

11. summary of Product complaints from customers related to the specified Divestiture Product;

12. Product recall reports filed with the FDA related to the specified Divestiture Product, and all reports, studies and other documents related to such recalls;

13. investigation reports and other documents related to any out of specification results for any impurities found in the specified Divestiture Product;

14. reports related to the specified Divestiture Product from any consultant or outside contractor engaged to investigate or perform testing for the purposes of resolving any product or process issues, including without limitation, identification and sources of impurities;

15. reports of vendors of the active pharmaceutical ingredients, excipients, packaging components and detergents used to produce the specified Divestiture Product that relate to the specifications, degradation, chemical interactions, testing and historical trends of the production of the specified Divestiture Product;

16. analytical methods development records related to the specified Divestiture Product;

17. manufacturing batch records related to the specified Divestiture Product;

18. stability testing records related to the specified Divestiture Product;

19. change in control history related to the specified Divestiture Product; and

20. executed validation and qualification protocols and reports related to the specified Divestiture Product.

AAA. "Product Employee Information" means the following, for each Divestiture Product Core Employee, as and to the extent permitted by Law:

1. a complete and accurate list containing the name of each Divestiture Product Core Employee (including former employees who were employed by the specified Respondent within ninety (90) days of the execution date of any Remedial Agreement);

2. with respect to each such employee, the following information:

   a. the date of hire and effective service date;

   b. job title or position held;

c. a specific description of the employee's responsibilities related to the relevant Divestiture Product; *provided, however*, in lieu of this description, the specified Respondent may provide the employee's most recent performance appraisal;

d. the base salary or current wages;

e. the most recent bonus paid, aggregate annual compensation for the relevant Respondent's last fiscal year and current target or guaranteed bonus, if any;

f. employment status (*i.e.*, active or on leave or disability; full-time or part-time);

g. and any other material terms and conditions of employment in regard to such employee that are not otherwise generally available to similarly situated employees;

3. at the Acquirer's option or the Proposed Acquirer's option (as applicable), copies of all employee benefit plans and summary plan descriptions (if any) applicable to the relevant employees.

BBB. "Product Intellectual Property" means all of the following related to a Divestiture Product (other than Product Licensed Intellectual Property):

1. Patents;

2. Product Copyrights;

3. Product Trademarks, Product Trade Dress, trade secrets, know-how, techniques, data, inventions, practices, methods, and other confidential or proprietary technical, business, research, Development and other information; and

4. rights to obtain and file for patents, trademarks, and copyrights and registrations thereof and to bring suit against a Third Party for the past, present or future infringement, misappropriation, dilution, misuse or other violations of any of the foregoing;

provided, *however*, "Product Intellectual Property" does not include the corporate names or corporate trade dress of "Endo" or "Boca" or the related corporate logos thereof, or the corporate names or corporate trade dress of any other corporations or companies owned or controlled by the Respondent or the related corporate logos thereof, or general registered images or symbols by which Endo, Boca Life or Boca Pharma can be identified or defined.

CCC. "Product Licensed Intellectual Property" means the following:

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

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

3. all Right(s) of Reference or Use that is either owned or controlled by, or has been granted or licensed to the Respondent that is related to the Drug Master File of an NDA of a Product that is the therapeutic equivalent (as that term is defined by the FDA) of the specified Divestiture Product.

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

EEE. "Product Manufacturing Technology" means all of the following related to a Divestiture Product:

1. all technology, trade secrets, know-how, formulas, and proprietary information (whether patented, patentable or otherwise) related to the manufacture of that Product, including, but not limited to, the following: all product specifications, processes, analytical methods, product designs, plans, trade secrets, ideas, concepts, manufacturing, engineering, and other manuals and drawings, standard operating procedures, flow diagrams, chemical, safety, quality assurance, quality control, research records, clinical data, compositions, annual product reviews, regulatory communications, control history, current and historical information associated with the FDA Application(s) conformance and cGMP compliance, and labeling and all other information related to the manufacturing process, and supplier lists;

2. all ingredients, materials, or components used in the manufacture of that Product including the active pharmaceutical ingredient, excipients or packaging materials; and,

3. for those instances in which the manufacturing equipment is not readily available from a Third Party, at the Acquirer's option, all such equipment used to manufacture that Product.

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

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

HHH. "Product Scientific and Regulatory Material" means all technological, scientific, chemical, biological, pharmacological, toxicological, regulatory and Clinical Trial materials and information.

III. "Product Trade Dress" means the current trade dress of a Product, including but not limited to, Product packaging, and the lettering of the Product trade name or brand name.

JJJ. "Product Trademark(s)" means all proprietary names or designations, trademarks, service marks, trade names, and brand names, including registrations and applications for registration therefor (and all renewals, modifications, and extensions thereof) and all common law rights, and the goodwill symbolized thereby and associated therewith, for a Product.

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

LLL. "Remedial Agreement(s)" means the following:

1. any agreement between a Respondent(s) and an Acquirer that is specifically referenced and attached to this Order, including all amendments, exhibits, attachments, agreements, and schedules thereto, related to the relevant assets or rights to be assigned, granted, licensed, divested, transferred, delivered, or otherwise conveyed, including without limitation, any agreement to supply specified products or components thereof, and that has been approved by the Commission to accomplish the requirements of the Order in connection with the Commission's determination to make this Order final and effective;

2. any agreement between a Respondent(s) and a Third Party to effect the assignment of assets or rights of that Respondent(s) related to a Divestiture Product to the benefit of an Acquirer that is specifically referenced and attached to this Order, including all amendments, exhibits, attachments, agreements, and schedules thereto, that has been approved by the Commission to accomplish the requirements of the Order in connection with the Commission's determination to make this Order final and effective;

3. any agreement between a Respondent(s) and an Acquirer (or between a Divestiture Trustee and an Acquirer) that has been approved by the Commission to accomplish the requirements of this Order, including all amendments, exhibits, attachments, agreements, and schedules thereto, related to the relevant assets or rights to be assigned, granted, licensed, divested, transferred, delivered, or otherwise conveyed, including without limitation, any agreement by that Respondent(s) to supply specified products or components thereof, and that has been approved by the Commission to accomplish the requirements of this Order; and/or

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

MMM. "Retained Product" means any Product(s) other than a Divestiture Product.

NNN. "Rhodes" means Rhodes Pharmaceuticals, L.P., a limited partnership organized, existing, and doing business under and by virtue of the laws of the State of

Delaware with its headquarters address located at 498 Washington Street, Coventry, Rhode Island 02816.

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

PPP. "Sonar" means Sonar Products, Inc. a corporation organized, existing and doing business under and by virtue of the laws of the State of New Jersey with its headquarters address located at 609-613 Industrial Road, Carlstadt, New Jersey 07072.

QQQ. "Supply Cost" means a cost not to exceed the Respondent's (as that Respondent is identified in the definition of the respective Divestiture Product) average direct per unit cost in United States dollars of manufacturing the specified Divestiture Product for the twelve (12) month period immediately preceding the Acquisition Date. "Supply Cost" shall expressly exclude any intracompany business transfer profit; *provided, however*, that in each instance where: (i) an agreement to Contract Manufacture is specifically referenced and attached to this Order, and (ii) such agreement becomes a Remedial Agreement for a Divestiture Product, "Supply Cost" means the cost as specified in such Remedial Agreement for that Divestiture Product.

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

1. designating employees of the Respondent(s) knowledgeable about the Product Manufacturing Technology (and all related intellectual property) related to each of the Divestiture Products who will be responsible for communicating directly with the Acquirer or its Manufacturing Designee, and the Interim Monitor (if one has been appointed), for the purpose of effecting such delivery;

2. preparing technology transfer protocols and transfer acceptance criteria for both the processes and analytical methods related to the specified Divestiture Product that are acceptable to the Acquirer;

3. preparing and implementing a detailed technological transfer plan that contains, *inter alia*, the transfer of all relevant information, all appropriate documentation, all other materials, and projected time lines for the delivery of all such Product Manufacturing Technology (including all related intellectual property) to the Acquirer or its Manufacturing Designee; and

4. providing, in a timely manner, assistance and advice to enable the Acquirer or its Manufacturing Designee to:

    a. manufacture the specified Divestiture Product in the quality and quantities achieved by the specified Respondent (as that Respondent is identified in the definition of the specified Divestiture Product), or the manufacturer and/or developer of such Divestiture Product;

    b. obtain any Product Approvals necessary for the Acquirer or its Manufacturing Designee, to manufacture, distribute, market, and sell the specified Divestiture Product in commercial quantities and to meet all Agency-approved specifications for such Divestiture Product; and

c. receive, integrate, and use all such Product Manufacturing Technology and all such intellectual property related to the specified Divestiture Product.

SSS. "Third Party(ies)" means any non-governmental Person other than the following: the Respondents; or, the Acquirer of particular assets or rights pursuant to this Order.

TTT. "Transition Period for the Vitamin Products" means for each Vitamin Product, the period beginning on the date the Order to Maintain Assets in this matter is issued by the Commission and ending, with respect to each Vitamin Product, on the earlier of the following dates: (i) the date thirty (30) days from a termination notice by Sonar and the New Marketing Partner as provided for in the Vitamin Product Divestiture Agreements; or (ii) the date six (6) months from the Order Date.

UUU. "Vitamin Product(s)" means all of the following Products sold or distributed by Boca Pharma:

1. Multi-Vitamin with Fluoride (0.25 MG) & Iron Drops (50 mL bottles sold under NDC Number 64376-0821-50);

2. Multi-Vitamin with Fluoride (0.25 MG) Drops (50 mL bottles sold under NDC Number 64376-0820-50);

3. Multi-Vitamin with Fluoride (0.50 MG) Drops (50 mL bottles sold under NDC Number 64376-0822-50);

4. Triple Vitamin with Fluoride (0.25 MG) Drops (50 mL bottles sold under NDC Number 64376-0823-50);

including, without limitation, any other package form or size of the foregoing strengths.

VVV. "Vitamin Product Divestiture Assets" means the following assets and rights of Respondent Boca Pharma:

1. for each Vitamin Product, all of Respondent Boca Pharma's rights to import, Develop, manufacture, process, commercialize, distribute, sell, advertise, market, promote, out-license, or offer for sale, any of the Vitamin Products. Such rights include, without limitation, all of the foregoing rights acquired or held by Respondent Boca Pharma as a result of any agreement with Sonar and all rights to any and all improvements to the Vitamin Products;

2. all rights to all Product Marketing Materials related to each Vitamin Product;

3. all rights to all Website(s) related exclusively to each Vitamin Product;

4. all content related exclusively to each Vitamin Product that is displayed on any Website that is not dedicated exclusively to the specified Vitamin Product;

5. rights, to the extent permitted by Law:

   a. to require any Respondent to discontinue the use of the NDC Numbers related to each Vitamin Product in the sale or marketing of the specified Vitamin Product *except* for returns, rebates, allowances, and adjustments for such Product sold prior to the end of the Transition Period for the Vitamin Products and *except* as may be required by applicable Law;

   b. to prohibit any Respondent from seeking from any customer any type of cross- referencing of those NDC Numbers with any Retained Product(s) *except* for returns, rebates, allowances, and adjustments for such Product sold prior to the end of the Transition Period

for the Vitamin Products and *except* as may be required by applicable Law;

c. to approve the timing of any Respondent's discontinued use of those NDC Numbers in the sale or marketing of such Vitamin Product *except* for returns, rebates, allowances, and adjustments for such Vitamin Product sold prior to the end of the Transition Period for the Vitamin Products and *except* as may be required by applicable Law;

d. to approve any notification(s) from any Respondent to any customer(s) regarding the use or discontinued use of such NDC numbers by the Respondent prior to such notification(s) being disseminated to the customer(s);

6. a list of all customers and targeted customers for each Vitamin Product and, the following:

a. a listing of the net sales (in either units or dollars) of the Vitamin Product to such customers on either an annual, quarterly, or monthly basis including, but not limited to, a separate list specifying the above-described information for the High Volume Accounts and including the name of the employee(s) for each High Volume Account that is or has been responsible for the purchase of the Vitamin Product on behalf of the High Volume Account and his or her business contact information;

b. a listing of the inventory levels (weeks of supply) for each customer as of the date the Order to Maintain Assets is issued to become final and effective; and

c. anticipated reorder dates for each customer as of the date the Order to Maintain Assets is issued to become final and effective.

7. at the option of Sonar, copies of all unfilled customer purchase orders for the specified Divestiture Product at any date during the Transition Period;

8. copies of all of the Respondent's books, records, and files directly related to the foregoing;

provided, however, that "Vitamin Product Divestiture Assets" shall not include: (i) documents relating to any Respondent's general business strategies or practices relating to research, Development, manufacture, marketing or sales of generic pharmaceutical Products, where such documents do not discuss with particularity the Vitamin Product(s); (ii) administrative, financial, and accounting records; (iii) quality control records that are determined by the Interim Monitor or Sonar not to be material to the marketing, distribution or sale of the specified Vitamin Product; (iv) competitively sensitive pricing information to the extent that it is related to the Retained Products; (v) rights to the corporate names or corporate trade dress of "Endo" or "Boca", or the related corporate logos thereof, or the corporate names or corporate trade dress of any other corporations or companies owned or controlled by any Respondent or the related corporate logos thereof, or general registered images or symbols by which Endo, Boca Life or Boca Pharma can be identified or defined; and (vi) information that is contained in documents, records, or books of any Respondent provided to Sonar by such Respondent that is unrelated to the Vitamin Products or that is exclusively related to Retained Product(s);

provided further, *however*, the Respondents shall provide Sonar access to original documents under circumstances where copies of documents are insufficient for evidentiary or regulatory purposes and Respondents may require Sonar to enter into an agreement to return such original documents under

terms that are customary and reasonable for such purposes.

WWW. "Vitamin Product Divestiture Agreements" means, the following:

1. The *Boca Vitamin Products Agreement* by and among Boca Pharmacal, LLC and Sonar Products Inc. dated January 13, 2014;

2. The *Transitional Services Agreement* attached thereto (to be executed on the Closing Date for the Vitamin Product Divestiture Assets) ; and,

3. all amendments, exhibits, attachments, agreements, and schedules thereto,

related to the Vitamin Product Divestiture Assets that have been approved by the Commission to accomplish the requirements of this Order. The Vitamin Product Divestiture Agreements are contained in Non-Public Appendix I.

XXX. "Vitamin Product Marketing Employee(s)" means all employees of Respondent Boca Pharma that have been directly involved in the marketing or sales of the Vitamin Products to any High Volume Account.

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

II.

IT IS FURTHER ORDERED that:

K. Not later than the earlier of: (i) ten (10) days after the Acquisition Date or (ii) ten (10) days after the Order Date, Respondent Endo shall divest the Generic Divestiture Product Assets and grant the related Divestiture Product License, absolutely and in good faith, to Rhodes pursuant to, and in accordance with, the Generic Divestiture Product Agreement(s) (which agreements shall not limit or contradict, or be construed to limit or contradict, the terms of this Order, it being understood that this Order shall not be construed to reduce any rights or benefits of Rhodes or to reduce any obligations of Respondent Endo under such agreements), and each such agreement, if it becomes a Remedial Agreement related to the Generic Divestiture Product Assets is incorporated by reference into this Order and made a part hereof;

provided, however, that if Respondent Endo has divested the Generic Divestiture Product Assets to Rhodes prior to the Order Date, and if, at the time the Commission determines to make this Order final and effective, the Commission notifies Respondent Endo that Rhodes is not an acceptable purchaser of the Generic Divestiture Product Assets, then Respondent Endo shall immediately rescind the transaction with Rhodes, in whole or in part, as directed by the Commission, and shall divest the Generic Divestiture Product Assets within one hundred eighty (180) days from the Order Date, 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 Endo has divested the Generic Divestiture Product Assets to Rhodes prior to the Order Date, and if, at the time the Commission determines to make this Order final and

effective, the Commission notifies Respondent Endo that the manner in which the divestiture was accomplished is not acceptable, the Commission may direct Respondent Endo, or appoint a Divestiture Trustee, to effect such modifications to the manner of divestiture of the Generic Divestiture Product Assets to Rhodes (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.

L. Not later than the earlier of: (i) ten (10) days after the Acquisition Date or (ii) ten (10) days after the Order Date, Respondents shall divest the Vitamin Product Divestiture Assets (to the extent that such assets are not already owned, controlled or in the possession of Sonar), absolutely and in good faith, to Sonar pursuant to, and in accordance with, the Vitamin Product Divestiture Agreements (which agreements shall not limit or contradict, or be construed to limit or contradict, the terms of this Order, it being understood that this Order shall not be construed to reduce any rights or benefits of Sonar or to reduce any obligations of Respondents under such agreements), and each such agreement, if it becomes a Remedial Agreement related to the Vitamin Product Divestiture Assets is incorporated by reference into this Order and made a part hereof;

provided, *however*, that if Respondents have divested the Vitamin Product Divestiture Assets to Sonar prior to the Order Date, and if, at the time the Commission determines to make this Order final and effective, the Commission notifies Respondents that the manner in which the divestiture was accomplished is not acceptable, the Commission may direct Respondents, or appoint a Divestiture Trustee, to effect such modifications to the manner of divestiture of the Vitamin Product Divestiture Assets to Sonar (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.

M. Prior to the Closing Date, Respondents shall secure all consents and waivers from all Third Parties that are necessary to permit Respondents to divest the assets required to be divested pursuant to this Order to an Acquirer, and to permit the relevant Acquirer to continue the Business of the Divestiture Product(s) being acquired by that Acquirer;

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

N. Respondents shall:

1. submit to each Acquirer, at Respondents' expense, all Confidential Business Information related to the Divestiture Products being acquired by that Acquirer;

2. deliver all Confidential Business Information related to the Divestiture Products being acquired by that Acquirer to that Acquirer:

   a. in good faith;

   b. in a timely manner, *i.e.*, as soon as practicable, avoiding any delays in transmission of the respective information; and

   c. in a manner that ensures its completeness and accuracy and that fully preserves its usefulness;

3. pending complete delivery of all such Confidential Business Information to the relevant Acquirer, provide that Acquirer and the Interim Monitor (if any has been appointed) with access to all such Confidential Business Information and employees

who possess or are able to locate such information for the purposes of identifying the books, records, and files directly related to the Divestiture Products acquired by that Acquirer that contain such Confidential Business Information and facilitating the delivery in a manner consistent with this Order;

4. not use, directly or indirectly, any such Confidential Business Information related to the Business of the Divestiture Products other than as necessary to comply with the following:

   a. the requirements of this Order;

   b. Respondents' obligations to each respective Acquirer under the terms of any related Remedial Agreement; or

   c. applicable Law;

5. not disclose or convey any Confidential Business Information, directly or indirectly, to any Person except (i) the Acquirer of the particular Divestiture Products, (ii) other Persons specifically authorized by that Acquirer to receive such information, (iii) the Commission, or (iv) the Interim Monitor (if any has been appointed); and

6. not provide, disclose or otherwise make available, directly or indirectly, any Confidential Business Information related to the marketing or sales of the Divestiture Products to the marketing or sales employees associated with the Business related to those Retained Products that are the therapeutic equivalent (as that term is defined by the FDA) of the Divestiture Products.

O. For each Acquirer of a Generic Divestiture Product, Respondents shall provide, or cause to be provided to that Acquirer in a manner consistent with the Technology Transfer Standards the following:

1. all Product Manufacturing Technology (including all related intellectual property) related to the Divestiture Product(s) being acquired by that Acquirer; and

2. all rights to all Product Manufacturing Technology (including all related intellectual property) that is owned by a Third Party and licensed to any Respondent related to the Divestiture Products being acquired by that Acquirer.

Respondent Endo shall obtain any consents from Third Parties required to comply with this provision. No Respondent shall enforce any agreement against a Third Party or an Acquirer to the extent that such agreement may limit or otherwise impair the ability of that Acquirer to use or to acquire from the Third Party the Product Manufacturing Technology (including all related intellectual property) related to the Divestiture Products acquired by that Acquirer. Such agreements include, but are not limited to, agreements with respect to the disclosure of Confidential Business Information related to such Product Manufacturing Technology. Not later than ten (10) days after the Closing Date, Respondents shall grant a release to each Third Party that is subject to such agreements that allows the Third Party to provide the relevant Product Manufacturing Technology to that Acquirer. Within five (5) days of the execution of each such release, Respondents shall provide a copy of the release to that Acquirer.

P. For each Acquirer of a Divestiture Product that is a Contract Manufacture Product, Respondent Endo shall:

1. upon reasonable written notice and request from that Acquirer to Respondent Endo, Contract Manufacture and deliver, or cause to be manufactured and delivered, to the requesting Acquirer, in a timely manner and under reasonable terms and conditions, a supply of each of the Contract Manufacture Products related to the

Divestiture Products acquired by that Acquirer at Supply Cost, for a period of time sufficient to allow that Acquirer (or the Manufacturing Designee of the Acquirer) to obtain all of the relevant Product Approvals necessary to manufacture in commercial quantities, and in a manner consistent with cGMP, the finished drug product independently of Respondent Endo, and to secure sources of supply of the active pharmaceutical ingredients, excipients, other ingredients, and necessary components listed in Application(s) of the relevant Respondent (as that Respondent is identified in the definition of the respective Divestiture Product) for the Divestiture Product(s) acquired by that Acquirer from Persons other than Respondent Endo;

2. make representations and warranties to such Acquirer that the Contract Manufacture Product(s) supplied by a Respondent pursuant to a Remedial Agreement meet the relevant Agency-approved specifications. For the Contract Manufacture Product(s) to be marketed or sold in the Geographic Territory, the supplying Respondent shall agree to indemnify, defend and hold the Acquirer harmless from any and all suits, claims, actions, demands, liabilities, expenses or losses alleged to result from the failure of the Contract Manufacture Product(s) supplied to the Acquirer pursuant to a Remedial Agreement by that Respondent to meet cGMP. This obligation may be made contingent upon the Acquirer giving that Respondent prompt written notice of such claim and cooperating fully in the defense of such claim;

   provided, however, that a Respondent may reserve the right to control the defense of any such claim, including the right to settle the claim, so long as such settlement is consistent with that Respondent's responsibilities to supply the Contract Manufacture Products in the manner required by this Order; *provided further, however*,

that this obligation shall not require Respondents to be liable for any negligent act or omission of the Acquirer or for any representations and warranties, express or implied, made by the Acquirer that exceed the representations and warranties made by a Respondent to the Acquirer in an agreement to Contract Manufacture;

provided further, however, that in each instance where: (i) an agreement to divest relevant assets or Contract Manufacture is specifically referenced and attached to this Order, and (ii) such agreement becomes a Remedial Agreement for a Divestiture Product, each such agreement may contain limits on a Respondent's aggregate liability resulting from the failure of the Contract Manufacture Products supplied to the Acquirer pursuant to such Remedial Agreement to meet cGMP;

3. give priority to supplying a Contract Manufacture Product to the relevant Acquirer over manufacturing and supplying of Products for Respondents' own use or sale;

4. make representations and warranties to each Acquirer that Respondents shall hold harmless and indemnify the Acquirer for any liabilities or loss of profits resulting from the failure of the Contract Manufacture Products to be delivered in a timely manner as required by the Remedial Agreement(s) unless Respondents can demonstrate that the failure was beyond the control of Respondents and in no part the result of negligence or willful misconduct by Respondents;

   provided, however, that in each instance where: (i) an agreement to divest relevant assets or Contract Manufacture is specifically referenced and attached to this Order and (ii) such agreement becomes a Remedial Agreement for a Divestiture Product, each such agreement may contain limits on a Respondent's aggregate liability for such a failure;

5. during the term of any agreement to Contract Manufacture, upon written request of that Acquirer or the Interim Monitor (if any has been appointed), make available to the Acquirer and the Interim Monitor (if any has been appointed) all records that relate directly to the manufacture of the relevant Contract Manufacture Products that are generated or created after the Closing Date;

6. during the term of any agreement to Contract Manufacture, Respondent Endo shall take all actions as are reasonably necessary to ensure an uninterrupted supply of the Contract Manufacture Product(s);

7. in the event Respondent Endo becomes unable to supply or produce a Contract Manufacture Product from the facility or facilities originally contemplated under a Remedial Agreement with an Acquirer, then Respondent Endo shall provide a therapeutically equivalent (as that term is defined by the FDA) Product from another of Respondent Endo's facility or facilities in those instances where such facilities are being used or have previously been used, and are able to be used, by Respondents to manufacture such Product(s);

8. provide access to all information and facilities, and make such arrangements with Third Parties, as are necessary to allow the Interim Monitor to monitor compliance with the obligations to Contract Manufacture;

9. during the term of any agreement to Contract Manufacture, provide consultation with knowledgeable employees of the Respondents and training, at the written request of the Acquirer and at a facility chosen by the Acquirer, for the purposes of enabling that Acquirer (or the Manufacturing Designee of that Acquirer) to obtain all Product Approvals to manufacture the Contract Manufacture Products acquired by that

Acquirer in the same quality achieved by, or on behalf of, the relevant Respondent (as that Respondent is identified in the definition of the respective Divestiture Product) and in commercial quantities, and in a manner consistent with cGMP, independently of Respondent Endo and sufficient to satisfy management of the Acquirer that its personnel (or the Manufacturing Designee's personnel) are adequately trained in the manufacture of the Contract Manufacture Products;

The foregoing provisions, II.F.1. - 9., shall remain in effect with respect to each Contract Manufacture Product until the earliest of: (i) the date the Acquirer of that Contract Manufacture Product (or the Manufacturing Designee(s) of that Acquirer), respectively, is approved by the FDA to manufacture and sell such Contract Manufacture Product in the United States and able to manufacture such Contract Manufacture Product in commercial quantities, in a manner consistent with cGMP, independently of Respondent Endo; (ii) the date the Acquirer of a particular Contract Manufacture Product notifies the Commission and Respondent Endo of its intention to abandon its efforts to manufacture such Contract Manufacture Product; (iii) the date of written notification from staff of the Commission that the Interim Monitor, in consultation with staff of the Commission, has determined that the Acquirer of a particular Contract Manufacture Product has abandoned its efforts to manufacture such Contract Manufacture Product, or (iv) the date five (5) years from the Closing Date.

Q. Respondent Endo shall require, as a condition of continued employment post-divestiture of the assets required to be divested pursuant to this Order, that each employee that has had responsibilities related to the marketing or sales of the Divestiture Products within the one (1) year period prior to the Closing Date and each employee that has responsibilities related to the marketing or sales of those Retained Products that

are the therapeutic equivalent (as that term is defined by the FDA) of the Divestiture Products, in each case who have or may have had access to Confidential Business Information, and the direct supervisor(s) of any such employee sign a confidentiality agreement pursuant to which that employee shall be required to maintain all Confidential Business Information related to the Divestiture Products as strictly confidential, including the nondisclosure of that information to all other employees, executives or other personnel of Respondent Endo (other than as necessary to comply with the requirements of this Order).

R. Not later than thirty (30) days after the Closing Date, Respondent Endo shall provide written notification of the restrictions on the use and disclosure of the Confidential Business Information related to the Divestiture Products by Respondent Endo's personnel to all of their employees who (i) may be in possession of such Confidential Business Information or (ii) may have access to such Confidential Business Information. Respondent Endo shall give the above-described notification by e-mail with return receipt requested or similar transmission, and keep a file of those receipts for one (1) year after the Closing Date. Respondent Endo shall provide a copy of the notification to the relevant Acquirer. Respondent Endo shall maintain complete records of all such notifications at Respondent Endo's registered office within the United States and shall provide an officer's certification to the Commission stating that the acknowledgment program has been implemented and is being complied with. Respondent Endo shall provide the relevant Acquirer with copies of all certifications, notifications and reminders sent to Respondent Endo's personnel.

S. For each Acquirer of a Divestiture Product, Respondent Endo shall:

1. for a period of six (6) months from the Closing Date or until the hiring of two (2) Divestiture Product Core Employees by that Acquirer or its

Manufacturing Designee or its New Marketing Partner, whichever occurs earlier, provide that Acquirer, its Manufacturing Designee, or its New Marketing Partner with the opportunity to enter into employment contracts with the Divestiture Product Core Employees related to the Divestiture Products and assets acquired by that Acquirer. Each of these periods is hereinafter referred to as the "Divestiture Product Core Employee Access Period(s);"

2. not later than the earlier of the following dates: (i) ten (10) days after notice by staff of the Commission to Respondent Endo to provide the Product Employee Information; or (ii) ten (10) days after written request by an Acquirer, provide that Acquirer or Proposed Acquirer(s) with the Product Employee Information related to the Divestiture Product Core Employees. Failure by Respondent Endo to provide the Product Employee Information for any Divestiture Product Core Employee within the time provided herein shall extend the Divestiture Product Core Employee Access Period(s) with respect to that employee in an amount equal to the delay; *provided, however*, that the provision of such information may be conditioned upon the Acquirer's or Proposed Acquirer's written confirmation that it will (i) treat the information as confidential and, more specifically, (ii) use the information solely in connection with considering whether to provide or providing to Divestiture Product Core Employees the opportunity to enter into employment contracts during a Divestiture Product Core Employee Access Period, (iii) restrict access to the information to such of the Acquirer's or Proposed Acquirer's employees who need such access in connection with the specified and permitted use, and (iv) destroy or return the information without retaining copies at such time as the specified and permitted use ends;

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

   provided, however, that, subject to the conditions of continued employment prescribed in this Order, this Paragraph shall not prohibit Respondents from continuing to employ any Divestiture Product Core Employee under the terms of that employee's employment with Respondents prior to the date of the written offer of employment from the Acquirer, its Manufacturing Designee or its New Marketing Partner to that employee;

4. until the Closing Date, provide all Divestiture Product Core Employees with reasonable financial incentives to continue in their positions and to research, Develop, manufacture and/or market the Divestiture Product(s) consistent with past practices and/or as may be necessary to preserve the marketability, viability and competitiveness of the Divestiture Product(s) and to ensure successful

execution of the pre-Acquisition plans for that Divestiture Product(s). Such incentives shall include a continuation of all employee compensation and benefits offered by Respondents until the Closing Date(s) for the divestiture of the assets related to the Divestiture Product has occurred, including regularly scheduled raises, bonuses, and vesting of pension benefits (as permitted by Law);

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

5. for a period of one (1) year from the Closing Date, not, directly or indirectly, solicit or otherwise attempt to induce any employee of the Acquirer, its Manufacturing Designee or its New Marketing Partner with any amount of responsibility related to a Divestiture Product ("Divestiture Product Employee") to terminate his or her employment relationship with the Acquirer, its Manufacturing Designee or its New Marketing Partner; or hire any Divestiture Product Employee;

   provided, however, Respondents may hire any former Divestiture Product Employee whose employment has been terminated by the Acquirer, its Manufacturing Designee, or its New Marketing Partner or who independently applies for employment with a Respondent, as long as that employee was not solicited in violation of the nonsolicitation requirements contained herein;

   provided further, *however*, that any Respondent may do the following: (i) advertise for employees in newspapers, trade publications or other media not targeted specifically at the Divestiture Product Employees; or (ii) hire a Divestiture Product

Employee who contacts any Respondent on his or her own initiative without any direct or indirect solicitation or encouragement from any Respondent.

T. Until Respondents complete the divestitures required by this Order and fully provide, or cause to be provided, the Product Manufacturing Technology related to a particular Divestiture Product to the relevant Acquirer,

1. Respondents shall take actions as are necessary to:

   a. maintain the full economic viability and marketability of the Businesses associated with that Divestiture Product;

   b. minimize any risk of loss of competitive potential for that Business;

   c. prevent the destruction, removal, wasting, deterioration, or impairment of any of the assets related to that Divestiture Product;

   d. ensure the assets related to each Divestiture Product are provided to the relevant Acquirer in a manner without disruption, delay, or impairment of the regulatory approval processes related to the Business associated with each Divestiture Product;

   e. ensure the completeness of the transfer and delivery of the Product Manufacturing Technology; and

2. Respondents shall not sell, transfer, encumber or otherwise impair the assets required to be divested (other than in the manner prescribed in this Order) nor take any action that lessens the full economic viability, marketability, or competitiveness of the Businesses associated with that Divestiture Product.

U. Respondents shall not join, file, prosecute or maintain any suit, in law or equity, against an Acquirer or the Divestiture Product Releasee(s) of that Acquirer under the following:

1. any Patent owned by or licensed to a Respondent as of the day after the Acquisition Date that claims a method of making, using, or administering, or a composition of matter of a Product, or that claims a device relating to the use thereof;

2. any Patent that was filed or in existence on or before the Acquisition Date that is acquired by or licensed to a Respondent at any time after the Acquisition Date that claims a method of making, using, or administering, or a composition of matter of a Product, or that claims a device relating to the use thereof;

if such suit would have the potential directly to limit or interfere with that Acquirer's freedom to practice the following: (i) the research, Development, or manufacture anywhere in the World of the Divestiture Product(s) acquired by that Acquirer for the purposes of marketing, sale or offer for sale within the United States of America of such Divestiture Product(s); or (ii) the use within, import into, export from, or the supply, distribution, or sale within, the United States of America of the Divestiture Product(s) acquired by that Acquirer. Each Respondent shall also covenant to that Acquirer that as a condition of any assignment or license from that Respondent to a Third Party of the above-described Patents, the Third Party shall agree to provide a covenant whereby the Third Party covenants not to sue that Acquirer or the related Divestiture Product Releasee(s) under such Patents, if the suit would have the potential directly to limit or interfere with that Acquirer's freedom to practice the following: (i) the research, Development, or manufacture anywhere in the World of the Divestiture Product(s) acquired by that Acquirer for the purposes of marketing, sale or offer for sale within the United

States of America of such Divestiture Product(s); or (ii) the use within, import into, export from, or the supply, distribution, or sale or offer for sale within, the United States of America of the Divestiture Product(s) acquired by that Acquirer. The provisions of this Paragraph do not apply to any Patent owned by, acquired by or licensed to or from a Respondent that claims inventions conceived by and reduced to practice after the Acquisition Date.

V. Upon reasonable written notice and request from an Acquirer to Respondent Endo, Respondent Endo shall provide, in a timely manner, at no greater than Direct Cost, assistance of knowledgeable employees of Respondent Endo to assist that Acquirer to defend against, respond to, or otherwise participate in any litigation brought by a Third Party related to the Product Intellectual Property related to any of the Divestiture Product(s) acquired by that Acquirer, if such litigation would have the potential to interfere with that Acquirer's freedom to practice the following: (i) the research, Development, or manufacture anywhere in the World of the Divestiture Product(s) acquired by that Acquirer for the purposes of marketing, sale or offer for sale within the United States of America of such Divestiture Product(s); or (ii) the use within, import into, export from, or the supply, distribution, or sale within, the United States of America of the Divestiture Product(s) acquired by that Acquirer.

W. For any patent infringement suit filed prior to the Closing Date in which any Respondent is alleged to have infringed a Patent of a Third Party or any potential patent infringement suit from a Third Party that any Respondent has prepared or is preparing to defend against as of the Closing Date, and where such a suit would have the potential directly to limit or interfere with the relevant Acquirer's freedom to practice the following: (i) the research, Development, or manufacture anywhere in the World of the Divestiture Product(s) acquired by that Acquirer for

the purposes of marketing, sale or offer for sale within the United States of America of such Divestiture Products; or (ii) the use within, import into, export from, or the supply, distribution, or sale or offer for sale within, the United States of America of such Divestiture Product(s), that Respondent shall:

1. cooperate with that Acquirer and provide any and all necessary technical and legal assistance, documentation and witnesses from that Respondent in connection with obtaining resolution of any pending patent litigation related to that Divestiture Product;

2. waive conflicts of interest, if any, to allow that Respondent's outside legal counsel to represent that Acquirer in any ongoing patent litigation related to that Divestiture Product; and

3. permit the transfer to that Acquirer of all of the litigation files and any related attorney work-product in the possession of that Respondent's outside counsel related to that Divestiture Product.

X. The purpose of the divestiture of the Divestiture Product Assets and the provision of the related Product Manufacturing Technology and the related obligations imposed on the Respondents by this Order is:

1. to ensure the continued use of such assets for the purposes of the Business associated with each Divestiture Product within the Geographic Territory; and

2. to create a viable and effective competitor, that is independent of Respondent Endo in the Business of each Divestiture Product within the Geographic Territory; and,

3. to remedy the lessening of competition resulting from the Acquisition as alleged in the

Commission's Complaint in a timely and sufficient manner.

III.

IT IS FURTHER ORDERED that:

A. At any time after the Respondents sign the Consent Agreement in this matter, the Commission may appoint a monitor ("Interim Monitor") to assure that the Respondents expeditiously comply with all of their obligations and perform all of their responsibilities as required by this Order, the Order to Maintain Assets and the Remedial Agreements.

B. The Commission shall select the Interim Monitor, subject to the consent of Respondents, which consent shall not be unreasonably withheld. If Respondent Endo 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 Endo of the identity of any proposed Interim Monitor, Respondents shall be deemed to have consented to the selection of the proposed Interim Monitor.

C. Not later than ten (10) days after the appointment of the Interim Monitor, Respondent Endo shall execute an agreement that, subject to the prior approval of the Commission, confers on the Interim Monitor all the rights and powers necessary to permit the Interim Monitor to monitor Respondents' compliance with the relevant requirements of the Order in a manner consistent with the purposes of the Order.

D. If an Interim Monitor is appointed, Respondents shall consent to the following terms and conditions regarding the powers, duties, authorities, and responsibilities of the Interim Monitor:

1. The Interim Monitor shall have the power and authority to monitor Respondent's compliance with

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

2. The Interim Monitor shall act in a fiduciary capacity for the benefit of the Commission.

3. The Interim Monitor shall serve until the date of completion by the Respondents of the divestiture of all Divestiture Product Assets and the transfer and delivery of the related Product Manufacturing Technology in a manner that fully satisfies the requirements of this Order and,

   a. with respect to each Divestiture Product that is a Contract Manufacture Product, until the earliest of: (i) the date the Acquirer of that Divestiture Product (or that Acquirer's Manufacturing Designee(s)) is approved by the FDA to manufacture and sell that Divestiture Product and able to manufacture the Divestiture Product in commercial quantities, in a manner consistent with cGMP, independently of Respondent Endo; (ii) the date the Acquirer of that Divestiture Product notifies the Commission and Respondent Endo of its intention to abandon its efforts to manufacture that Divestiture Product; or (iii) the date of written notification from staff of the Commission that the Interim Monitor, in consultation with staff of the Commission, has determined that the Acquirer has abandoned its efforts to manufacture that Divestiture Product;

   b. with respect to the Vitamin Products, the end of the Transition Period for the Vitamin Products.

provided, however, that, the Interim Monitor's service shall not exceed five (5) years from the Order Date *unless* the Commission decides to extend or modify this period as may be necessary or appropriate to accomplish the purposes of the Orders.

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 ordinary course of business, facilities and technical information, and such other relevant information as the Interim Monitor may reasonably request, related to Respondents' compliance with its obligations under the Orders, including, but not limited to, its obligations related to the relevant assets. Respondents shall cooperate with any reasonable request of the Interim Monitor and shall take no action to interfere with or impede the Interim Monitor's ability to monitor Respondents' compliance with the Orders.

F. The Interim Monitor shall serve, without bond or other security, at the expense of Respondent Endo, 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 Endo, such consultants, accountants, attorneys and other representatives and assistants as are reasonably necessary to carry out the Interim Monitor's duties and responsibilities.

G. Respondents shall indemnify the Interim Monitor and hold the Interim Monitor harmless against any losses, claims, damages, liabilities, or expenses arising out of, or in connection with, the performance of the Interim Monitor's duties, including all reasonable fees of counsel and other reasonable expenses incurred in connection with the preparations for, or defense of, any claim, whether or not resulting in any liability, except to the extent that such losses, claims, damages, liabilities, or expenses result from gross negligence,

willful or wanton acts, or bad faith by the Interim Monitor.

H. Respondents shall report to the Interim Monitor in accordance with the requirements of this Order and as otherwise provided in any agreement approved by the Commission. The Interim Monitor shall evaluate the reports submitted to the Interim Monitor by Respondents, and any reports submitted by each Acquirer with respect to the performance of Respondents' obligations under the Order or the Remedial Agreement(s). Within thirty (30) days from the date the Interim Monitor receives these reports, the Interim Monitor shall report in writing to the Commission concerning performance by Respondents of their obligations under the Order. *provided, however*, beginning ninety (90) days after Respondents have filed their final report pursuant to Paragraph VII.B., and ninety (90) days thereafter, the Interim Monitor shall report in writing to the Commission concerning progress by each Acquirer toward obtaining FDA approval to manufacture each Divestiture Product and obtaining the ability to manufacture each Divestiture Product in commercial quantities, in a manner consistent with cGMP, independently of Respondents.

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.

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.

IV.

IT IS FURTHER ORDERED that:

A. If Respondents have not fully complied with the obligations to assign, grant, license, divest, transfer, deliver or otherwise convey the Divestiture Product Assets as required by this Order, the Commission may appoint a trustee ("Divestiture Trustee") to assign, grant, license, divest, transfer, deliver or otherwise convey these assets in a manner that satisfies the requirements of this Order. In the event that the Commission or the Attorney General brings an action pursuant to § 5(l) of the Federal Trade Commission Act, 15 U.S.C. § 45(l), or any other statute enforced by the Commission, Respondents shall consent to the appointment of a Divestiture Trustee in such action to assign, grant, license, divest, transfer, deliver or otherwise convey these assets. Neither the appointment of a Divestiture Trustee nor a decision not to appoint a Divestiture Trustee under this Paragraph shall preclude the Commission or the Attorney General from seeking civil penalties or any other relief available to it, including a court appointed Divestiture Trustee, pursuant to § 5(l) of the Federal Trade Commission Act, or any other statute enforced by the

Commission, for any failure by Respondents to comply with this Order.

B. The Commission shall select the Divestiture Trustee, subject to the consent of Respondent Endo, which consent shall not be unreasonably withheld. The Divestiture Trustee shall be a Person with experience and expertise in acquisitions and divestitures. If Respondent Endo 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 Endo of the identity of any proposed Divestiture Trustee, Respondents shall be deemed to have consented to the selection of the proposed Divestiture

C. Not later than ten (10) days after the appointment of a Divestiture Trustee, Respondent shall execute a trust agreement that, subject to the prior approval of the Commission, transfers to the Divestiture Trustee all rights and powers necessary to permit the Divestiture Trustee to effect the divestiture required by this Order.

D. If a Divestiture Trustee is appointed by the Commission or a court pursuant to this Paragraph, Respondent shall consent to the following terms and conditions regarding the Divestiture Trustee's powers, duties, authority, and responsibilities:

1. Subject to the prior approval of the Commission, the Divestiture Trustee shall have the exclusive power and authority to assign, grant, license, divest, transfer, deliver or otherwise convey the assets that are required by this Order to be assigned, granted, licensed, divested, transferred, delivered or otherwise conveyed.

2. The Divestiture Trustee shall have one (1) year after the date the Commission approves the trust agreement described herein to accomplish the divestiture, which shall be subject to the prior approval of the Commission. If, however, at the

end of the one (1) year period, the Divestiture Trustee has submitted a plan of divestiture or the Commission believes that the divestiture can be achieved within a reasonable time, the divestiture period may be extended by the Commission; provided, however, the Commission may extend the divestiture period only two (2) times.

3. Subject to any demonstrated legally recognized privilege, the Divestiture Trustee shall have full and complete access to the personnel, books, records and facilities related to the relevant assets that are required to be assigned, granted, licensed, divested, delivered or otherwise conveyed by this Order and to any other relevant information, as the Divestiture Trustee may request. Respondent shall develop such financial or other information as the Divestiture Trustee may request and shall cooperate with the Divestiture Trustee. Respondent shall take no action to interfere with or impede the Divestiture Trustee's accomplishment of the divestiture. Any delays in divestiture caused by Respondent shall extend the time for divestiture under this Paragraph in an amount equal to the delay, as determined by the Commission or, for a court appointed Divestiture Trustee, by the court.

4. The Divestiture Trustee shall use commercially reasonable efforts to negotiate the most favorable price and terms available in each contract that is submitted to the Commission, subject to Respondent's absolute and unconditional obligation to divest expeditiously and at no minimum price. The divestiture shall be made in the manner and to an Acquirer as required by this Order; provided, however, if the Divestiture Trustee receives bona fide offers from more than one acquiring Person, and if the Commission determines to approve more than one such acquiring Person, the Divestiture Trustee shall divest to the acquiring Person selected by Respondent from among those approved by the

Commission; provided further, however, that Respondent shall select such Person within five (5) days after receiving notification of the Commission's approval.

5. The Divestiture Trustee shall serve, without bond or other security, at the cost and expense of Respondents, on such reasonable and customary terms and conditions as the Commission or a court may set. The Divestiture Trustee shall have the authority to employ, at the cost and expense of Respondents, such consultants, accountants, attorneys, investment bankers, business brokers, appraisers, and other representatives and assistants as are necessary to carry out the Divestiture Trustee's duties and responsibilities. The Divestiture Trustee shall account for all monies derived from the divestiture and all expenses incurred. After approval by the Commission of the account of the Divestiture Trustee, including fees for the Divestiture Trustee's services, all remaining monies shall be paid at the direction of Respondents, and the Divestiture Trustee's power shall be terminated. The compensation of the Divestiture Trustee shall be based at least in significant part on a commission arrangement contingent on the divestiture of all of the relevant assets that are required to be divested by this Order.

6. Respondent shall indemnify the Divestiture Trustee and hold the Divestiture Trustee harmless against any losses, claims, damages, liabilities, or expenses arising out of, or in connection with, the performance of the Divestiture Trustee's duties, including all reasonable fees of counsel and other expenses incurred in connection with the preparation for, or defense of, any claim, whether or not resulting in any liability, except to the extent that such losses, claims, damages, liabilities, or expenses result from gross negligence, willful or

wanton acts, or bad faith by the Divestiture Trustee.

7. The Divestiture Trustee shall have no obligation or authority to operate or maintain the relevant assets required to be divested by this Order; provided, however, that the Divestiture Trustee appointed pursuant to this Paragraph may be the same Person appointed as Interim Monitor pursuant to the relevant provisions of this Order or the Order to Maintain Assets in this matter.

8. The Divestiture Trustee shall report in writing to Respondent and to the Commission every sixty (60) days concerning the Divestiture Trustee's efforts to accomplish the divestiture.

9.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, that such agreement shall not restrict the Divestiture Trustee from providing any information to the Commission.

E. 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 related to Commission materials and information received in connection with the performance of the Divestiture Trustee's duties.

F. 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.

G. The Commission or, in the case of a court-appointed Divestiture Trustee, the court, may on its own

initiative or at the request of the Divestiture Trustee issue such additional orders or directions as may be necessary or appropriate to accomplish the divestiture required by this Order.

V.

IT IS FURTHER ORDERED that, in addition to any other requirements and prohibitions relating to Confidential Business Information in this Order, each Respondent shall assure that its own counsel (including its own in-house counsel under appropriate confidentiality arrangements) shall not retain unredacted copies of documents or other materials provided to an Acquirer or access original documents provided to an Acquirer, except under circumstances where copies of documents are insufficient or otherwise unavailable, and for the following purposes:

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

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

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

provided further, *however*, that pursuant to this Paragraph V, the Respondent needing such access to original documents shall: (i) require those who view such unredacted documents or other materials to enter

into confidentiality agreements with the relevant Acquirer (but shall not be deemed to have violated this requirement if that Acquirer withholds such agreement unreasonably); and (ii) use best efforts to obtain a protective order to protect the confidentiality of such information during any adjudication.

VI.

IT IS FURTHER ORDERED that:

A. Any Remedial Agreement shall be deemed incorporated into this Order.

B. Any failure by a Respondent to comply with any term of such Remedial Agreement shall constitute a failure to comply with this Order.

C. Respondents shall include in each Remedial Agreement related to each of the Divestiture Products a specific reference to this Order, the remedial purposes thereof, and provisions to reflect the full scope and breadth of each Respondent's obligation to the Acquirer pursuant to this Order.

D. For each Divestiture Product that is a Contract Manufacture Product, Respondents shall include in the Remedial Agreement(s) related to that Divestiture Product a representation from the Acquirer that the Acquirer shall use commercially reasonable efforts to secure the FDA approval(s) necessary to manufacture, or to have manufactured by a Third Party, in commercial quantities, each such Divestiture Product, as applicable, and to have any such manufacture to be independent of the Respondents, all as soon as reasonably practicable.

E. No Respondent shall seek, directly or indirectly, pursuant to any dispute resolution mechanism incorporated in any Remedial Agreement, or in any agreement related to any of the Divestiture Products a decision the result of which would be inconsistent with

the terms of this Order or the remedial purposes thereof.

F. No Respondent shall modify or amend any of the terms of any Remedial Agreement without the prior approval of the Commission, except as otherwise provided in Rule 2.41(f)(5) of the Commission's Rules of Practice and Procedure, 16 C.F.R. § 2.41(f)(5). Notwithstanding any term of the Remedial Agreement(s), any modification or amendment of any Remedial Agreement made 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.

VII.

IT IS FURTHER ORDERED that:

A. Within five (5) days of the Acquisition, Respondent Endo shall submit to the Commission a letter certifying the date on which the Acquisition occurred.

B. Within thirty (30) days after the Order Date, and every sixty (60) days thereafter until Respondent Endo has fully complied with Paragraphs II.A., II.B., II.C., II.D.1.-II.D.3., II.E., II.F., II.I., and II.J., Respondent Endo 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 Endo 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 Endo 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:

1. a detailed description of all substantive contacts, negotiations, or recommendations related to (i) the divestiture and transfer of all relevant assets and

rights, (ii) transitional services being provided by the Respondents to the relevant Acquirer, and (iii) the agreement(s) to Contract Manufacture; and

2. a detailed description of the timing for the completion of such obligations.

C. One (1) year after the Order Date, annually for the next nine years on the anniversary of the Order Date, and at other times as the Commission may require, Respondent Endo 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.

VIII.

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.

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 any Respondent made to its principal United States offices, registered office of its United States subsidiary, or its headquarters address, that Respondent shall, without restraint or interference, permit any duly authorized representative of the Commission:

D. 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

E. 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 19, 2024.

By the Commission.

NON-PUBLIC APPENDIX I

AGREEMENTS RELATED TO THE DIVESTITURES

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

ANALYSIS OF CONSENT ORDER TO AID PUBLIC COMMENT

The Federal Trade Commission ("Commission") has accepted, subject to final approval, an Agreement Containing Consent Order ("Consent Agreement") from Endo Health Solutions Inc. ("Endo") that is designed to remedy the anticompetitive effects in seven generic pharmaceutical markets resulting from Endo's acquisition of the non-corporate interests of Boca Pharmacal, LLC from Boca Life Science Holdings, LLC ("Boca"). Under the terms of the proposed Consent Agreement, Boca is required to relinquish all rights and assets related to Boca's four prescription fluoride multivitamin drops: (1) generic PolyViFlor 0.25mg multivitamin drops; (2) generic PolyViFlor 0.5mg multivitamin drops; (3) generic PolyViFlor 0.25mg multivitamin drops with iron; and (4) generic TriViFlor 0.25mg multivitamin drops to Sonar Products, Inc. ("Sonar"), the current manufacturer of all four multivitamin drops products. Furthermore, the parties are required to divest to Rhodes Pharmaceuticals, Inc. ("Rhodes") all of Endo's rights and interests relating to: (1) generic oral syrup containing brompheniramine maleate (2mg/5ml), dextromethorphan hydrobromide (10mg/5ml), and pseudoephedrine hydrochloride (30mg/5ml) ("generic Bromfed-DM"); (2) generic oral solution containing hydrocodone (10mg/15ml) and acetaminophen (325mg/15ml) ("generic Zamicet"); as well as Boca's rights and interests relating to generic glacial acetic acid (2%) with hydrocortisone (1%) otic drops ("generic Vosol HC").

The proposed Consent Agreement has been placed on the public record for thirty days for receipt of comments from interested persons. Comments received during this period will become part of the public record. After thirty days, the Commission will again evaluate the proposed Consent Agreement, along with the comments received, in order to make a final decision as to whether it should withdraw from the proposed Consent Agreement, or make final the Decision and Order ("Order").

Pursuant to a Purchase and Sale Agreement dated August 27, 2013, Endo proposes to acquire the non-corporate interests of Boca Pharmacal, LLC from Boca, for approximately $225 million

(the "Proposed Acquisition"). The Commission alleges in its Complaint that the Proposed Acquisition, if consummated, would violate Section 7 of the Clayton Act, as amended, 15 U.S.C. § 18, and Section 5 of the Federal Trade Commission Act, as amended, 15 U.S.C. § 45, by lessening current and future competition in U.S. markets for the following generic pharmaceutical products: (1) generic PolyViFlor 0.25mg multivitamin drops; (2) generic PolyViFlor 0.5mg multivitamin drops; (3) generic PolyViFlor 0.25mg multivitamin drops with iron; (4) generic TriViFlor 0.25mg multivitamin drops; (5) generic Bromfed-DM; (6) generic Zamicet; and (7) generic Vosol HC (collectively, the "Products"). The proposed Consent Agreement will remedy the alleged violations by preserving the competition that would otherwise be eliminated by the Proposed Acquisition.

The Products and Structure of the Markets

The Proposed Acquisition would reduce the number of suppliers in the relevant markets, each of which has or will have a limited number of market participants. In pharmaceutical product markets with generic competition, price generally decreases as the number of generic competitors increases. Accordingly, the reduction in the number of suppliers within each relevant market would have a direct and substantial anticompetitive effect on pricing.

The Proposed Acquisition would reduce current competition in four generic prescription multivitamin markets: (1) generic PolyViFlor 0.25mg multivitamin drops; (2) generic PolyViFlor 0.5mg multivitamin drops; (3) generic PolyViFlor 0.25mg multivitamin drops with iron; and (4) generic TriViFlor 0.25mg multivitamin drops. Each of these generic multivitamin drops products contains fluoride and is prescribed for children who do not have access to fluoridated water. The structure of these markets is as follows:

- The generic PolyViFlor 0.25mg multivitamin drops market currently has three suppliers: Endo, with a market share of approximately 59%, Boca, with a market share of approximately 36%, and Libertas Pharma Inc. ("Libertas"), with a market share of approximately 5%. The proposed transaction would reduce the number of

suppliers in this market from three to two, and would give the merged firm a market share in excess of 90%.

- Endo and Boca are the only two firms that market generic PolyViFlor 0.5mg multivitamin drops. Endo has a market share of approximately 61% and Boca has a market share of approximately 39%. Thus, the proposed transaction would create a monopoly in the generic PolyViFlor 0.5mg multivitamin drops market.

- The generic PolyViFlor 0.25mg multivitamin drops with iron market currently has three suppliers: Endo, with a market share of approximately 56%, Boca, with a market share of approximately 38%, and Libertas, with a market share of approximately 6%. The proposed transaction would reduce the number of suppliers in this market from three to two, and would give the merged firm a market share in excess of 90%.

- The generic TriViFlor 0.25mg multivitamin drops market has four participants: Endo, with a market share of approximately 51%, Libertas, with a market share of approximately 26%, Boca, with a market share of approximately 22%, and Sancilio & Company, Inc. ("Sancilio") with a market share of approximately 1%. The proposed transaction would reduce the number of suppliers of generic TriViFlor 0.25mg multivitamin drops from four to three, and would give the merged firm a market share in excess of 70%.

In addition to reducing current competition in the four generic prescription multivitamin markets, the proposed transaction would significantly reduce future competition in the generic Vosol HC market. Generic Vosol HC ear drops are prescribed for the treatment of Swimmer's Ear. Three firms currently supply generic Vosol HC: Actavis plc ("Actavis"), Sun Pharma Industries ("Sun"), and Endo. Actavis has a market share of approximately 79% and Sun has a market share of approximately 21%. Although Endo's recent market share has been minimal because it withdrew its product last year, its market share was 32% as recently as two years ago. Endo owns the Abbreviated New Drug Application for generic Vosol HC and could relaunch

its product at any time. Boca appears poised to be the next entrant with a generic Vosol HC product. Endo's acquisition of Boca would therefore deprive consumers of the increased competition and likely price reductions that would have occurred as a result of Boca's entry.

The transaction will also reduce future competition in two generic markets that do not yet exist, but will be highly concentrated at the time Endo and Boca enter: the generic Bromfed-DM market and the generic Zamicet market. When generic entry occurs, Endo and Boca would likely be among a limited number of suppliers in both markets. Thus, the proposed transaction would significantly reduce the number of likely future suppliers of these products to the detriment of consumers.

- Generic Bromfed-DM is prescribed for the treatment of symptoms caused by the common cold, flu, sinusitis, and other respiratory illnesses. Currently, there are no generic versions of Bromfed-DM available in the United States. Endo and Boca are two of a limited number of likely potential suppliers of generic Bromfed-DM. The Proposed Acquisition would eliminate a likely entrant into what will be a concentrated market for generic Bromfed-DM.

- Generic Zamicet is prescribed for the relief of moderate to moderately severe pain. Currently, there are no generic versions of Zamicet available in the United States. Endo and Boca are two of a limited number of likely potential suppliers of generic Zamicet. The Proposed Acquisition would eliminate a likely entrant into what will be a concentrated market for generic Zamicet.

Entry

Entry into the markets for the Products would not be timely, likely, or sufficient in magnitude, character, and scope to deter or counteract the anticompetitive effects of the acquisition. The combination of drug development times and regulatory requirements, including U.S. Food and Drug Administration ("FDA") approval, is costly and lengthy. Entry into the four multivitamins with fluoride markets is particularly unlikely

because new firms, unlike existing manufacturers whose products pre-date the FDA's current regulatory approval process, would be required to file Abbreviated New Drug Applications ("ANDAs") and wait for approvals for relatively small market opportunities.

Effects

The Proposed Acquisition would likely cause significant anticompetitive harm to consumers in the relevant generic pharmaceutical markets by eliminating current and/or future competition in concentrated existing markets or in future generic markets.

In generic pharmaceuticals markets, price is heavily influenced by the number of participants with sufficient supply. Market participants consistently characterize generic drug markets as commodity markets in which the number of generic suppliers has a direct impact on pricing. Customers and competitors alike have confirmed that the prices of the generic pharmaceutical products at issue continue to decrease with new entry even after a number of suppliers have entered these generic markets. Further, customers generally believe that having at least four suppliers in a generic pharmaceutical market produces more competitive prices than if fewer suppliers are available to them.

The evidence shows that anticompetitive effects are likely to result from the proposed transaction, due to a decrease in the number of independent competitors in the markets at issue. In each of the current prescription fluoride multivitamin drops markets, industry participants have indicated that the presence of Boca as a competitor has allowed them to negotiate lower prices from other suppliers, including Endo.

The evidence also shows that the Proposed Acquisition would eliminate significant future competition between Endo and Boca. Although neither Endo nor Boca currently has a marketed product in the generic Vosol HC market, and no generic product has yet gained approval in either the generic Zamicet or generic Bromfed-DM markets, the Proposed Acquisition eliminates one likely future entrant from a very limited pool of future entrants in each of these markets.

By eliminating the significant current and future competition between the parties, the Proposed Acquisition will likely cause U.S. consumers to pay significantly higher prices for these generic drugs, absent a remedy.

The Consent Agreement

The proposed Consent Agreement effectively remedies the Proposed Acquisition's anticompetitive effects in each of the relevant product markets. Pursuant to the Consent Agreement, Boca is required to return to Sonar all of Boca's rights related to the four prescription fluoride multivitamin drops. Sonar owns and manufactures these products and, prior to the Proposed Acquisition, had an exclusive marketing and distribution agreement with Boca for these products. Under the proposed Asset Maintenance Order, Boca is required to continue to distribute the multivitamin drops for Sonar for a period of up to six months in order to allow Sonar time to establish itself with a new marketing and distribution partner. Sonar will choose another marketing and distribution partner from among several interested parties, thereby replicating the competition in the relevant markets posed by pre-acquisition Boca.

Further, Endo is required to divest to Rhodes all of its rights and interests in generic Bromfed-DM and generic Zamicet as well as all of Boca's rights and interests in generic Vosol HC. The parties must accomplish these divestitures and relinquish their rights no later than ten days after the acquisition.

The Commission's goal in evaluating possible purchasers of divested assets is to maintain the competitive environment that existed prior to the Proposed Acquisition. If the Commission determines that Rhodes is not an acceptable acquirer of the divested assets, or that the manner of the divestitures is not acceptable, the parties must unwind the sale of rights to Rhodes and divest the Products to a Commission-approved acquirer within six months of the date the Order becomes final. In that circumstance, the Commission may appoint a trustee to divest the Products if the parties fail to divest the Products as required.

The proposed Consent Agreement contains several provisions to help ensure that the divestitures are successful. The Order

requires Endo and Boca to take all action to maintain the economic viability, marketability, and competitiveness of the products to be divested until such time that they are transferred to a Commission-approved acquirer. Endo and Boca must transfer their respective manufacturing technologies for the Products to Rhodes and must supply Rhodes with these products during a transitional period.

The Commission has agreed to appoint a representative of Quantic Regulatory Services, LLC to act as an interim monitor to assure that Endo and Boca expeditiously comply with all of their obligations and perform all of their responsibilities pursuant to the Consent Agreement. In order to ensure that the Commission remains informed about the status of the transfer of rights and assets, the Consent Agreement requires Endo and Boca to file reports with the interim monitor who will report in writing to the Commission concerning performance by the parties of their obligations under the Consent Agreement.

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

IN THE MATTER OF

APPLE INC.

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

Docket No. C-4444; File No. 112 3108
Complaint, March 25, 2014 – Decision, March 25, 2014

This consent order addresses Apple Inc.'s billing for charges incurred by children in apps that are likely to be used by children without having obtained the account holders' express informed consent. The complaint alleges that Apple offers thousands of apps, including games that children are likely to play, and that in many instances, children can obtain virtual items within a game app that cost money. The complaint further alleges that, Apple often fails to obtain parents' informed consent to charges incurred by children, which constitutes an unfair practice under Section 5 of the FTC Act. The consent order requires Apple to obtain express, informed consent to in-app charges before billing for such charges, and to allow consumers to revoke consent to prospective in-app charges at any time. The order also requires Apple to provide full refunds to Apple account holders who have been billed by Apple for unauthorized in-app charges incurred by minors. Apple will refund no less than $32.5 million for these in-app charges in the year following entry of the order, and if such refunds total less than $32.5 million, Apple will remit any remaining balance to the Commission to be used for informational remedies, further redress, or payment to the U.S. Treasury as equitable disgorgement.

Participants

For the *Commission*: *Jason Adler, Duane Pozza*, and *Miya Rahamim.*

For the *Respondent*: *Richard Cunningham, Sean Royall*, and *Robert Walters, Gibson Dunn*; and *Emily Blumsack, Andrew Farthing, Noreen Krall*, and *Heather Moser, in-house counsel.*

COMPLAINT

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

1. Respondent is a California corporation with its principal place of business at 1 Infinite Loop, Cupertino, California 95014.

2. Respondent has billed for charges related to activity within software applications ("apps") consumers download to their iPhone, iPod Touch, or iPad devices ("Apple mobile devices") from Respondent's app store.

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 FTC Act.

RESPONDENT'S BUSINESS PRACTICES

4. Apple offers thousands of apps for free or a specific dollar amount, including games that children are likely to play. In many instances, after installation, children can obtain virtual items within a game, many of which cost money. Apple bills charges for items that cost money within an app—"in-app charges"—to the parent. In connection with billing for children's in-app charges, Apple sometimes requests a parent's iTunes password. In many instances, Apple "caches" (that is, stores) the iTunes password for fifteen minutes after it is entered. During this process, Apple in many instances does not inform account holders that password entry will approve a charge or initiate a fifteen-minute window during which children using the app can incur charges without further action by the account holder. Through these practices, Apple often fails to obtain parents' informed consent to charges incurred by children. Since at least March 2011, tens of thousands of consumers have complained about unauthorized in-app charges by children, and many consumers have reported hundreds to thousands of dollars in such charges. Parents and other iTunes account holders therefore have suffered significant monetary injury.

Background on Apple's App Store

5. Apple offers apps through its App Store, a digital store preloaded on Apple mobile devices. Apps provide a wide variety of mobile computing functionality, allowing users to, for example, browse the Internet, check the weather, or play games.

6. According to Apple's app developer guidelines, before it agrees to offer any app designed by a third-party developer in the App Store, it reviews the app's functionality, content, and user experience. Apple generally assigns each app it sells to at least one topical category, such as "Games" or "News." Certain categories expand into subcategories. The "Games" category, for instance, includes subcategories like "Family," "Kids," and "Strategy." Apple also groups apps by price, including the top "Free" apps and top "Paid" apps.

7. Apple charges account holders for certain user activities within some apps. These in-app charges generally range from $0.99 to $99.99 and can be incurred in unlimited amounts. In many instances, the apps containing in-app charges are games that children are likely to play.

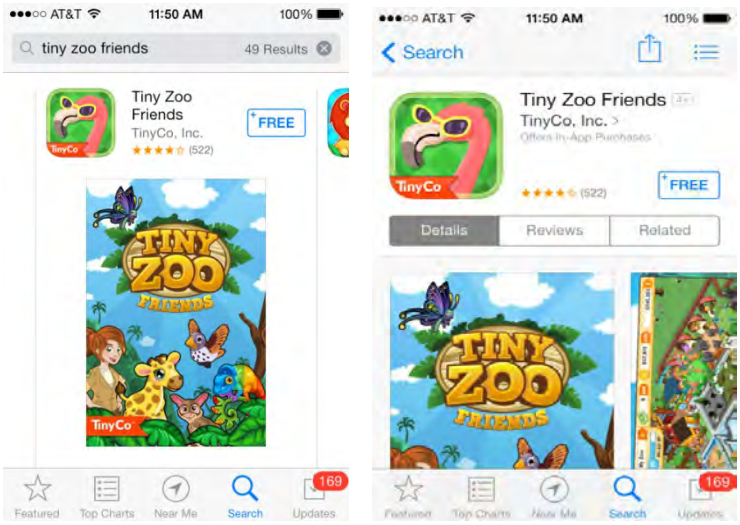
8. Before consumers can install any app, Apple requires that consumers link their Apple mobile device to an iTunes account, funded by a credit card, PayPal account, gift certificates, prepaid cards, or allowance credits. Apple bills consumers' iTunes accounts for App Store transactions and in-app charges, and retains thirty percent of all revenue. According to Apple's stated policy, all App Store transactions (including in-app charges) are final.

Installing an App from Apple's App Store

9. To install an app, a parent or other account holder must first locate it by searching for the app by keyword (*e.g.*, the name of the app) or by browsing the various categories and subcategories within the App Store. If an account holder searches for an app by keyword, the search results display as scrollable tiles (referred to herein as "Search Tiles"). If an account holder finds an app listed in a category or subcategory, he or she can click on the name of the app to access additional information (displayed on an "Info" page).

10. Each Search Tile and Info page contains a button (the "Price Button") labeled with the price of the app: either "FREE" or a specific dollar amount. Clicking on the Price Button—on either the Search Tile or the Info page—will begin the app

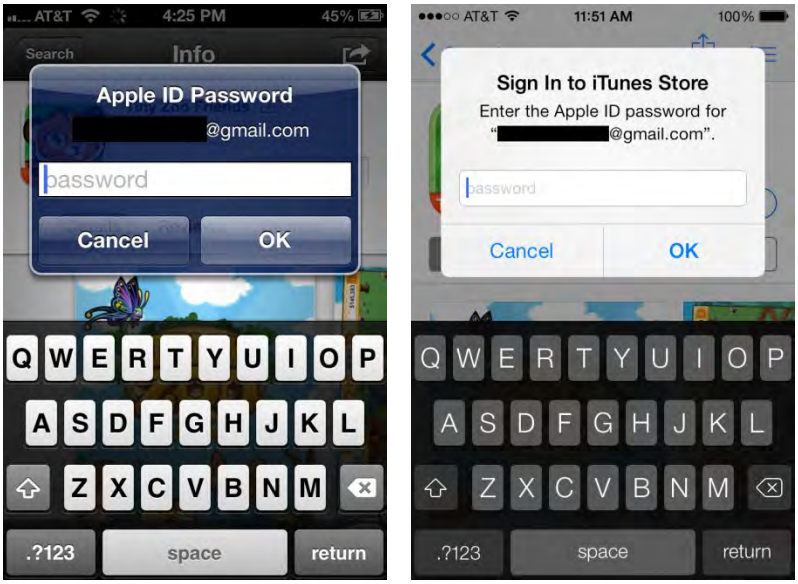
installation process. A sample Search Tile (on the left) and Info page (on the right) appear below.



As pictured above, Apple displays the words "Offers In-App Purchases" in small print on the Info pages (not the Search Tiles) of apps with in-app charges. Prior to spring 2013, Apple did not display that language. Neither the Search Tile nor the Info Page explain what "In-App Purchases" are (including that they cost real money or how much) or that entering the iTunes password within the app will approve a charge and initiate a fifteen-minute window during which children can incur charges without further action by the account holder.

11. To initiate app installation, the account holder must press the Price Button on the app's Search Tile or Info page. When pressed, the Price Button changes so that it displays the word "INSTALL" instead of the price. If pressed again, the app installation process begins.

12. Next, Apple prompts account holders for their iTunes account password before installation proceeds. This prompt (the "Password Prompt") is the same or similar to the ones depicted below.



The Password Prompt does not contain any information about in-app charges. Once the account holder enters the iTunes account password and presses "OK," the app is installed on the device.

13. As described in paragraph 4, Apple often caches the iTunes password for fifteen minutes after it is entered. During this fifteen-minute window, Apple does not display the Password Prompt again.

Incurring In-App Charges

14. After an account holder installs an app, a user can incur in-app charges. In many instances—particularly for apps that children are likely to play and that are, for example, rated as appropriate for four-year-olds—these users are children. In many instances, parents have complained that their children could not or did not understand that their activities while playing the app could result in charges that cost real money.

15. When a user engages in an activity associated with an in-app charge (*e.g.*, clicking on a button to acquire virtual treats for use in a game), Apple displays a popup containing information about the virtual item and the amount of the charge (the "Charge

Popup"). A child, however, can clear the Charge Popup simply by pressing a "Buy" button.

16. In many instances, during the fifteen-minute window following installation of an app (as described in paragraph 13 above), Apple has not displayed a Password Prompt for any in-app charges. This has allowed children to incur in-app charges simply by pressing the "Buy" button on each Charge Popup displayed during that fifteen-minute period. Regardless of the number or amount of charges incurred during this period, Apple has not prompted for additional password entry in these instances.

17. In many other instances, Apple displays a Password Prompt—identical to the Password Prompt displayed prior to installation of the app—after a child clears the Charge Popup. A sample Password Prompt appearing within an app is below.

The Password Prompt does not contain any information about in-app charges. Once the account holder enters the iTunes account password and presses "OK," Apple bills the in-app charge to the linked iTunes account. By default, entering the iTunes password and pressing "OK" triggers a fifteen-minute window during which Apple does not display the Password Prompt for subsequent in-app charges, allowing children to incur charges without password entry for fifteen minutes.

18. In September 2013, on devices running Apple's latest operating system, Apple reversed the order of the process described in paragraphs 15-17, displaying the Password Prompt before the Charge Popup. If the account holder enters the iTunes

password and presses "OK," Apple displays the Charge Popup. Once a user clicks "Buy" on the Charge Popup, Apple bills the in-app charge to the linked iTunes account. By default, Apple also initiates a fifteen-minute window during which it does not display the Password Prompt for subsequent in-app charges.

19. Neither the Password Prompt nor the Charge Popup explains that entering the iTunes password may approve the charge described on the Charge Popup and initiate a fifteen-minute window during which children can incur charges without further action by the account holder.

20. In many instances, Apple does not obtain an account holder's informed consent before billing for in-app charges by children. In particular, nowhere during the processes described in paragraphs 9 through 19 does Apple inform account holders that password entry—whether at installation or before incurring a particular in-app charge—triggers a window during which users can incur unlimited charges without further action by the account holder.

Apple Bills Many Parents for Unauthorized In-App Charges Incurred by Children

21. Many of the apps that charge for in-app activities are apps that children are likely to use. Indeed, many such apps, according to age ratings Apple uses in the App Store (4+, 9+, and 12+), are expressly described as appropriate for children. In addition to the age ratings, many apps that charge for in-app activities are listed in the "Kids" or "Family" categories in the App Store, are described or marketed as suitable for children, or are widely used by children.

22. Many of these games invite children to obtain virtual items in contexts that blur the line between what costs virtual currency and what costs real money. The app "Dragon Story," for example, is a game in which children hatch, raise, and breed virtual dragons. Children use "gold," "coins," and "food" to play the game. The game sometimes informs children that they are "low on food!" and that a dragon is "hungry," and provides a link to a screen titled "Stock Up!" The "Stock Up!" screen sells "gold" (virtual currency that costs real money) alongside "coins"

(virtual currency that can only be obtained with other virtual currency) and "food" (a virtual item that can only be obtained with virtual currency). Various quantities of gold cost various amounts of real money, with the largest amount (2900 gold) costing $99.99. The App Store describes Dragon Story, which is rated 4+, as the "BEST looking FREE dragon game" for Apple mobile devices.

23. Similarly, the app "Tiny Zoo Friends" challenges children to build and maintain a zoo whose "Zoo Value" is described in terms of dollars. That figure, however, does not correspond to real money, and instead is a score that varies based on a child's progress within the game. By contrast, the prices of the game's virtual currency—"coins" and "bucks"—are also described in terms of dollars, but that currency costs real money to obtain. From a screen called "Zoo Bucks," for instance, a child may obtain various quantities of "bucks," including "10 Bucks" for $0.99 or "3,500 Bucks" (also called a "Mountain of Bucks") for $99.99. Apple lists Tiny Zoo Friends with a rating of 4+.

24. Since at least March 2011, Apple has received at least tens of thousands of complaints related to unauthorized in-app charges by children in these and other games.

25. Many consumers report that they and their children were unaware that in-app activities would result in real monetary loss. For example, one App Store reviewer complaining about $534 in unauthorized charges incurred in two days described Dragon Story as "sucker[ing] young children into spending huge amounts of money" without their parents' knowledge. A parent whose seven-year-old incurred $500 in unauthorized charges playing Tiny Zoo Friends one afternoon commented that "children . . . cannot possibly understand" that they are spending real money.

26. In many games with in-app charges, consumers report that Apple billed for in-app activities without obtaining their consent. For example, one parent learned from her credit card company that her daughter had incurred $2600 in charges in the 9+ app "Tap Pet Hotel." Another consumer reported that her niece incurred $113.46 in unauthorized charges while playing the 4+ app "Racing Penguin, Flying Free." According to the consumer, her niece did not know the iTunes password, but was able to incur

the charges inside the fifteen-minute window during which Apple does not prompt account holders for a password. Apple has continued to receive complaints about millions of dollars of unauthorized in-app charges by children.

27. Many children incur unauthorized in-app charges without their parents' knowledge. Even parents who discover the charges and want to request a refund face a process that many consumers describe as cumbersome, involving steps that do not clearly explain whether and how a consumer can seek a refund for unauthorized in-app charges incurred by children. Indeed, as noted in paragraph 8 above, Apple's stated policy is that all App Store transactions are final.

COUNT I

Unfair Billing of In-App Charges

28. In numerous instances, Respondent bills parents and other iTunes account holders for children's activities in apps that are likely to be used by children without having obtained the account holders' express informed consent.

29. Respondent's practices as described in paragraph 28 cause or are likely to cause substantial injury to consumers that consumers themselves cannot reasonably avoid and that is not outweighed by countervailing benefits to consumers or competition.

30. Respondent's practices as described in paragraph 28 therefore constitute unfair acts or practices in or affecting commerce in violation of Section 5 of the FTC Act, 15 U.S.C. § 45(a) and (n).

THEREFORE, the Federal Trade Commission this twenty-fifth day of March, 2014, has issued this complaint against Respondent.

By the Commission, Commissioner Wright dissenting.

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 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 a violation of the Federal Trade Commission Act ("FTC Act"), 15 U.S.C. § 45 *et seq*; and

Respondent 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 has reason to believe that 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 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 any comments received from interested persons pursuant to Commission Rule 2.34, 16 C.F.R. § 2.34, now in further conformity with the procedure prescribed in Commission Rule 2.34, the Commission hereby issues its complaint, makes the following jurisdictional findings, and enters the following order:

1. Respondent Apple Inc. ("Apple") is a California corporation with its principal place of business at 1 Infinite Loop, Cupertino, California 95014.

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

A. "**Account Holder**" means an individual or entity, with a billing address in the United States, that controls an account to which Apple may bill In-App Charges.

B. "**Application**" or "**App**" means any software application that can be installed on a mobile device.

C. "**Clear and Conspicuous**" or "**Clearly and Conspicuously**" means:

1. In textual communications, the disclosure must be in a noticeable type, size, and location, using language and syntax comprehensible to an ordinary consumer;

2. In communications disseminated orally or through audible means, the disclosure must be delivered in a volume, cadence, language, and syntax sufficient for an ordinary consumer to hear and comprehend them;

3. In communications disseminated through video means: (1) written disclosures must be in a form consistent with definition 3.A and appear on the screen for a duration sufficient for an ordinary consumer to read and comprehend them, and be in the same language as the predominant language that is used in the communication; and (2) audio disclosures must be consistent with definition 3.B; and

4. The disclosure cannot be combined with other text or information that is unrelated or immaterial to the subject matter of the disclosure. No other

representation(s) may be contrary to, inconsistent with, or in mitigation of, the disclosure.

D. "**Defendant**" means Apple Inc. and its successors and assigns.

E. "**Express, Informed Consent**" means, upon being presented with options to provide or withhold consent, an affirmative act communicating informed authorization of In-App Charge(s), made proximate to an In-App Activity for which there is an In-App Charge and to Apple's Clear and Conspicuous disclosure of all material information related to the billing, including:

1. If consent is sought for a specific In-App Charge: (1) the In-App Activity associated with the charge (as provided to Apple by the App's developer); (2) the specific amount of the charge; and (3) the account that will be billed for the charge; or

2. If consent is sought for potential future In-App Charges: (1) the scope of the charges for which consent is sought, including the duration and Apps to which consent applies; (2) the account that will be billed for the charge; and (3) method(s) through which the Account Holder can revoke or otherwise modify the scope of consent on the device, including an immediate means to access the method(s).

Provided that the solicitation of the "affirmative act" and the disclosure of the information in definitions 5.A and 5.B above must be reasonably calculated to ensure that the person providing Express, Informed Consent is the Account Holder.

Provided also that if Apple obtains Express, Informed Consent to potential future In-App Charges as set forth in definition 5.B above, it must do so a minimum of once per mobile device.

F. "**In-App Activity**" or "**In-App Activities**" means any user conduct within an App including the acquisition of real or virtual currency, goods, or services, or other Apps.

G. "**In-App Charge**" means a charge associated with In-App Activity billed by Apple.

H. "**Consumer Redress Period**" means the twelve (12) month period of time between the entry and the first anniversary of this order.

I.

IT IS FURTHER ORDERED that Apple and its officers, agents, and employees, and all other persons in active concert or participation with it, who receive actual notice of this order, whether acting directly or indirectly, are restrained and enjoined for the term of this order from billing an account for any In-App Charge without having obtained Express, Informed Consent to Apple's billing that account for the In-App Charge. If Apple seeks and obtains Express, Informed Consent to billing potential future charges for In-App Activities, Apple must allow the Account Holder to revoke such consent at any time. Apple shall fully comply with this Section I by no later than March 31, 2014.

II.

IT IS FURTHER ORDERED that Apple shall provide full refunds to Account Holders who have been billed by Apple for unauthorized In-App Charges incurred by minors as follows:

A. Apple shall provide prompt refunds to Account Holders for the full purchase price of any Eligible In-App Charge(s). For purposes of this Section II, an "Eligible In-App Charge" is an In-App Charge that the Account Holder indicates was incurred by a minor and was accidental or not authorized by the Account Holder. For purposes of this Section II.A, a "prompt" refund means a refund provided within the later of fourteen (14) days of a request for refund of an

Eligible In-App Charge by the Account Holder or the completion of a fraud investigation. Apple may decline a refund request for an Eligible In-App Charge only if it has sufficient credible evidence that the refund request is fraudulent. Apple may process all refund requests through its customer service channels, which include a contact phone number and web form through which consumers may contact Apple directly.

B. Apple shall refund no less than $32,500,000.00 for Eligible In-App Charges pursuant to section II.A of this order, and such amount shall not constitute a penalty. Solely for the purposes of this section II.B of this order, Apple may approximate that 50% of all refunds provided to Account Holders for In-App Charges relate to Eligible In-App Charges.

C. Within thirty (30) days of the end of the Consumer Redress Period, Apple shall provide the Commission with records sufficient to show the refunds requested and paid to Account Holders for In-App Charges during the Consumer Redress Period, and any requests that were denied under Section II.A of this order.

D. If Apple fails to refund $32,500,000.00 pursuant to section II.B of this order, the balance of that amount shall be remitted to the Commission within forty-five (45) days of the end of the Consumer Redress Period.

E. All funds paid to the Commission pursuant to section II.D of this order may be deposited into a fund administered by the Commission or its designee to be used for equitable relief, at the Commission's sole discretion, for informational remedies regarding In-App Charges by children or consumer redress and any attendant expenses for the administration of any redress fund. Any money not used for such purposes shall be deposited to the United States Treasury. Apple shall have no right to challenge the Commission's choice of remedies under this Paragraph.

F. Apple shall provide an electronic notice to any Account Holder who has made an In-App Purchase prior to March 31, 2014. Apple shall send such notice within fifteen (15) days after March 31, 2014. The electronic notice shall include a subject line relating to the content of the notice and contain the following information, disclosed in a Clear and Conspicuous manner and in writing: (1) that refunds are available for Account Holders that have been billed for In-App Charges incurred by minors that were accidental or not authorized by the Account Holder, (2) that such refunds are available until the end of the Consumer Redress Period, and (3) instructions regarding how to obtain refunds pursuant to section II.A of this order, including means of contacting Apple for a refund. Apple shall send the notice to the current or last known email address for the Account Holder.

G. Sections II.A and II.B of this order shall be effective beginning on the date that the order is entered, and will terminate at the end of the Consumer Redress Period.

III.

IT IS FURTHER ORDERED that Respondent and its successors and assigns for five (5) years after the date of issuance of this order, shall maintain and upon request make available to the Federal Trade Commission business records demonstrating their compliance with the terms and provisions of this order, including but not limited to:

A. All consumer complaints conveyed to Respondent, or forwarded to Respondent by a third party, that relate to the conduct prohibited by this order and any responses to such complaints;

B. Refund requests related to In-App Charges, and refunds paid by Respondent related to In-App Charges; and

C. Records necessary to demonstrate full compliance with each provision of this order.

IV.

IT IS FURTHER ORDERED that Respondent and its successors and assigns shall deliver a copy (written or electronic) of this order to all current and future principals, officers, and corporate directors, and to all current and future managers, employees, agents, and representatives who participate in the design or implementation of Respondent's process through which Account Holders incur In-App Charges; the billing by Respondent of such charges; or Respondent's customer service relating to such charges, and shall secure from each such person a signed and dated statement acknowledging receipt of the order. Respondent shall deliver this order to current personnel within thirty (30) days after the date of service of this order, and to future personnel within thirty (30) days after the person assumes such position or responsibilities.

V.

IT IS FURTHER ORDERED that Respondent and its successors and assigns shall notify the Commission within fourteen (14) days of any change in the corporation that may affect compliance obligations arising under this order, including but not limited to a dissolution, assignment, sale, merger, or other action that would result in the emergence of a successor corporation; the creation or dissolution of a subsidiary, parent, or affiliate that engages in any acts or practices subject to this order; the proposed filing of a bankruptcy petition; or a change in the corporate name or address. All notices required by this Part shall be sent by certified mail to the Associate Director, Division of Enforcement, Bureau of Consumer Protection, Federal Trade Commission, Washington, D.C. 20580.

VI.

IT IS FURTHER ORDERED that Respondent or its successors and assigns shall, ninety (90) days after March 31, 2014, file with the Commission a report, in writing, setting forth in detail the manner and form in which they have complied with this order. Within ten (10) business days of receipt of a written notice from a representative of the Commission, Respondent shall submit additional compliance reports.

VII.

This order will terminate on March 25, 2034, 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; and

B. This order if such complaint is filed after the order has terminated pursuant to this Part.

Provided, further, that if such complaint is dismissed or a federal court rules that 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. Respondent may seek modification of this order pursuant to 15 U.S.C. § 45(b) and 16 C.F.R. 2.51(b) to address relevant developments that affect compliance with this order, including, but not limited to, technological changes and changes in methods of obtaining Express, Informed Consent.

By the Commission, Commissioner Wright dissenting.

ANALYSIS OF CONSENT ORDER TO AID PUBLIC COMMENT

The Federal Trade Commission ("Commission") has accepted, subject to final approval, an agreement containing a consent order from Apple Inc. ("Apple").

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.

Apple bills consumers for charges related to activity within software applications ("apps") that consumers download to their iPhone, iPod Touch, or iPad devices from Apple's App Store. This matter concerns Apple's billing for charges incurred by children in apps that are likely to be used by children without having obtained the account holders' express informed consent.

The Commission's proposed complaint alleges that Apple offers thousands of apps, including games that children are likely to play, and that in many instances, children can obtain virtual items within a game app that cost money. Apple bills parents and other adult account holders for items that cost money within an app—"in-app charges." In connection with billing for children's in-app charges, Apple sometimes requests a parent's iTunes password. In many instances, Apple "caches" (that is, stores) the iTunes password for fifteen minutes after it is entered. During this process, Apple in many instances has not informed account holders that password entry will approve a charge or initiate a fifteen-minute window during which children using the app can incur charges without further action by the account holder. The Commission's proposed complaint alleges that, through these practices, Apple often fails to obtain parents' informed consent to charges incurred by children, which constitutes an unfair practice under Section 5 of the FTC Act.

The proposed order contains provisions designed to prevent Apple from engaging in the same or similar acts or practices in the future. Part I of the proposed order requires Apple to obtain express, informed consent to in-app charges before billing for such charges, and to allow consumers to revoke consent to prospective in-app charges at any time. As defined in the proposed order, express, informed consent requires an affirmative act communicating authorization of an in-app charge (such as entering a password), made proximate to both an in-app activity

for which Apple is billing a charge and a clear and conspicuous disclosure of material information about the charge. Under the definition, the act and disclosure must be reasonably calculated to ensure that the person providing consent is the account holder (as opposed to the child). The proposed order would require the disclosure to appear at least once per mobile device. Apple must come into compliance with the Part I requirements by March 31, 2014.

Part II of the proposed order requires Apple to provide full refunds to Apple account holders who have been billed by Apple for unauthorized in-app charges incurred by minors. Apple will refund no less than $32.5 million for these in-app charges in the year following entry of the order, and if such refunds total less than $32.5 million, Apple will remit any remaining balance to the Commission to be used for informational remedies, further redress, or payment to the U.S. Treasury as equitable disgorgement. To effectuate refunds, Apple must send an electronic notice to its consumers that clearly and conspicuously discloses the availability of refunds and instructions on how to obtain such refunds. Within 30 days of the end of the one-year redress period, Apple must provide the Commission with records of refund requests, refunds paid, and any refunds denied.

Parts III through VII of the proposed order are reporting and compliance provisions. Part III of the proposed order requires Apple to maintain and upon request make available certain compliance-related records, including certain consumer complaints and refund requests, for a period of five years. Part IV is an order distribution provision that requires Apple to provide the order to current and future principals, officers, and corporate directors, as well as current and future managers, employees, agents, and representatives who participate in certain duties related to the subject matter of the proposed complaint and order, and to secure statements acknowledging receipt of the order.

Part V requires Apple to notify the Commission of corporate changes that may affect compliance obligations within 14 days of such a change. Part VI requires Apple to submit a compliance report 90 days after March 31, 2014, the date by which Apple is required to come into full compliance with Part I of the order. It also requires Apple to submit additional compliance reports

within 10 business days of a written request by the Commission. Part VII 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 complaint or proposed order, or to modify in any way the proposed order's terms.

Statement of Chairwoman Edith Ramirez and Commissioner Julie Brill

The Commission has issued a complaint and proposed consent order to resolve allegations that Apple Inc. unfairly failed to obtain informed consent for charges incurred by children in connection with their use of mobile apps on Apple devices in violation of Section 5 of the Federal Trade Commission Act. Consistent with prior application of the Commission's unfairness authority, our action today reaffirms that companies may not charge consumers for purchases that are unauthorized – a principle that applies regardless of whether consumers are in a retail store, on a website accessed from a desktop computer, or in a digital store using a mobile device.

As alleged in the Commission's complaint, Apple violated this basic principle by failing to inform parents that, by entering a password, they were permitting a charge for virtual goods or currency to be used by their child in playing a children's app and at the same time triggering a 15-minute window during which their child could make unlimited additional purchases without further parental action. As a consequence, at least tens of thousands of parents have incurred millions of dollars in unauthorized charges that they could not readily have avoided. Apple, however, could have prevented these unwanted purchases by including a few words on an existing prompt, without disrupting the in-app user experience. As explained below, we believe the Commission's allegations are more than sufficient to

satisfy the standard governing the FTC Act's prohibition against "unfair acts or practices."

I. Overview of In-App Purchases on Apple Mobile Devices

Apple distributes apps, including games, that are likely to be used by children on Apple mobile devices through its iTunes App Store. While playing these games, kids may incur charges for the purchase of virtual items such as digital goods or currency (known as "in-app charges") at prices ranging from $.99 to $99.99. These in-app charges are billed to their parents' iTunes accounts. Apple retains thirty percent of the revenues from in-app charges. As part of the in-app purchasing process, Apple displays a general prompt that calls for entry of the password for the iTunes account associated with the mobile device. Apple treats this password entry as authorizing a specific transaction and simultaneously allowing additional in-app purchases for 15 minutes.

While key aspects of the in-app purchasing sequence have changed over time, as described in the Commission's complaint, one constant has been that Apple does not explain to parents that entry of their password authorizes an in-app purchase and also opens a 15-minute window during which children are free to incur unlimited additional charges. We allege that, since at least March 2011, tens of thousands of consumers have complained about millions of dollars in unauthorized in-app purchases by children, with many of them individually reporting hundreds to thousands of dollars in such charges. As a result, we have reason to believe, and have alleged in our complaint, that Apple's failure to disclose the 15-minute window is an unfair practice that violates Section 5 because it has caused or is likely to cause substantial consumer injury that is neither reasonably avoidable by consumers nor outweighed by countervailing benefits to consumers or competition.[1]

The proposed consent order resolves these allegations by requiring Apple to obtain informed consent to in-app charges. The order also requires Apple to provide full refunds, an amount

1 15 U.S.C. § 45(n).

no less than $32.5 million, to all of its account holders who have been billed for unauthorized in-app charges incurred by minors.[2]

II. Application of the Unfairness Standard

Importantly, the Commission does not challenge Apple's use of a 15-minute purchasing window in apps used by kids. Rather, our charge is that, even after receiving at least tens of thousands of complaints about unauthorized charges relating to in-app purchases by kids, Apple continued to fail to disclose to parents and other Apple account holders that entry of a password in a children's app meant they were approving a single in-app charge plus 15 minutes of further, unlimited charges.

In asserting that Apple violated Section 5's prohibition against unfair practices by failing to obtain express informed consent for in-app charges incurred by kids, we follow a long line of FTC cases establishing that the imposition of unauthorized charges is an unfair act or practice.[3] This basic tenet applies regardless of the technology or platform used to bill consumers and regardless of whether a company engages in deliberate fraud. Indeed, there is nothing in the unfairness authority we have been granted by Congress or in the Commission's Unfairness Policy Statement to suggest that our power is in any way constrained or should be applied differently depending on the technology or platform at issue, or the intentions of the accused party.[4]

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2 Any sum below $32.5 million that is not returned to account holders is to be paid to the FTC.

3 *See, e.g.*, *FTC v. Willms*, No. 2:11-CV-828 MJP, 2011 WL 4103542, at *9 (W.D. Wash. Sept. 13, 2011); *FTC v. Inc21.com Corp*., 745 F. Supp. 2d 975 (N.D. Cal. 2010), *aff'd*, 475 Fed. Appx. 106 (9th Cir. Mar. 30, 2012); *FTC v. Crescent Publ'g Grp., Inc.*, 129 F. Supp. 2d 311, 322 (S.D.N.Y. 2001); *see also* Complaint, *FTC v. Jesta Digital, LLC*, No. 1:13-cv-01272 (D.D.C. filed Aug. 20, 2013).

4 The FTC need not prove intent to establish a violation of the FTC Act. *See, e.g., Orkin Exterminating Co. v. FTC*, 849 F.2d 1354, 1368 (11th Cir. 1988); **Federal Trade Commission Policy Statement on Unfairness,** appended to *Int'l Harvester Co*., 104 F.T.C. 949, 1070 (1984) ("FTC Unfairness Statement").

Our task here, as in all instances in which we assert jurisdiction over unfair acts or practices, is to determine whether the alleged unlawful conduct causes or is likely to cause substantial injury that is not reasonably avoidable by consumers and is not outweighed by countervailing benefits to consumers or competition. After a full investigation, we have reason to believe that Apple's conduct constitutes an unfair practice.

A. Substantial Injury to Consumers

We begin by addressing the issue of harm. It is well established that substantial injury may be demonstrated by a showing of either small harm to a large number of people or large harm in the aggregate.[5] Both are present here. As alleged in the complaint, in many individual instances, Apple customers paid hundreds of dollars in unauthorized charges while thousands of others incurred lower charges that together totaled large sums. We allege that, in the aggregate, at least tens of thousands of consumers have complained of millions of dollars of unauthorized in-app charges by children. Moreover, we have reason to believe that, for a variety of reasons, many more affected customers never complained. Some, for example, were undoubtedly deterred by Apple's stated policy that all App Store transactions are final. Others who incurred low charges likely did not protest because of the relatively small dollar value at issue. Indeed, extensive Commission experience teaches that consumer complaints typically represent only a small fraction of actual consumer injury.[6]

In his dissent, Commissioner Wright expresses the view that the harm alleged by the Commission involves "a miniscule percentage of consumers" and is therefore insubstantial.[7] We

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5 *See FTC v. Neovi, Inc.*, 604 F.3d 1150, 1157 (9th Cir. 2010), *amended*, 2010 WL 2365956 (9th Cir. June 15, 2010); *Orkin*, 849 F.2d at 1365; FTC Unfairness Statement n.12.

6 Likewise, there is research indicating consumers do not register the vast majority of their complaints about problems with goods and services. *See* Amy J. Schmitz, *Access to Consumer Remedies in the Squeaky Wheel System*, 39 PEPP. L. REV. 279, 286 (2012).

7 Dissenting Statement of Commissioner Joshua D. Wright ("Wright Dissent")

respectfully disagree. We find it of little consequence that the number of complainants is a small fraction of all app downloads, as Commissioner Wright asserts.[8] As an initial matter, our complaint focuses on conduct affecting Apple account holders whose children may unwittingly incur in-app charges in games likely to be played by kids. The proportion of complaints about children's in-app purchases as compared to total app downloads, revenue from the sale of Apple mobile devices, or Apple's total sales revenue sheds no light on the extent of harm alleged in this case. More fundamentally, the FTC Act does not give a company with a vast user base and product offerings license to injure large numbers of consumers or inflict millions of dollars of harm merely because the injury affects a small percentage of its customers or relates to a fraction of its product offerings.

It is also incorrect that "in order to qualify as substantial, the harm must be large compared to any offsetting benefits."[9] This conflates the third prong of the unfairness test, calling for a weighing of countervailing benefits against the relevant harm, with the substantial injury requirement. As shown above, the allegations in the complaint are more than sufficient to establish substantial injury.[10]

B. Injury Not Reasonably Avoidable by Consumers

We also have reason to believe that consumers could not reasonably avoid the alleged injury. An injury is not reasonably

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at 1.

8 *See id*. at 6.

9 *Id.* (citation and internal quotation marks omitted).

10 *See, e.g.*, *Orkin*, 849 F.2d at 1365 (substantial injury demonstrated by small injury to large number of customers); *FTC v. Neovi, Inc.*, 598 F. Supp. 2d 1104, 1115 (S.D. Cal. 2008) (substantial consumer injury resulted from unauthorized charges to tens of thousands of consumers), *aff'd*, 604 F.3d 1150 (9th Cir. 2010); *FTC v. Global Mktg. Group, Inc.*, 594 F. Supp. 2d 1281, 1288-89 (M.D. Fla. 2008) (millions of dollars in unlawful charges demonstrated substantial injury); *FTC v. Windward Mktg., Inc.*, No. 1:96-CV-615F, 1997 WL 33642380, at *11 (N.D. Ga. Sept. 30, 1997) (harm to large number of consumers sufficient to establish substantial injury).

preventable by consumers unless they had an opportunity to make a "free and informed choice" to avoid the harm.[11] Before billing parents for in-app charges by children, Apple presented parents with a generic password prompt devoid of any explanation that password entry approves a single charge as well as all charges within the 15 minutes to follow. We do not think parents acted unreasonably by not averting harm from a 15-minute window that was not disclosed to them. Consumers cannot avoid or protect themselves from a practice of which they are not made aware, and companies like Apple cannot impose on consumers the responsibility for ferreting out material aspects of payment systems, as FTC enforcement actions in a variety of contexts make clear.[12] Apple's disclosure of the 15-minute window in its Terms and Conditions was not sufficient to provide consumers with adequate notice.

Over time, through experience, some parents may infer that entry of a password opens a 15-minute window during which unlimited purchases can be made. The receipt of an invoice with unauthorized charges may be sufficient to alert some parents about the unwanted charges. But that does not relieve Apple of the obligation to take reasonable steps to inform consumers of the 15-minute window before the user opens that window and before Apple places charges on a bill. In light of Apple's failure to disclose the 15-minute purchasing window, it was reasonable for parents not to expect that when they input their iTunes password they were authorizing 15 minutes of unlimited purchases without the child having to ask the parent to input the password again. There was nothing to suggest this and thus no "obligation for them to investigate further" as Commissioner Wright suggests.[13]

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11 *Neovi*, 598 F. Supp. 2d at 1115.

12 *See, e.g.*, *Facebook, Inc.*, No. C-4365, at 4 (F.T.C. July 27, 2012) (consent order) (requiring "clear and prominent" disclosure of certain information material to privacy protections "separate and apart from" the detailed privacy policy or terms of use); *Google Inc*., No.C-4336, at 3-4 (F.T.C. Oct. 13, 2011) (consent order) (setting similar requirements).

13 Wright Dissent at 10.

C. Injury Not Outweighed by Benefits to Consumers or Competition

Finally, we also have reason to believe that the harm alleged outweighs any countervailing benefits to consumers or competition from Apple's practices. This is not a case about Apple's "choice to integrate the fifteen-minute window into Apple users' experience on the platform," as Commissioner Wright implies.[14] What is at issue is Apple's failure to disclose the 15-minute window to parents and other account holders in connection with children's apps, not Apple's use of a 15-minute window as part of the in-app purchasing sequence.

Under the proposed consent order, Apple is permitted to bill for multiple charges within a 15-minute window upon password entry provided it informs consumers what they are authorizing, allowing consumers to make an informed choice about whether to open a period during which additional charges can be incurred without further entry of a password.[15] The order gives Apple full discretion to determine how to provide this disclosure. But we note that the information called for, while important, can be conveyed through a few words on an existing prompt. The burden, if any, to users who have never had unauthorized charges for in-app purchases, or to Apple, from the provision of this additional information is *de minimis*.[16] Nor do we believe the required disclosure would detract in any material way from a streamlined and seamless user experience. In our view, the absence of such minimal, though essential, information does not constitute an offsetting benefit to Apple's users that even comes close to outweighing the substantial injury the Commission has identified.

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14 *Id.* at 4.

15 *See* Proposed Order ¶¶ 3, 5 (defining "Clear and Conspicuous" and "Express, Informed Consent").

16 For this reason alone, it was unnecessary for the Commission to undertake a study of how consumers react to different disclosures before issuing its complaint against Apple, as Commissioner Wright suggests. We also note that the Commission need only determine that it has a "reason to believe" that there has been an FTC Act violation in order to issue a complaint. 15 U.S.C. § 45(b).

Moreover, we are confident that our action today fully preserves the incentive to innovate and develop digital platforms that are user-friendly and beneficial for consumers. In this respect, we emphasize that we do not expect companies "to anticipate *all* things that might go wrong" when designing a complicated platform or product.[17] Our action against Apple is based on its failure to provide any meaningful disclosures about the 15-minute window in the purchase sequence, despite receiving at least tens of thousands of complaints about unauthorized in-app purchases by children and despite having the issue flagged in high-profile media reports in late 2010 and early 2011.[18] We recognize that Apple did make certain changes to its in-app purchase sequence in an attempt to resolve the issue. Most notably, Apple added a password prompt to the in-app purchase sequence in March 2011. But for well over two-and-a-half years after that point, the password prompt has lacked any information to signal that the account holder is about to open a 15-minute window in which unlimited charges could be made in a children's app.

The extent and duration of the unauthorized in-app charges alleged in the complaint support our conclusion that, while Apple has strong incentives to cultivate customer goodwill in order to encourage the purchase of in-app goods and currency and promote the sale of its mobile devices, these incentives may not be sufficient to produce the necessary disclosures. Because customers are often unaware of the way in-app charges work, let alone the possibility of Apple disclosing its practices, we do not think that Commissioner Wright's belief that Apple "has more than enough incentives to disclose"[19] is justified. Indeed, his argument appears to presuppose that a sufficient number of Apple

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17 Wright Dissent at 15 (emphasis in original).

18 *See, e.g.*, Cecilia Kang, *In-app purchases in iPad, iPhone, iPod kids' games touch off parental firestorm*, WASH. POST, Feb. 8, 2011, *available at* http://www.washingtonpost.com/wp-dyn/content/article/2011/02/07/AR2011020706073.html; Associated Press, *Apple App Store: Catnip for Free-Spending Kids?*, CBS NEWS, Dec. 9, 2010, *available at* http://www.cbsnews.com/news/apple-app-store-catnip-for-free-spending-kids/.

19 Wright Dissent at 14.

customers will respond to the lack of adequate information by leaving Apple for other companies. But customers cannot switch suppliers easily or quickly. Mobile phone and data contracts typically last two years, with a penalty for early termination. In addition, the time and effort required to learn another company's operating system and features, not to mention the general inertia often observed for consumers with plans for cellular, data, and Internet services, could very well mean that Apple customers may not be as responsive to Apple's disclosure policies as seems to be envisioned by Commissioner Wright.

* * *

We applaud the innovation that is occurring in the mobile arena. Today, parents have access to an enormous number and variety of apps for use by their children. We firmly believe that technological innovation and fundamental consumer protections can coexist and, in fact, are mutually beneficial. Such innovation is enhanced, and will only reach its full potential, if all marketplace participants abide by the basic principle that they must obtain consumers' informed consent to charges before they are imposed.

Statement of Commissioner Maureen K. Ohlhausen

I voted to accept for public comment the accompanying proposed administrative complaint and consent order, settling allegations that Apple Inc. engaged in unfair acts or practices by billing iTunes account holders for charges incurred by children in apps that are likely to be used by children without the account holders' express informed consent.[1] I write separately to emphasize that our action today is consistent with the fundamental

1 For the reasons given in the Statement of Chairwoman Ramirez and Commissioner Brill, I believe the complaint meets the requirements of 15 U.S.C. § 45(n) and the Commission's Unfairness Statement.

principle that any commercial entity, before billing customers, has an obligation to notify such customers of what they may be charged for and when, a principle that applies even to reputable and highly successful companies that offer many popular products and services.

In his dissent, Commissioner Wright lauds the iterative software design process of rapid prototyping, release, and revision based on market feedback; this approach has proven to be one of the most successful methods for balancing design tradeoffs. He also notes that it can be difficult to forecast problems that may arise with complicated products across millions of users and expresses concern that our decision today requires companies to anticipate and fix all such problems in advance.

I agree with Commissioner Wright that we should avoid actions that would chill an iterative approach to software development or that would unduly burden the creation of complex products by imposing an obligation to foresee all problems that may arise in a widely-used product.[2] I do not believe, however, that today's action implicates such concerns. First, Apple's iterative approach was not the cause of the harm the complaint challenges. In fact, Apple's iterative approach should have made it easier for the company to update its design in the face of heavy consumer complaints. Second, we are not penalizing Apple for failing to have anticipated every potential issue in its complex platform.[3] The complaint challenges only one billing issue of

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2 I am concerned about any action that this agency takes that is likely to have adverse effects on firms' incentives to innovate. For example, in the antitrust context, I voted against the Commission's complaints in *Bosch* and *Google/MMI* based in significant part on my concern that those enforcement actions would hamper intellectual property rights and innovation more generally. *See In re* Motorola Mobility LLC & Google Inc., FTC File No. 121-0120, Dissenting Statement of Commissioner Maureen K. Ohlhausen (Jan. 3, 2013), *available at* http://www.ftc.gov/sites/default/files/documents/cases/2013/01/130103googlemotorolaohlhausenstmt.pdf; *In re* Robert Bosch GmbH, FTC File No. 121-0081, Statement of Commissioner Maureen K. Ohlhausen (Nov. 26, 2012), *available at* http://www.ftc.gov/sites/default/files/documents/cases/2013/04/121126boschohlhausenstatement.pdf.

3 The complaint challenges harm that occurred since March 2011, after Apple changed its process to require the entry of the account holder's iTunes password before incurring any in-app charges immediately after installation.

which Apple became well aware but failed to address in subsequent design iterations. By March 2011, consumers had submitted more than ten thousand complaints to Apple stating that its billing platform for in-app purchases for children's apps was failing to inform them about what they were being billed for and when. Although Apple adjusted certain screens in response and offered refunds, it still failed to notify account holders that by entering their password they were initiating a fifteen-minute window during which children using the app could incur charges without further action by the account holder. Even if Apple chose to forgo providing this information—the type of information that is critical for any billing platform, no matter how innovative, to provide—in favor of what it believed was a smoother user experience for some users, the result was unfair to the thousands of consumers who subsequently experienced unauthorized in-app charges totaling millions of dollars.[4]

Commissioner Wright also argues that under our unfairness authority "substantiality is analyzed relative to the magnitude of any offsetting benefits,"[5] and concludes that compared to Apple's total sales or in-app sales, injury was not substantial and that any injury that did occur is outweighed by the benefits to consumers and competition of Apple's overall platform. The relevant statutory provision focuses on the substantial injury caused by an individual act or practice, which we must then weigh against countervailing benefits to consumers or competition from that act or practice.[6] Thus, we first examine whether the harm caused by

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Previously, the entry of the password to install an app also opened a fifteen-minute window during which charges could be incurred without again entering a password.

4 It is also important to note that the Commission's proposed order does not prohibit the use of the fifteen-minute window nor require that the account holder input a password for each purchase.

5 Dissenting Statement of Commissioner Joshua D. Wright at 5.

6 "The Commission shall have no authority under this section or section 57a of this title 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 practice of not clearly disclosing the fifteen-minute purchase window is substantial and then compare that harm to any benefits from that particular practice, namely the benefits to consumers and competition of not having a clear and conspicuous disclosure of the fifteen-minute billing window. It is not appropriate, however, to compare the injury caused by Apple's lack of clear disclosure with the benefits of the entire Apple mobile device ecosystem. To do so implies that all of the benefits of Apple products are contingent on Apple's decision not to provide a clear disclosure of the fifteen-minute purchase window for in-app purchases. Such an approach would skew the balancing test for unfairness and improperly compare injury "oranges" from an individual practice with overall "Apple" ecosystem benefits.

Dissenting Statement of Commissioner Joshua D. Wright

Today, through the issuance of an administrative complaint, the Commission alleges that Apple, Inc. ("Apple") has engaged in "unfair acts or practices" by billing parents and other iTunes account holders for the activities of children who were engaging with software applications ("apps") likely to be used by children that had been downloaded onto Apple mobile devices.[1] In particular, the Commission takes issue with a product feature of Apple's platform that opens a fifteen-minute period during which a user does not need to re-enter a billing password after completing a first transaction with the password.[2] Because Apple does not expressly inform account holders that the entry of a password upon the first transaction triggers the fifteen-minute window during which users can make additional purchases

1 Complaint, Apple, Inc., FTC File No. 1123108, at para. 28-30 (Jan. 15, 2014) [hereinafter *Apple Complaint*].

2 As indicated in the complaint, initially the fifteen-minute window was triggered when an app was downloaded. *Id.* at para. 16. Apple changed the interface in March 2011 and subsequently the fifteen-minute window was triggered upon the first in-app purchase. *Id.* at para. 17. *See also infra* note 13.

without once again entering the password, the Commission has charged that Apple bills parents and other iTunes account holders for the activities of children without obtaining express informed consent.[3]

Today's action has been characterized as nothing more than a reaffirmance of the concept that "companies may not charge consumers for purchases that are unauthorized."[4] I respectfully disagree. This is a case involving a miniscule percentage of consumers – the parents of children who made purchases ostensibly without their authorization or knowledge. There is no disagreement that the overwhelming majority of consumers use the very same mechanism to make purchases and that those charges are properly authorized. The injury in this case is limited to an extremely small – and arguably, diminishing – subset of consumers. The Commission, under the rubric of "unfair acts and practices," substitutes its own judgment for a private firm's decisions as to how to design its product to satisfy as many users as possible, and requires a company to revamp an otherwise indisputably legitimate business practice. Given the apparent benefits to some consumers and to competition from Apple's allegedly unfair practices, I believe the Commission should have conducted a much more robust analysis to determine whether the injury to this small group of consumers justifies the finding of unfairness and the imposition of a remedy.

Section 5 of the FTC Act prohibits, in part, "unfair . . . acts or practices in or affecting commerce."[5] As set forth in Section 5(n), in order for an act or practice to be deemed unfair, it must "cause[] or [be] likely to cause substantial injury to consumers which is not reasonably avoidable by consumers themselves and not outweighed by countervailing benefits to consumers or competition."[6]

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3 *Apple Complaint*, *supra* note 1, at para. 4, 20, 28.

4 Statement of Chairwoman Ramirez and Commissioner Brill at 1.

5 15 U.S.C. § 45(a).

6 15 U.S.C. § 45(n).

The test the Commission uses to evaluate whether an unfair act or practice is unfair used to be different. Previously the Commission considered: whether the practice injured consumers; whether it violated established public policy; and whether it was unethical or unscrupulous.[7] Only after an aggressive enforcement initiative that culminated in a temporary rulemaking suspension and Congressional threats of stripping the Commission of its unfairness authority altogether, was the current iteration of the unfairness test reached.[8] Importantly, this articulation, as set forth in the FTC Policy Statement on Unfairness ("Unfairness Statement"), not only requires that the alleged injury be substantial, it also includes the critical requirements that such injury "must not be outweighed by any countervailing benefits to consumers or competition that the practice produces" and "it must be an injury that consumers themselves could not reasonably have avoided."[9]

As set forth in more detail below, I do not believe the Commission has met its burden to satisfy all three requirements in the unfairness analysis. In particular, although Apple's allegedly unfair act or practice has harmed some consumers, I do not believe the Commission has demonstrated the injury is substantial. More importantly, any injury to consumers flowing from Apple's choice of disclosure and billing practices is outweighed considerably by the benefits to competition and to consumers that flow from the same practice. Accordingly, I respectfully dissent from the issuance of this administrative complaint and consent order.

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7 FTC Policy Statement on Unfairness, *appended to* Int'l Harvester Co., 104 F.T.C. 949, 1070 (1984), *available at* http://www.ftc.gov/ftc-policy-statement-on-unfairness [hereinafter *Unfairness Statement*].

8 ABA SECTION OF ANTITRUST LAW, CONSUMER PROTECTION LAW DEVELOPMENTS, 57-59 (2009); J. Howard Beales, III, Director, Bureau of Consumer Protection, Fed. Trade Comm'n, The FTC's Use of Unfairness Authority: Its Rise, Fall, and Resurrection at 9 (May 2003), *available at* http://www.ftc.gov/public-statements/2003/05/ftcs-use-unfairness-authority-its-rise-fall-and-resurrection [hereinafter *Beales' Unfairness Speech*].

9 *Unfairness Statement*, *supra* note 7, at 1073.

Introduction

This case requires the Commission to analyze consumer injury under the unfairness theory in a novel context: an allegation of a failure to disclose a product feature to consumers that results in some injury to one group of consumers but that generates benefits for another group.

The circumstances surrounding Apple's decision to forgo disclosing during the transaction the fifteen-minute window to its users – and according to the Commission's complaint, thereby failing to obtain express informed consent – are distinguishable from any other prior Commission case alleging unfairness. The economic consequences of the allegedly unfair act or practice in this case – a product design decision that benefits some consumers and harms others – also differ significantly from those in the Commission's previous unfairness cases.

The Commission commonly brings unfairness cases alleging failure to obtain express informed consent. These cases invariably involve conduct where the defendant has intentionally obscured the fact that consumers would be billed. Many of these cases involve unauthorized billing or cramming – the outright fraudulent use of payment information.[10] Other cases involve conduct just shy of complete fraud – the consumer may have agreed to one transaction but the defendant charges the consumer for additional, improperly disclosed items. [11] Under this scenario,

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10 *See, e.g.*, Complaint at 6, FTC v. Jesta Digital, LLC, Civ. No. 1:13-cv-01272 (D.D.C. Aug. 20, 2013) (alleging that "Jesta charged consumers who did not click on the subscribe button and charged consumers for products they did not order."); Complaint, FTC v. Wise Media, LLC, Civ. No. 1:13-CV-1234 (N.D. Ga. Apr. 16, 2013) (alleging that defendants charge consumers for purported services without consumers ever knowingly signing up for such services).

11 Complaint at 15-16, FTC v. JAB Ventures, LLC, Civ No. CV08-04648 (RZx) (C.D. Cal. July 8, 2008) (alleging unauthorized billing when defendants charged consumers who had cancelled their enrollment or who had not been adequately informed about negative option features); FTC v. Crescent Publ'g Group, Inc., 129 F. Supp. 2d 311 (S.D.N.Y. 2001) (pornography website failing to disclose the point at which a "free tour" ended and a monthly membership would begin).

the allegedly unfair act or practice injures consumers and does not provide economic value to consumers or competition. In such cases, the requirement to provide adequate disclosure itself does not cause significant harmful effects and can be satisfied at low cost.

However, the particular facts of this case differ in several respects from the above scenario. First, there is no evidence Apple intended to harm consumers by not disclosing the fifteen-minute window.[12] For example, when Apple began receiving complaints about children making unauthorized in-app purchases on their parents' iTunes accounts, the company took steps to address the problem.[13] In addition, Apple has an established relationship with its customers and its business model depends upon customer satisfaction and repeat business.

Second, rather than an unscrupulous or questionable practice, the nature of Apple's disclosures on its platform is an important attribute of Apple's platform that affects the demand for and consumer benefits derived from Apple devices and services. Disclosures made on the screen while consumers interact with mobile devices are a fundamental part of the user experience for products like mobile computing devices. It is well known that Apple invests considerable resources in its product design and functionality.[14] In streamlining disclosures on its platform and in

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12 By distinguishing the facts of this case from other unfairness cases brought by the Commission alleging the failure to obtain express informed consent, I do not imply that intent is a required element of the analysis. However, I think drawing the distinction informs the discussion. Furthermore, I am unaware that the Commission has ever exercised its unfairness authority where it has alleged only that the defendant inadvertently charged consumers.

13 *See* Chris Foresman, *Apple facing class-action lawsuit over kids' in-app purchases*, arstechnica, Apr. 15, 2011, http://arstechnica.com/apple/2011/04/apple-facing-class-action-lawsuit-over-kids-in-app-purchases/ ("After entering a password to purchase an app from the App Store, the password now has to be reentered in order to make any initial in-app purchases.").

14 Nigel Hollis, *The Secret to Apple's Marketing Genius (Hint: It's Not Marketing)*, The Atlantic, July 11, 2011, http://www.theatlantic.com/business/archive/2011/07/the-secret-to-apples-marketing-genius-hint-its-not-marketing/241724/ (in discussing Apple's functionality, "[u]sing an Apple product feels so natural, so intuitive, so transparent, that sometimes, even people paid to know what makes products great completely miss the cause of

its choice to integrate the fifteen-minute window into Apple users' experience on the platform, Apple has apparently determined that most consumers do not want to experience excessive disclosures or to be inconvenienced by having to enter their passwords every time they make a purchase.

The Commission has long recognized that in utilizing its authority to deem an act or practice as "unfair" it must undertake a much more rigorous analysis than is necessary under a deception theory.[15] As a former Bureau Director has noted, "the primary difference between full-blown unfairness analysis and deception analysis is that deception does not ask about offsetting benefits. Instead, it presumes that false or misleading statements either have no benefits, or that the injury they cause consumers can be avoided by the company at very low cost."[16] It is also well established that one of the primary benefits of performing a cost-benefit analysis is to ensure that government action does more good than harm.[17] The discussion below explains why I believe the Commission's action today fails to satisfy the elements of the unfairness framework and thereby conclude that placing Apple under a twenty-year order in a marketplace in which consumer

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their addiction to Apple products. It's the natural, intuitive transparency of the technology. The superlative product experience comes from an unusual combination of human and technical understanding, and it creates the foundation of all the other positive aspects of the brand."); Peter Eckert, *Dollars And Sense: The Business Case For Investing In UI Design*, Fast Company, Mar. 15, 2012, http://www.fastcodesign.com/1669283/dollars-and-sense-the-business-case-for-investing-in-ui-design ("As we have seen with Apple's success, creating products that offer as much simplicity as functionality drives market share and premium pricing."). *See also* Neil Hughes, *Apple's research & development costs ballooned 32% in 2013 to $4.5B*, Apple Insider, Oct. 30, 2013, http://appleinsider.com/articles/13/10/30/apples-research-development-costs-ballooned-32-in-2013-to-45b; Cliff Kuang, *The Six Pillars of Steve Jobs' Design Philosophy*, Fast Company, Nov. 7, 2011, http://www.fastcodesign.com/1665375/the-6-pillars-of-steve-jobss-design-philosophy.

15 Int'l Harvester Co., 104 F.T.C. 949, 1070 (1984); *Beales' Unfairness Speech*, *supra* note 8, § III.

16 *Beales' Unfairness Speech*, *supra* note 8, § III.

17 Int'l Harvester, 104 F.T.C. at 1070.

preferences and technology are rapidly changing is very likely to do more harm to consumers than it is to protect them.

I. The Evidence Does Not Support a Finding of Substantial Injury as Required by the Unfairness Analysis

Apple's choice to include the fifteen-minute window in its platform design, and its decision on how to disclose this window, resulted in harm to a small fraction of consumers. Any consumer harm is limited to parents who incurred in-app charges that would have been avoided had Apple instead designed its platform to provide specific disclosures about the fifteen-minute window for apps with in-app purchasing capability that are likely to be used by children. That harm to some consumers results from a design choice for a platform used by millions of users with disparate preferences is not surprising. The failure to provide perfect information to consumers will always result in "some" injury to consumers. The relevant inquiry is whether the injury to the subset of consumers is "substantial" as contemplated by the Commission's unfairness analysis.

Consumer injury may be established by demonstrating the allegedly unfair act or practice causes "a very severe harm to a small number"[18] of people or "a small harm to a large number of people."[19] While it is possible to demonstrate substantial injury occurred as a result of an act or practice causing a small harm to a large number of consumers, substantiality is analyzed relative to the magnitude of any offsetting benefits.[20] This is particularly critical when the allegedly unfair practice is not a fraudulent activity such as unauthorized billing or cramming, where there are no offsetting benefits.

By reasonable measures of the potential harms and benefits available to the Commission, the injury is relatively small and not

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18 Int'l Harvester, 104 F.T.C. at 1064.

19 *Unfairness Statement*, *supra* note 7, at n.12.

20 *Beales' Unfairness Speech*, *supra* note 8, § III ("relative to the benefits, the injury may still be substantial" and "[t]o qualify as substantial, an injury must be real, and it must be large compared to any offsetting benefits.").

necessarily substantial in this case. The complaint alleges Apple has received "at least tens of thousands of complaints related to unauthorized in-app charges by children"[21] while playing games acquired on Apple's platform, which supports all music, books, and applications purchased for use with Apple mobile devices (e.g., iPhone, iPad, iPod, hereinafter "iDevices"). Although "tens of thousands" sounds like a large number, the unfairness inquiry requires this number be evaluated in an appropriate context. Apple announced its 50 billionth app download in May 2013.[22] Even 200,000 complaints in 50 billion downloads would represent only four complaints in a million, which is quite a small fraction.

In addition, the complaint presents a few examples in which children made unauthorized in-app purchases that were relatively large, some greater than $500, and one bill as high as $2,600.[23] There is undoubtedly consumer harm in these instances, assuming the purchases are correctly attributed to the alleged failure to disclose, but again, in order to qualify as substantial, the harm "must be large compared to any offsetting benefits."[24]

The relevant economic context required to understand substantiality of injury in this case includes the proportions of populations potentially harmed and benefitted by the failure to disclose product features in this case. A measure of harm that gives weight to both the number of consumers harmed and the size of the individual harms is the ratio of the value of unauthorized purchases to the total sales affected by the practice. We can construct such a measure as follows. The $32.5 million in consumer refunds required by the consent decree presumably relates in some way to the harm arising from Apple's disclosure practices. Recognizing that monetary amounts emerging from consent decrees are a product of compromise and an assessment

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21 *Apple Complaint*, *supra* note 1, at para. 24.

22 Press Release, Apple, Inc., Apple's App Store Marks Historic 50 Billionth Download (May 16, 2013), *available at* http://www.apple.com/pr/library/2013/05/16Apples-App-Store-Marks-Historic-50-Billionth-Download.html.

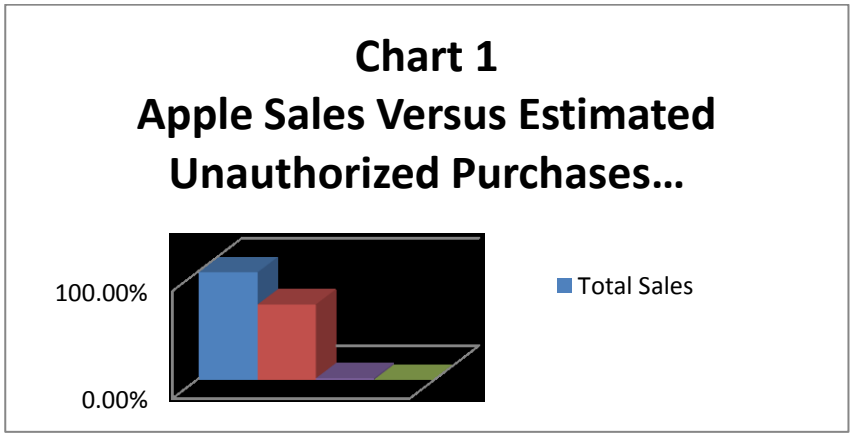
23 *Apple Complaint*, *supra* note 1, at para. 25-26.

24 *Beales' Unfairness Speech*, *supra* note 8, § III.

of litigation risk, suppose that the value of unauthorized purchases is ten times higher than the negotiated settlement amount. This assumption gives a conservatively high estimate of $325 million in unauthorized purchases since the inception of the App Store.

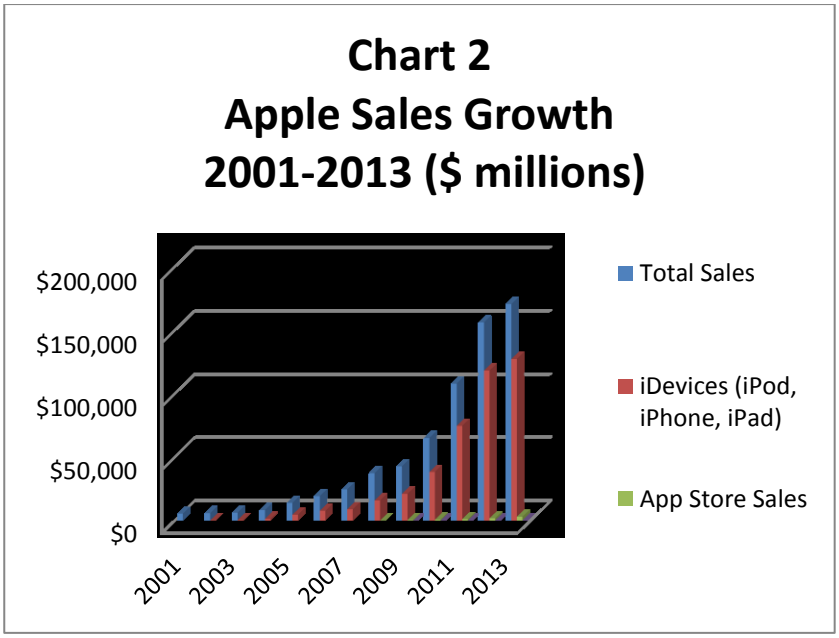
The total sales affected by Apple's disclosure practices likely include not only the sale of apps and in-app purchases, but also the sale of iDevices. This is likely because the benefits from using apps and making in-app purchases are components of the stream of benefits generated by iDevices, and a customer's decision to purchase an iDevice will depend upon the stream of benefits derived from the device. Indeed, the degree of integration across all components of Apple's platform is remarkably high, suggesting that Apple's disclosure practices may affect all Apple's sales. For completeness, Charts 1 and 2 below measure the estimated harm as a fraction of all three variants of Apple's sales – App Store sales, iDevice sales, and total sales. These data are available from Apple's Annual Reports and press releases.

Chart 1 shows that the estimated value of the harm is a miniscule fraction of both Apple total sales (about six one-hundredths of one percent) and iDevice sales (about eight one-hundredths of one percent) over the five-year period from the inception of the App Store to September 2013. This measure of harm, a conservatively high estimate, is also a relatively small fraction of App Store sales (about 4.6 percent).



Sources: Apple, Inc., Annual Reports for 2009-2013 (Form 10-K); Marin Perez, *Apple App Store A $1.2 Billion Business In 2009*, InformationWeek, June 11, 2008, *available at* http://www.informationweek.com/mobile/mobile-devices/apple-app-store-a-$12-billion-business-in-2009/d/d-id/1068794; *Apple Complaint*, *supra* note 1 (for the $32.5 million settlement amount).

Chart 2 illustrates the same relationship with respect to Apple sales growth over the last 13 years.



Sources: Same as Chart 1, plus Apple, Inc., Annual Reports for 2002-2008 (Form 10-K). Calculations assume the App Store sales and estimated unauthorized purchases grew at a constant percentage growth rate from 2009 through 2013.

Taking into account the full economic context of Apple's choice of disclosures relating to the fifteen-minute window undermines the conclusion that any consumer injury is substantial.

II. At Least Some of the Injury Could Be Reasonably Avoided by Consumers

The Unfairness Statement provides that the "injury must be one which consumers could not reasonably have avoided."[25] In explaining that requirement the Commission noted, "[i]n some senses any injury can be avoided – for example, by hiring independent experts to test all products in advance, or by private legal actions for damages – but these courses may be too expensive to be practicable for individual consumers to pursue."[26] The complaint does not allege that the undisclosed fifteen-minute window is an unfair practice as to any consumer other than parents of children playing games likely to be played by children that have in-app purchasing capability.[27] In the instant case, it is very likely that most parents were able to reasonably avoid the potential for injury, and this avoidance required nothing as drastic as hiring an independent expert, but rather common sense and a modicum of diligence.

The harm to consumers contemplated in the complaint involves app functionality that changed over time. In the earliest timeframe, the harm occurred when a parent typed in their Apple password to download an app with in-app purchase capability, handed the Apple device to their child, and then unbeknownst to the parent, the child was able to make in-app purchases by pressing the "buy" button during the fifteen-minute window in which the password was cached. This was apparently an oversight on Apple's part. When it came to the company's attention, Apple implemented a password prompt for the first in-app purchase after download.[28]

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25 *Unfairness Statement*, *supra* note 7, at 1074.

26 *Unfairness Statement*, *supra* note 7, at n.19.

27 Indeed, there are many financial, banking, and retail apps and websites that allow consumers to conduct a series of transactions after entering a password only once. These services usually only require re-entry of a password after a certain amount of time has elapsed, or the session expires because of inactivity on the user's part. It is doubtful that the Commission would bring an unfairness case because these services do not disclose this window.

28 *See* Foresman, *supra* note 13.

During the later timeframe, after being handed the Apple device, a child again would press the "buy" button to make an in-app purchase. At this point, the child would have needed to turn the device back over to the parent for entry of the password. Alternatively, some children may have known their parent's password and entered it themselves. In either case, the fifteen-minute window was opened and additional in-app purchases could be made without further password prompts.

Under the first scenario, account holders received no password prompt for the first in-app purchase and thus the injury experienced by some consumers arguably may not have been reasonably avoidable. Because the opening of the fifteen-minute window *in this context* does not appear to be a product design feature, but rather an unintended oversight, I will focus my attention upon the harm experienced by consumers in the latter scenario and discuss their ability to reasonably avoid it.

Irrespective of the existence of the fifteen-minute window, a user can only make an in-app purchase by pressing a "buy" button while engaging with the app. In other words, the user must decide to make an in-app purchase. To execute the first in-app purchase, the user must enter a password. The fifteen-minute window eliminates the second step of verification – entering a password – only *after* the user has made the first in-app purchase by clicking the "buy" button and entering the password.

By entering their password into the Apple device – an action that is performed in response to a request for permission – parents were effectively put on notice that they were authorizing a transaction.[29] Although the complaint alleges that the fifteen-minute window was not expressly disclosed to parents, regular users of Apple's platform become familiar with the opportunity to make purchases without entering a password every time.[30] Even

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29 Furthermore, Apple sends an email receipt to the iTunes account holder after a purchase has been made in the either the iTunes or App Store. *See e.g.*, http://www.apple.com/privacy/.

30 To the extent that users read the Apple Terms and Conditions when they opened their iTunes accounts, consumer injury would also have been avoided. The Terms and Conditions explain the fifteen-minute window and other aspects of how Apple's platform works, including the App Store. It appears that Apple

if some parents were not familiar with the fifteen-minute window, the requirement to re-enter their password to authorize a transaction arguably triggered some obligation for them to investigate further, rather than just to hand the device back to the child without further inquiry.[31]

III. Any Consumer Injury Caused by Apple's Platform is Outweighed by Countervailing Benefits to Consumers and Competition

Assuming for the moment there is at least some harm that consumers cannot reasonably avoid, the question turns to whether the harms are substantial relative to any benefits to competition or consumers attributable to the conduct. In performing this balancing, the Commission must also take "account of the various costs that a remedy would entail. These include not only the costs to the parties directly before the agency, but also the burdens on society in general in the form of increased paperwork, increased regulatory burdens on the flow of information, reduced incentives to innovation and capital formation, and similar matters."[32] I now turn to that question.

A. Apple's Platform as a Benefit to Consumers and Competition

Unfairness analysis requires an evaluation and comparison of the benefits and costs of Apple's decision not to increase or

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has included these explanations since at least June 2011. *See* http://www.apple.com/legal/internet-services/itunes/us/terms.html#SALE (Apple's current Terms and Conditions) and http://www.proandcontracts.com/wp-content/uploads/2011/06/2011.06.09-iTunes-Terms-and-Conditions-June-2011-Update-with-Highlighting.pdf (cached copy of what appears to be its Terms and Conditions as of June 2011).

31 The Terms and Conditions also explain how to use the parental control settings to control how the App Store works. *See* http://support.apple.com/kb/HT1904 and http://support.apple.com/kb/HT4213. These parental control settings allow users to disable in-app purchasing capability as well as establish settings that require a password each time a purchase is made, thereby eliminating the fifteen-minute window.

32 *Unfairness Statement*, *supra* note 7, at 1073-74.

enhance its disclosure of how Apple's platform works, including the fifteen-minute window. The fifteen-minute window is a *feature* of Apple's platform that applies to purchases of songs, books, apps, and in-app purchases. This feature has long been a part of the iTunes Store for downloading music, and regular users of iTunes apparently value it. In the context here, disclosure is perhaps better thought of as a product attribute—*guidance*—that Apple provides to the customer through on-screen and other explanations of how to use Apple's platform.[33]

In deciding what guidance to provide and how to provide it, firms face two important issues. First, since it is generally not possible to customize guidance for every individual customer, the optimal guidance inevitably balances the needs of different customers. In drawing this balance, the potential for harm from misinterpretation is likely important in deciding which customer on the sophistication spectrum might represent the least common denominator for directing the guidance. For any given degree of guidance, some customers will get it immediately, while others will have to work harder. If the potential for harm is very large, e.g., harm from a drug overdose, then both the firm and consumers want obvious, strong disclosures about dosage, and perhaps other steps like childproof caps. If the potential for harm is small, then strong guidance (or caps that are hard to open in the drug context) may make it more costly for consumers to use the product. Platform designers clearly face such tradeoffs in their decision-making regarding guidance and disclosures. Apple clearly faces the same tradeoff with respect to its decisions concerning the fifteen-minute window. This tradeoff is relevant for evaluating the benefit-cost test at the core of unfairness analysis.

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33 Compare the disclosure contemplated here with disclosure in the mortgage context, for example. Here, the disclosure itself – or the guidance offered while the user is interacting with the product – is an intrinsic part of the product's value. Indeed, Apple's business model is built on offering an integrated platform with a clean design that customers find intuitive and easy to use. The way the platform is presented, including disclosures or guidance offered during use, is a critically important component of value. In the mortgage context, the disclosures signed at closing are not a significant component of the value of the mortgage.

Second, because it is difficult to anticipate the full set of issues that might benefit from guidance of various types, the firm must decide how much time to spend researching, discovering, and potentially fixing possible issues *ex ante* versus finding and fixing issues as they arise. With complex technology products such as computing platforms, firms generally find and address numerous problems as experience is gained with the product. Virtually all software evolves this way, for example. This tradeoff—between time spent perfecting a platform up front versus solving problems as they arise—is also relevant for evaluating unfairness.

Apple presumably weighs the costs and benefits to Apple of different ways to provide guidance. In doing so, Apple must consider: (i) the benefit to Apple of greater sales of mobile devices, music, books, apps, and in-app components to customers who benefit from the additional guidance and make more purchases; (ii) the cost to Apple of fewer sales of mobile devices, music, books, apps, and in-app components by customers who find that more real-time guidance hampers their experience; and (iii) the cost to Apple of developing and implementing more guidance. In weighing (i) and (ii), Apple is particularly concerned about the effects on the sales of mobile devices that use Apple's platform, as they constitute the bulk of Apple's business, as indicated in Charts 1 and 2.[34]

The relevant universe for assessing unfairness of Apple's guidance provision, including disclosures relating to the fifteen-minute window, is the set of users to whom the guidance is directed. This includes all users of Apple's platform who might make online purchases through the platform.

The ratio of estimated unauthorized purchases in this case to all purchases made by users of Apple's platform is miniscule, as Charts 1 and 2 illustrate. This fact, by itself, does not establish that the benefits of Apple's decision to forgo additional guidance

34 In 2012, sales of the iPhone, iPad, and iPod accounted for over 76 percent of Apple's $157 billion in sales. *See* Apple, Inc., Annual Report (Form 10-K), at 73 (Oct. 31, 2012), *available at* http://files.shareholder.com/downloads/AAPL/2661211346x0xS1193125-12-444068/320193/filing.pdf.

of the type required by the consent order outweigh its costs. However, the remarkably low ratio does provide perspective on the following question: How much would the average non-cancelling customer need to be harmed by a requirement of additional guidance in order to outweigh the benefit of preventing harm to other consumers? Suppose the fraction of customers that would benefit from additional guidance is approximated by the ratio of estimated unauthorized purchases to total sales of iDevices. The analysis in Charts 1 and 2 indicates that estimated unauthorized purchases have been about 0.08 percent of iDevice-related sales since the App Store was launched. Suppose that customers that make unauthorized purchases cancel them and seek a refund. Suppose also that the time cost involved in seeking a refund return is $11.95.[35] Then, if the average harm to non-cancelling customers from additional guidance sufficient to prevent cancellations is more than about a penny per transaction, the additional guidance will be counter-productive.[36]

To be clear, the sales of iDevices are not an estimate of consumer benefits but rather they approximate the total universe of economic activity implicated by the Commission's consent order. Similarly, estimated unauthorized purchases merely approximate the total universe of consumers potentially harmed by Apple's practices. The harm from Apple's disclosure policy is limited to users that actually make unauthorized purchases. However, the potential benefits from Apple's disclosure choices are available to the entire set of iDevice users because these are

35 The $11.95 figure represents the seasonally adjust average earnings per half hour across all employees on private nonfarm payrolls, as reported by the Bureau of Labor and Statistics in May 2013. See http://www.bls.gov/news.release/empsit.t19.htm for the most recent report. The assumption is that customers that asked for returns were reimbursed for the charges as Apple attests, and that obtaining a reimbursement takes half an hour.

36 Let Y be the harm to non-cancelling customers from additional guidance sufficient to prevent cancellations. This harm will just equal the benefit of avoiding cancellations if (% Cancelling) x (Refund Time Cost) - (% Not Cancelling) x Y = 0. Assuming (% Cancelling) is .0008, (Refund Time Cost) is $11.95, and (% Not Cancelling) is .9992, solving for Y gives Y = $.009. In other words, if the harm to non-cancelling customers from additional guidance is more than roughly one cent for each transaction, then then the costs of the additional guidance will outweigh the benefits.

the consumers capable of purchasing apps and making in-app purchases. The disparity in the relative magnitudes of these universes of potential harms and benefits suggests, at a minimum, that further analysis is required before the Commission can conclude that it has satisfied its burden of demonstrating that any consumer injury arising from Apple's allegedly unfair acts or practices exceeds the countervailing benefits to consumers and competition. [37]

Nonetheless, the Commission effectively rejects an analysis of tradeoffs between the benefits of additional guidance and potential harm to some consumers or to competition from mandating guidance by assuming that "the burden, if any, to users who have never had unauthorized charges for in-app purchases, or to Apple, from the provision of this additional information is *de minimis*" and that any mandated disclosure would not "detract in any material way from a streamlined and seamless user experience." I respectfully disagree. These assumptions adopt too cramped a view of consumer benefits under the Unfairness Statement and, without more rigorous analysis to justify their application, are insufficient to establish the Commission's burden.

B. The Costs and Benefits to Consumers and Competition of Apple's Product Design and Disclosure Choices

To justify a finding of unfairness, the Commission must demonstrate the allegedly unlawful conduct results in net consumer injury. This requirement, in turn, logically implies the Commission must demonstrate Apple's chosen levels of guidance are less than optimal because consumers would benefit from additional disclosure. There is a considerable economic literature on this subject that sheds light upon the conditions under which

37 Commissioner Ohlhausen suggests that our unfairness analysis compares inappropriately the injury caused by Apple's lack of clear disclosure with the benefits of Apple's disclosure policy to the entire ecosystem. She argues that this approach "skew[s] the balancing test for unfairness and improperly compare[s] injury 'oranges' from an individual practice with overall 'Apple' ecosystem benefits." Statement of Commissioner Ohlhausen at 3. For the reasons discussed, this analysis misses the point.

one might reasonably expect private disclosure levels to result in net consumer harm.[38]

To support the complaint and consent order the Commission issues today requires evidence sufficient to support a reason to believe that Apple will undersupply guidance about its platform relative to the socially optimal level. Economic theory teaches that such a showing would require evidence that "marginal" customers – the marginal consumer is the customer that is just indifferent between making the purchase or not at the current price – would benefit *less* from the consent order than the "inframarginal" customers who are willing to pay significantly more for the product than the current price and therefore would purchase the product irrespective of a small adjustment in an attribute. Nobel Laureate Michael Spence points out in his seminal work on the subject that this analysis generally requires information on the valuations of inframarginal consumers.[39] Here, marginal consumers are those who would not have made in-app purchases if Apple would have disclosed the fifteen-minute window. Inframarginal consumers are those Apple customers who would not change their purchasing behavior in response to a change in Apple's disclosures.

Staff has not conducted a survey or any other analysis that might ascertain the effects of the consent order upon consumers. The Commission should not support a case that alleges that Apple has underprovided disclosure without establishing this through rigorous analysis demonstrating – whether qualitatively or quantitatively – that the costs to consumers from Apple's disclosure decisions have outweighed benefits to consumers and the competitive process. The absence of this sort of rigorous analysis is made more troublesome in the context of a platform with countless product attributes and where significant consumer

38 Disclosure in this context is analogous to a quality decision that may affect different customers differently. A. Michael Spence, *Monopoly, Quality and Regulation*, 6 BELL J. OF ECON. 417-29 (1975); Eytan Sheshinski, *Price, Quality and Quantity Regulation in Monopoly Situations*, 43 ECONOMICA 127-37 (1976). The analysis of this issue is also explained in JEAN TIROLE, THE THEORY OF INDUSTRIAL ORGANIZATION § 2.2.1 (MIT Press 1988).

39 Spence, *supra* note 38.

benefits are intuitively obvious and borne out by data available to the Commission. We cannot say with certainty whether the average consumer would benefit more or less than the marginal consumer from additional disclosure without empirical evidence. This evidence might come from a study of how customers react to different disclosures. However, given the likelihood that the average benefit of more disclosure to unaffected customers is less than the benefit to affected customers who are likely to be customers closer to the margin, I am inclined to believe that Apple has more than enough incentive to disclose.[40]

C. Other Considerations When Examining the Costs and Benefits of Platforms and other Multi-Attribute Products

Unfairness analysis also requires the Commission to consider the impact of contemplated remedies or changes in the incentives to innovate new product features upon consumers and competition.[41] I close by discussing some additional dimensions of an economic analysis of the costs and benefits of product disclosures in the context of complicated products and platforms with many attributes, like Apple's platform, where such disclosures are a critical component of the user experience and have considerable impact upon the value consumers derive from the product.

For complicated products – for example, a web-based platform for purchasing and interacting with potentially millions of items using a mobile device – there are many things that can

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40 This argument does not, as Chairwoman Ramirez and Commissioner Brill suggest, "*presuppose* that a sufficient number of Apple customers will respond to the lack of adequate information by leaving Apple for other companies." Statement of Chairwoman Ramirez and Commissioner Brill at 5-6. Nor does the economic logic require any belief about the magnitude of switching costs. Rather, the analysis relies only upon the standard economic assumption that Apple chooses disclosure to maximize shareholder value, weighing how customers react to different disclosure policies. If Apple behaves this way, the average benefit of more disclosure to unaffected customers is less than the benefit to affected customers, and affected customers are more likely to be on the margin than unaffected customers, then economic theory implies that Apple is likely to have more than enough incentive to disclose.

41 *Unfairness Statement*, *supra* note 7, at 1073-74.

negatively impact user experience. The number of potential issues for products that involve hardware, software, and a human interface is large. This is the nature of technology. When designing a complex product, it is prohibitively costly to try to anticipate *all* the things that might go wrong. Indeed, it is very likely impossible. Even when potential problems are found, it is sometimes hard to come up with solutions that that one can be confident will fix the problem. Sometimes proposed solutions make it worse. In deciding how to allocate its scarce resources, the creator of a complex product weighs the tradeoffs between (i) researching and testing to identify and determine whether to fix potential problems in advance, versus (ii) waiting to see what problems arise after the product hits the marketplace and issuing desirable fixes on an ongoing basis. We observe the latter strategy in action for virtually all software.

The relevant analysis of benefits and costs for allegedly unfair omissions requires weighing of the benefits and costs of discovering and fixing the issue that arose *in advance* versus the benefits and costs of finding the problem and fixing it *ex post*. These considerations fit comfortably within the unfairness framework laid out by the Commission.[42] The Commission also takes account of the various costs that a remedy would entail. These include not only the costs to the parties directly before the agency, but also the burdens on society in general in the form of increased regulatory burdens on the flow of information, reduced incentives to innovate and invest capital, and other social costs.[43]

Here, Apple did not anticipate the problems customers would have with children making in-app purchases that parents did not expect. When the problem arose in late 2010, press reports indicate that Apple developed a strategy for addressing the problem in a way that it believed made sense, and it also refunded customers that reported unintended purchases.[44] This is precisely

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42 The Commission must take "account of the various costs that a remedy would entail" including "reduced incentives to innovation and capital formation, and similar matters." *Unfairness Statement*, *supra* note 7, at 1073-74.

43 *Unfairness Statement*, *supra* note 7, at 1073-74.

44 *See* Foresman, *supra* note 13.

the efficient strategy described above when complex products like Apple's platform develop problems that are difficult to anticipate and fix in advance. Establishing that it is "unfair" unless a firm anticipates and fixes such problems in advance – precisely what the Commission's complaint and consent order establishes today – is likely to impose significant costs in the context of complicated products with countless product attributes. These costs will be passed on to consumers and threaten consumer harm that is likely to dwarf the magnitude of consumer injury contemplated by the complaint.

This investigation began largely because of complaints that arose when in-app purchases were first introduced into the marketplace and Apple had not had enough experience with the platform to recognize how parents and children would use the App Store. In late 2010, complaints began to emerge. In March 2011, Apple first altered its platform to address complaints about unauthorized in-app purchases. It is not unreasonable to surmise that as Apple has modified its policies based on experience, and customers have learned more about how to use the platform, unauthorized in-app purchases by children have most likely steadily declined.

The Commission has no foundation upon which to base a reasonable belief that consumers would be made better off if Apple modified its disclosures to confirm to the parameters of the consent order. Given the absence of such evidence, enforcement action here is neither warranted nor in consumers' best interest.

Complaint

IN THE MATTER OF

L'OCCITANE, INC.

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

Docket No. C-4445; File No. 122 3115
Complaint, March 27, 2014 – Decision, March 27, 2014

This consent order addresses L'Occitane, Inc.'s advertising, marketing, and sale of "Almond Beautiful Shape" and "Almond Shaping Delight." The complaint alleges that respondent represented, in various advertisements, that topical use of Almond Beautiful Shape trims 1.3 inches from the user's thighs in just four weeks; topical use of Almond Beautiful Shape significantly slims the user's thighs and buttocks; topical use of Almond Beautiful Shape significantly reduces cellulite; and topical use of Almond Shaping Delight significantly slims the body in just four weeks. The complaint also alleges that respondent represented, in various advertisements, that scientific tests prove that topical use of Almond Beautiful Shape trims 1.3 inches from the user's thighs in just four weeks; scientific tests prove that topical use of Almond Beautiful Shape significantly reduces cellulite; and scientific tests prove that Almond Shaping Delight significantly slims the body in just four weeks. The consent order requires respondent to pay four hundred and fifty thousand dollars ($450,000) to the Commission to be used for equitable relief, including restitution, and any attendant expenses for the administration of such equitable relief. The order also prohibits respondent from making any representation that use of a drug or cosmetic reduces or eliminates cellulite or affects body fat or weight, unless the representation is non-misleading, and, at the time of making such representation, respondent possesses and relies 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.

Participants

For the *Commission*: *Matthew D. Gold* and *Evan Rose.*

For the *Respondent*: *Richard P. Jacobson, Colucci & Umans; Georgia Ravitz, Arent Fox LLP*; and *Thomas Perrelli, Jenner & Block.*

COMPLAINT

The Federal Trade Commission, having reason to believe that L'Occitane, Inc., a corporation ("respondent"), has violated the provisions of the Federal Trade Commission Act, and it appearing to the Commission that this proceeding is in the public interest, alleges:

1. Respondent L'Occitane, Inc., is a New York corporation with its principal office or place of business at 1430 Broadway, Second Floor, New York, New York 10018.

2. Respondent has manufactured, advertised, labeled, offered for sale, sold, and distributed products to the public, including "Almond Beautiful Shape" and "Almond Shaping Delight." Almond Beautiful Shape and Almond Shaping Delight are "drugs" and/or "cosmetics" within the meaning of Sections 12 and 15 of the Federal Trade Commission Act.

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

4. Almond Beautiful Shape and Almond Shaping Delight are skin creams that contain almond extracts and other ingredients. Respondent promotes Almond Beautiful Shape and Almond Shaping Delight as able to slim and reshape the body.

5. Respondent disseminated or caused to be disseminated advertisements for Almond Beautiful Shape and Almond Shaping Delight, including but not necessarily limited to the attached Exhibits A to D. These advertisements contain the following statements:

a. Shape magazine advertisement (Exhibit A)

Body Sculpting Solved
with L'OCCITANE

L'OCCITANE has harnessed nature's secret, with body sculpting almond extracts cultivated in the south of France. We've teamed up with the Shaping Experts

to bring you a firmer, smoother body… and it's all just 4 weeks away!

. . . .

Almond
Shaping Delight
3 out of 4 women saw
firmer, lifted skin.*
This luxuriously lightweight
massage gel instantly melts
into the skin to help visibly **{SCULPTING EXPERT}**
refine and sculpt the
silhouette.
*Reported by 25 women after 4 weeks.

. . . .

Almond Beautiful Shape
Trim 1.3 inches in just 4 weeks.*
This ultra-fresh gel-cream helps to visibly
reduce the appearance of cellulite, while
smoothing and firming the skin.
*Centimetric loss measurement of thigh circumference.
{CELLULITE FIGHTER}

b. Direct mail advertisement (Exhibit B)

TIME TO SHAPE UP!
NEW Almond Shaping Delight

CLINICALLY PROVEN
SLIMMING EFFECTIVENESS

. . . .

A noticeably **slimmer, firmer, you...**
(in just 4 weeks!)

NEW! ALMOND SHAPING DELIGHT

SCULPTING EXPERT

3 OUT OF 4 WOMEN SAW
FIRMER, LIFTED SKIN.*

This luxuriously lightweight massage gel instantly melts into the skin to help visibly refine and sculpt the silhouette. Almond bud extracts and almond proteins naturally slim, smooth and lift the skin's surface.

*Reported by 25 women after 4 weeks.

NEW! ALMOND BEAUTIFUL SHAPE

CELLULITE FIGHTER

TRIM 1.3 INCHES
IN JUST 4 WEEKS.*

Concentrated in a powerful combination of Almond and a NEW lemon micro-exfoliating extract, this ultra-fresh gel-cream helps to visibly reduce the appearance of cellulite, while smoothing and firming the skin.

*Centimetric loss measurement of thigh circumference.

c. Almond Beautiful Shape packaging (Exhibit C)

This ultra-fresh gel-cream helps to visibly reduce the appearance of cellulite and to slim the thighs and buttocks, while smoothing and firming the skin.

. . . .

• **ANTI-FAT STORAGE:** slows the appearance of new fat cells on the thighs and buttocks with Peruvian liana, quinoa extract and carrot essential oil.

• **FAT RELEASE:** releases existing fat cells particularly with almond tree buds, rich in draining flavonoids, natural caffeine, immortelle, palmarosa and peppermint essential oils.

. . . .

Effectiveness clinically proven on the Beautiful Shape formula:

- Trims up to 3,3cm from the circumference of thighs
- Cellulite is significantly reduced

d. Almond Shaping Delight packaging (Exhibit D)

This fresh massage gel instantly melts into the skin to contribute to visibly refine and reshape the silhouette, to resculpt and tone the body contours.

. . . .

Slimming effectiveness clinically proven*

. . . .

*25 women after 28 days

6. Through the means described in Paragraph 5, respondent has represented, directly or indirectly, expressly or by implication, that:

a. Topical use of Almond Beautiful Shape trims 1.3 inches from the user's thighs in just four weeks;

b. Topical use of Almond Beautiful Shape significantly slims the user's thighs and buttocks;

c. Topical use of Almond Beautiful Shape significantly reduces cellulite; and

d. Topical use of Almond Shaping Delight significantly slims the body in just four weeks.

7. Through the means described in Paragraph 5, respondent has represented, expressly or by implication, that it possessed and relied upon a reasonable basis that substantiated the representations set forth in Paragraph 6, at the time the representations were made.

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

9. Through the means described in Paragraph 5, respondent has represented, directly or indirectly, expressly or by implication, that:

a. Scientific tests prove that topical use of Almond Beautiful Shape trims 1.3 inches from the user's thighs in just four weeks;

b. Scientific tests prove that topical use of Almond Beautiful Shape significantly reduces cellulite; and

c. Scientific tests prove that Almond Shaping Delight significantly slims the body in just four weeks.

10. In truth and in fact:

a. Scientific tests do not prove that topical use of Almond Beautiful Shape trims 1.3 inches from the user's thighs in just four weeks;

b. Scientific tests do not prove that topical use of Almond Beautiful Shape significantly reduces cellulite; and

c. Scientific tests do not prove that Almond Shaping Delight significantly slims the body in just four weeks.

Among other things, the evidence relied on by respondent for its representations concerning Almond Beautiful Shape consisted primarily of results from a single unblinded, uncontrolled clinical trial. Moreover, respondent exaggerated the results of the trial; the average reported reduction in thigh circumference was less than one quarter of an inch, and only one participant out of fifty was reported to have achieved a reduction of 1.3 inches. The evidence relied on by respondent for its representation concerning Almond Shaping Delight consisted primarily of results from a single nonrandomized, unblinded, uncontrolled clinical trial. Therefore, the representations set forth in Paragraph 9 were, and are, false or misleading.

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

THEREFORE, the Federal Trade Commission this twenty-seventh day of March, 2014, has issued this complaint against respondent.

By the Commission

Complaint

Exhibit A

Exhibit A: *Shape* magazine advertisement

ADVERTISEMENT

The *Shape Up* Plan

Peel off the layers of winter and reveal a sleek new you just in time for Spring

Out with the negative, in with the positive. Learn to lighten up, and let go of the emotional build up. Replace each negative thought with a positive affirmation and see what a difference it makes in your state of mind.

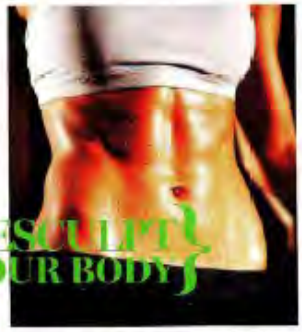
{RENEW YOUR SPIRIT}

{REFRESH YOUR LOOK}

Get a more polished look by paring down your closet to essential pieces that you can mix and match to make an array of stylish outfits for every occasion. Multi-tasking "musts" like a white button down shirt or a neutral colored cardigan will be easier to pair up than last year's trendy top.

{REFINE YOUR DIET}

Consuming a healthy, balanced diet and eliminating refined foods (white bread and rice, sugary cereals and pastries) from your diet may lower your overall body fat percentage and can help to reduce the appearance of unsightly dimples. The high fiber content in whole grains also helps to treat and prevent cellulite, according to the University of Maryland Medical Center.



{RESCULPT YOUR BODY}

Strong, toned muscles increase your metabolism and burn calories more than cardio-only workouts, walking or stair climbing. Incorporate core strengthening exercises and resistance training into your usual workout. Be sure to pay attention to your form so you get the best results.

Exhibit A-1


ADVERTISEMENT
Body Sculpting Solved
with L'OCCITANE
L'OCCITANE has harnessed nature's secret, with body sculpting almond extracts cultivated in the south of France. We've teamed up with the Shaping Experts to bring you a firmer, smoother body... and it's all just 4 weeks away!
Almond Shower Oil
Use as a cleanser or a shaving base to leave skin silky, supple and ready for application of your targeted shaping expert.
{BEST SELLER!}
Almond Milk Concentrate
96% of women saw smoother skin.*
This velvety, multi-tasking body cream for daily use nourishes, firms and tones the skin.
{BODY SMOOTHER}
Almond Shaping Delight
3 out of 4 women saw firmer, lifted skin.*
This luxuriously lightweight massage gel instantly melts into the skin to help visibly refine and sculpt the silhouette.
{SCULPTING EXPERT}
Almond Beautiful Shape
Trim 1.3 inches in just 4 weeks.*
This ultra-fresh gel-cream helps to visibly reduce the appearance of cellulite, while smoothing and firming the skin.
{CELLULITE FIGHTER}
Mark Your Calendar
Exclusive event with L'OCCITANE and SHAPE!
WHEN: Thursday, April 5th
WHAT: Enjoy an exclusive party with expert tips and detoxifying beauty treatments. Plus, receive a special gift with any $25 purchase.
WHERE: To find an event near you, visit usa.loccitane.com/ShapeUpEvent
Your Gift! A $40 Value

Exhibit A-2

Complaint

Exhibit B

Exhibit B: Direct mail advertisement

Exhibit B-1

Complaint

Exhibit B-2


THE TRUE STORY OF
ALMOND BODY CARE
A true customer favorite, Almond body care combines the sweet fragrance of sustainably cultivated almonds from Provence with incredibly firming and nourishing benefits.
Just in time for spring, you can now reveal a firmer, smoother body!
YOUR EXCLUSIVE GIFT!
Shape-Up Ritual
L'OCCITANE
EN PROVENCE
CONCENTRÉ DE LAIT
MILK CONCENTRATE
ALMOND MILK CONCENTRATE
$44 7 oz. #26LC20XA0
BODY SMOOTHER
96% OF WOMEN SAW SMOOTHER SKIN.*
This multi-tasking body cream nourishes, firms and tones the skin with the help of almond protein and silicium.

Exhibit B-3

Complaint

Exhibit B-4

Complaint

Exhibit C

Exhibit C: Almond Beautiful Shape packaging

Front

Side

Back

Exhibit C-1

Exhibit D

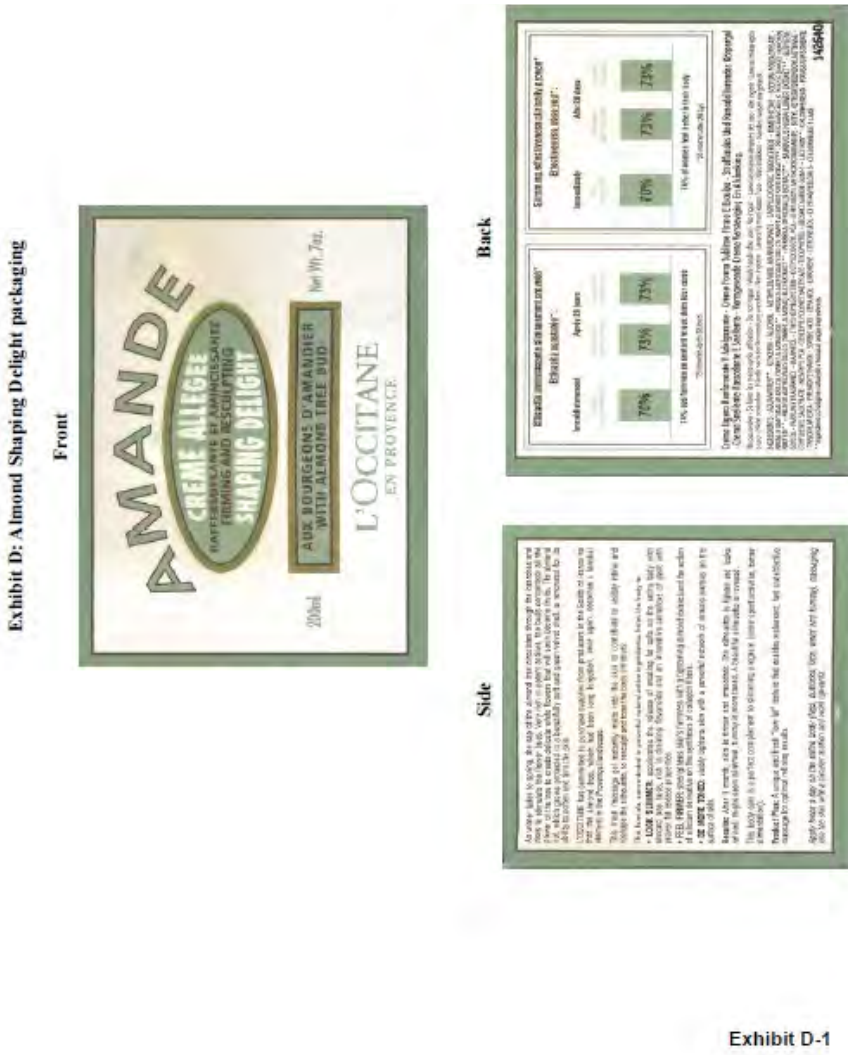


Exhibit D-1

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 of a complaint which the Western Region-San Francisco proposed to present to the Commission for its consideration and which, if issued, would charge the respondent with violations of the Federal Trade Commission Act; and

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 Federal Trade Commission Act, and that a complaint should issue stating its charges in that respect, and having thereupon accepted the executed consent agreement and placed such agreement on the public record for a period of thirty (30) days for the receipt and consideration of public comments, and having duly considered the comments received from an interested person pursuant to Commission Rule 2.34, 16 C.F.R. § 2.34, now in further conformity with the procedure prescribed in Commission Rule 2.34, the Commission hereby issues its complaint, makes the following jurisdictional findings and enters the following order:

1. Respondent L'Occitane, Inc., is a New York corporation with its principal office or place of business at 1430 Broadway, Second Floor, New York, New York 10018.

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

ORDER

DEFINITIONS

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

A. Unless otherwise specified, "respondent" shall mean L'Occitane, Inc., a corporation, its successors and assigns, and its officers, agents, representatives, and employees.

B. "Adequate and well-controlled human clinical study" means a human clinical study that is randomized, double-blind, placebo controlled, and conducted by persons qualified by training and experience to conduct such study.

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

D. "Covered Product" means any drug or cosmetic.

E. "Drug" and "cosmetic" mean as defined in Section 15 of the FTC Act, 15 U.S.C. § 55.

F. "Essentially Equivalent Product" means a product that contains the identical ingredients, except for inactive ingredients (e.g., binders, colors, fillers, excipients), in the same form and dosage, and with the same route of administration (e.g., orally, sublingually), as the Covered Product; *provided that* the Covered Product may contain additional ingredients if reliable scientific evidence generally accepted by experts in the field demonstrates that the amount and combination of additional ingredients is unlikely to impede or inhibit the effectiveness of the ingredients in the Essentially Equivalent Product.

I.

IT IS ORDERED that respondent, 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 Almond Beautiful Shape, Almond Shaping Delight, or any other topically applied product, in or affecting commerce, shall not represent, in any manner, expressly or by implication, including through the use of a product name, endorsement, depiction, or illustration, that use of such product causes substantial weight or fat loss or a substantial reduction in body size.

II.

IT IS FURTHER ORDERED that respondent, 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, other than representations covered under Part I of this order, in any manner, expressly or by implication, including through the use of a product name, endorsement, depiction, or illustration, that use of such product causes weight or fat loss or a reduction in body size, unless the representation is non-misleading, and, at the time it is made, respondent possesses and relies upon competent and reliable scientific evidence that substantiates that the representation is true. For purposes of this Part, competent and reliable scientific evidence shall consist of at least two adequate and well-controlled human clinical studies of the Covered Product, or of an Essentially Equivalent Product, conducted by different researchers, independently of each other, that conform to acceptable designs and protocols and whose results, when considered in light of the entire body of relevant and reliable scientific evidence, are sufficient to substantiate that the representation is true. Respondent shall have the burden of proving that a product satisfies the definition of Essentially Equivalent Product.

III.

IT IS FURTHER ORDERED that respondent, 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, other than representations covered under Parts I and II of this order, in any manner, expressly or by implication, including through the use of a product name, endorsement, depiction, or illustration, that use of such product reduces or eliminates cellulite or affects body fat or weight, unless the representation is non-misleading, and, at the time of making such representation, the respondent possesses and relies 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, 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 that are generally accepted in the profession to yield accurate and reliable results.

IV.

IT IS FURTHER ORDERED that respondent, 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 product in or affecting commerce, shall not misrepresent, or assist others in misrepresenting, in any manner, expressly or by implication, including through the use of any product name or endorsement:

A. The existence, contents, validity, results, conclusions, or interpretations of any test, study, or research; or

B. That the benefits of the product are scientifically proven.

V.

IT IS FURTHER ORDERED that nothing in this order shall prohibit respondent from making any representation for:

A. 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; and

B. 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.

VI.

IT IS FURTHER ORDERED that respondent shall, within thirty (30) days after the date of entry of this order, provide to the Commission a searchable electronic file containing the name and contact information of all consumers who purchased Almond Beautiful Shape or Almond Shaping Delight from March 19, 2012 through the date of entry of this order, to the extent it has such information in its possession or control, including information available upon request from franchisees or others. Such file: (1) shall include each consumer's name and address, the product(s) purchased, the total amount of moneys paid less any amount credited for returns or refunds, the date(s) of purchase, and, if available, the consumer's telephone number and email address; (2) shall be updated through the National Change of Address database; and (3) shall be accompanied by a sworn affidavit attesting to its accuracy.

VII.

IT IS FURTHER ORDERED that respondent shall pay to the Federal Trade Commission the sum of four hundred fifty thousand dollars ($450,000). This payment shall be made in the following manner:

A. The payment shall be made by electronic funds transfer within ten (10) days after the date that this order becomes final and in accordance with instructions provided by a representative of the Federal Trade Commission.

B. In the event of default on any obligation to make payment under this order, interest, computed pursuant to 28 U.S.C. § 1961(a), shall accrue from the date of default to the date of payment. In the event such default continues for ten (10) calendar days beyond the date that payment is due, the entire amount shall immediately become due and payable.

C. All funds paid to the Commission pursuant to this order shall be deposited into an account administered by the Commission or its agents to be used for equitable relief, including restitution, and any attendant expenses for the administration of such equitable relief. In the event that direct redress to consumers is wholly or partially impracticable or funds remain after the redress to consumers (which shall be the first priority for dispensing the funds set forth above) is completed, the Commission may apply any remaining funds for such other equitable relief (including consumer information remedies) as it determines to be reasonably related to respondent's practices alleged in the complaint. Any funds not used for such equitable relief shall be deposited in the United States Treasury as disgorgement. Respondent shall be notified as to how the funds are distributed, but shall have no right to challenge the Commission's choice of remedies under this Part. Respondent shall have no right to contest the manner of distribution chosen by the Commission. No portion of any payment under this Part shall be deemed a payment of any fine, penalty, or punitive assessment.

D. 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 for

return of the funds, directly or indirectly, through counsel or otherwise.

E. Respondent agrees that the facts as alleged in the complaint filed in this action shall be taken as true without further proof in any bankruptcy case or subsequent civil litigation pursued by the Commission to enforce its rights to any payment or money judgment pursuant to this order, including but not limited to a nondischargeability complaint in any bankruptcy case. Respondent further agrees that the facts alleged in the complaint establish all elements necessary to sustain an action by the Commission pursuant to Section 523(a)(2)(A) of the Bankruptcy Code, 11 U.S.C. § 523(a)(2)(A), and that this order shall have collateral estoppel effect for such purposes.

F. In accordance with 31 U.S.C. § 7701, respondent is hereby required, unless it has done so already, to furnish to the Commission its taxpayer identifying number, which shall be used for the purposes of collecting and reporting on any delinquent amount arising out of respondent's relationship with the government.

G. Proceedings instituted under this Part are in addition to, and not in lieu of, any other civil or criminal remedies that may be provided by law, including any other proceedings the Commission may initiate to enforce this order.

VIII.

IT IS FURTHER ORDERED that respondent L'Occitane, Inc., and its successors and assigns shall, for five (5) years after the last date of dissemination of any representation covered by this order, maintain and, upon reasonable notice and 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.

IX.

IT IS FURTHER ORDERED that respondent L'Occitane, Inc., and its successors and assigns shall deliver a copy of this order to all current and, for the next three (3) years, all future principals, officers, directors, and other employees having primary responsibilities with respect to the subject matter of this order, and shall secure from each such person a signed and dated statement acknowledging receipt of the order. Respondent L'Occitane, Inc., and its successors and assigns shall deliver this order to current personnel within thirty (30) days after the date of service of this order, and to future personnel within thirty (30) days after the person assumes such position or responsibilities.

X.

IT IS FURTHER ORDERED that respondent L'Occitane, Inc., and its successors and assigns shall notify the Commission at least thirty (30) days prior to any change in the corporation(s) that may affect compliance obligations arising under this order, including but not limited to a dissolution, assignment, sale, merger, or other action that would result in the emergence of a successor corporation; the creation or dissolution of a subsidiary, parent, or affiliate that engages in any acts or practices subject to this order; the proposed filing of a bankruptcy petition; or a change in the corporate name or address. Provided, however, that, with respect to any proposed change in the corporation about which respondent learns less than thirty (30) days prior to the date such action is to take place, respondent shall notify the Commission as soon as is practicable after obtaining such knowledge. 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: In the Matter of L'Occitane, Inc., FTC File Number 122 3115. *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 respondent L'Occitane, Inc., and its successors and assigns shall, within sixty (60) days after the date of service of this order, file with the Commission a true and accurate report, in writing, setting forth in detail the manner and form of its own 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.

XII.

This order will terminate on March 27, 2034, or twenty (20) years from the most recent date that the United States or the Federal Trade Commission files a complaint (with or without an accompanying consent decree) in federal court alleging any violation of the order, whichever comes later; provided, however, that the filing of such a complaint will not affect the duration of:

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

B. This order's application to any respondent that is not named as a defendant in such complaint; and

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

Provided, further, that if such complaint is dismissed or a federal court rules that the respondent did not violate any provision of the order, and the dismissal or ruling is either not appealed or upheld

on appeal, then the order will terminate according to this Part as though the complaint had never been filed, except that the order will not terminate between the date such complaint is filed and the later of the deadline for appealing such dismissal or ruling and the date such dismissal or ruling is upheld on appeal.

By the Commission.

ANALYSIS OF CONSENT ORDER TO AID PUBLIC COMMENT

The Federal Trade Commission ("FTC" or "Commission") has accepted, subject to final approval, an Agreement Containing Consent Order from L'Occitane, Inc. ("respondent"). The proposed consent order has been placed on the public record for thirty (30) days for receipt of comments by interested persons. Comments received during this period will become part of the public record. After thirty (30) days, the Commission will again review the agreement and the comments received, and will decide whether it should withdraw from the agreement and take appropriate action or make final the agreement's proposed order.

This matter involves the advertising, marketing, and sale of "Almond Beautiful Shape" and "Almond Shaping Delight" (collectively, "the almond products") by respondent. Respondent has marketed the almond products to consumers through its retail stores and website, and through third-party retail outlets.

The almond products are skin creams that contain almond extracts and other ingredients. According to the FTC complaint, respondent promoted the almond products as able to slim and reshape the body.

Specifically, the FTC complaint alleges that respondent represented, in various advertisements, that topical use of Almond Beautiful Shape trims 1.3 inches from the user's thighs in just four weeks; topical use of Almond Beautiful Shape significantly

slims the user's thighs and buttocks; topical use of Almond Beautiful Shape significantly reduces cellulite; and topical use of Almond Shaping Delight significantly slims the body in just four weeks. The complaint alleges that these claims are unsubstantiated and thus violate the FTC Act. The complaint also alleges that respondent represented, in various advertisements, that scientific tests prove that topical use of Almond Beautiful Shape trims 1.3 inches from the user's thighs in just four weeks; scientific tests prove that topical use of Almond Beautiful Shape significantly reduces cellulite; and scientific tests prove that Almond Shaping Delight significantly slims the body in just four weeks. The complaint alleges that these claims are false and thus violate the FTC Act.

The proposed consent order contains provisions designed to prevent respondent from engaging in similar acts or practices in the future. Specifically, Part I prohibits respondent from claiming that the almond products or any other topically applied product causes substantial weight or fat loss or a substantial reduction in body size. Part I of the order is designed to fence in respondent by ensuring that extreme, scientifically unfeasible claims will not be made in the future.

Part II addresses the slimming claims at issue in this matter. It covers any representation, other than representations covered under Part I, that a drug or cosmetic causes weight or fat loss or a reduction in body size. Part II prohibits respondent from making such representations unless the representation is non-misleading, and, at the time of making such representation, respondent possesses and relies upon competent and reliable scientific evidence that substantiates that the representation is true. For purposes of Part II, the proposed order defines "competent and reliable scientific evidence" as at least two randomized, double-blind, placebo-controlled human clinical studies that are conducted by independent, qualified researchers and that conform to acceptable designs and protocols, and whose results, when considered in light of the entire body of relevant and reliable scientific evidence, are sufficient to substantiate that the representation is true.

Part III of the proposed order prohibits respondent from making any representation, other than representations covered

under Parts I or II, that use of a drug or cosmetic reduces or eliminates cellulite or affects body fat or weight, unless the representation is non-misleading, and, at the time of making such representation, respondent possesses and relies 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 Part III, the proposed order defines "competent and reliable scientific evidence" as tests, analyses, research, or studies that have been conducted and evaluated in an objective manner by qualified persons, and that are generally accepted in the profession to yield accurate and reliable results.

Part IV of the proposed order addresses the allegedly false claims that scientific tests prove that topical use of Almond Beautiful Shape trims 1.3 inches from the user's thighs in just four weeks; scientific tests prove that topical use of Almond Beautiful Shape significantly reduces cellulite; and scientific tests prove that Almond Shaping Delight significantly slims the body in just four weeks. Part IV prohibits respondent, when advertising any product, from misrepresenting the existence, contents, validity, results, conclusions, or interpretations of any test, study, or research, or misrepresenting that the benefits of the product are scientifically proven.

Part V of the proposed order states that the order does not prohibit respondent from making representations for any drug that are permitted in labeling for that drug under any tentative or final standard promulgated by the Food and Drug Administration ("FDA"), or under any new drug application approved by the FDA. This part of the proposed order also states that the order does not prohibit respondent from making representations for any product that are specifically permitted in labeling for that product by regulations issued by the FDA under the Nutrition Labeling and Education Act of 1990.

Part VII of the proposed order requires respondent to pay four hundred and fifty thousand dollars ($450,000) to the Commission to be used for equitable relief, including restitution, and any attendant expenses for the administration of such equitable relief.

To facilitate the payment of redress, Part VI of the proposed order requires L'Occitane to provide to the Commission a searchable electronic file containing the name and contact information of all consumers who purchased the almond products from March 19, 2012 through the date of entry of the order.

Parts VIII, IX, X, and XI of the proposed order require respondent to keep copies of relevant advertisements and materials substantiating claims made in the advertisements; to provide copies of the order to its personnel; to notify the Commission of changes in corporate structure that might affect compliance obligations under the order; and to file compliance reports with the Commission. Part XII 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 their terms in any way.

Complaint

IN THE MATTER OF

GOLDENSHORES TECHNOLOGIES, LLC
AND
ERIK M. GEIDL

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

Docket No. C-4446; File No. 132 3087
Complaint, March 31, 2014 – Decision, March 31, 2014

This consent order addresses Goldenshores Technologies, LLC, and Erik M. Geidl's marketing of the "Brightest Flashlight Free" mobile application to consumers for use on their Android mobile devices. The complaint alleges that fail to disclose, or adequately disclose, that, when users run the Brightest Flashlight App, the application transmits, or allows the transmission of, their devices' precise geolocation along with persistent device identifiers to various third parties, including third party advertising networks. The complaint further alleges that the Brightest Flashlight App transmits, or causes the transmission of, device data as soon as the consumer launches the application and before they have chosen to accept or refuse the terms of the Brightest Flashlight EULA. The consent order requires respondents to give users of their mobile applications a clear and prominent notice and to obtain express affirmative consent prior to collecting their geolocation information; and to delete any "covered information" in their possession, custody, or control that they collected from users of the Brightest Flashlight App prior to the entry of the order. The order also prohibits respondent from misrepresenting (1) the extent to which "covered information" is collected, used, disclosed, or shared and (2) the extent to which users may exercise control over the collection, use, disclosure, or sharing of "covered information" collected from or about them, their computers or devices, or their online activities.

Participants

For the *Commission*: *Kerry O'Brien* and *Sarah Schroeder*.

For the *Respondents*: *Samuel T. Creason, Creason, Moore, Dokken & Geidl, PLLC.*

COMPLAINT

The Federal Trade Commission, having reason to believe that Goldenshores Technologies, LLC, a limited liability company, and Erik M. Geidl, individually and as the managing member of the limited liability 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:

1. Respondent Goldenshores Technologies, LLC, is a Delaware limited liability company with its principal office or place of business at 1205 Ponderosa Drive, Moscow, ID 83843.

2. Respondent Erik M. Geidl is the managing member of the limited liability company. Individually or in concert with others, he formulates, directs, or controls the policies, acts, or practices of the company, including the acts or practices alleged in this complaint. His principal office or place of business is the same as that of Goldenshores Technologies, LLC.

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

Brightest Flashlight Free Application

4. Since at least February 2011, respondents have advertised and distributed products to the public, including the "Brightest Flashlight Free" mobile application ("Brightest Flashlight App") developed for Google's Android operating system. Consumers have downloaded the Brightest Flashlight App from a variety of sources, including the Google Play application store. As of May 2013, the Google Play application store ranked the Brightest Flashlight App as one of the top free applications available for download. Users have downloaded the Brightest Flashlight App tens of millions of times via Google Play.

5. The Brightest Flashlight App purportedly works by activating all lights on a mobile device, including, where available, the device's LED camera flash and screen to provide outward-facing illumination. While running, however, the application also transmits, or allows the transmission of, data from the mobile device to various third parties, including advertising networks. The types of data transmitted include, among other things, the device's precise geolocation along with persistent device identifiers that can be used to track a user's location over time.

6. Respondents have disseminated or have caused to be disseminated application promotion pages ("app promotion pages") for the Brightest Flashlight App in Google Play, including but not limited to the attached Exhibit A. The app promotion pages provide a description of the application. (*See* Exhibit A, screens 1 to 3) This description does not make any statements relating to the collection or use of data from users' mobile devices. The app promotion pages also include the general "permission" statements that appear for all Android applications. (*See* Exhibit A, screens 12 to 30)

7. Android "permissions" provide notice to consumers regarding what sensitive information (*e.g.*, location information) or sensitive device functionality (*e.g.*, the ability to take photos with the device's camera) an application may access. The permissions, however, do not explain whether the application shares any information with third parties.

Respondents' Privacy Policy

8. Consumers may view respondents' Privacy Policy by clicking on a Privacy Policy link on the Brightest Flashlight app promotion pages in Google Play. (See Exhibit A, screen 9) The Privacy Policy also is available at respondents' website, www.goldenshorestechnologies.com.

9. Respondents have disseminated or have caused to be disseminated respondents' Privacy Policy, including but not limited to the attached Exhibit B. Their Privacy Policy contains the following statements concerning the collection and use of device data:

> Consent to Use of Data. Goldenshores Technologies and its subsidiaries and agents may collect, maintain, process and use diagnostic, technical and related information, including but not limited to information about your computer, system and application software, and peripherals, that is gathered periodically to facilitate the provision of software updates, product support and other services to you (if any) related to the Goldenshores Technologies Software, and to verify compliance with the

> terms of the License. Goldenshores Technologies may use this information, as long as it is in a form that does not personally identify you, to improve our products or to provide services or technologies to you.
>
> (Exhibit B-1, Privacy Policy)

Following this summary, the Privacy Policy provides the contents of the Brightest Flashlight end user license agreement ("EULA"), described below.

10. Respondents' Privacy Policy does not disclose or adequately disclose to consumers that the Brightest Flashlight App transmits or allows the transmission of device data, including precise geolocation along with persistent device identifiers, to third parties, including advertising networks.

Respondents' End-User License Agreement Document

11. After installing the Brightest Flashlight App, the application presents users with a Brightest Flashlight EULA, including but not limited to the attached Exhibit C. The Brightest Flashlight EULA instructs consumers to:

> [R]ead this software license agreement ("license") carefully before using the Goldenshores Technologies Software. By using the Goldenshores Technologies software, you are agreeing to be bound by the terms of this license. If you do not agree to the terms of this license, do not install and/or use the software.
>
> (Exhibit C, screens 4-5)

The Brightest Flashlight EULA also represents that users must "Accept" or "Refuse" the EULA by selecting the appropriate button. (Exhibit C) Those buttons appear at the bottom of each screen displaying the EULA.

12. The Brightest Flashlight EULA reiterates respondents' Privacy Policy, including the following statements relating to the collection and use of device data:

> 3. Consent to Use of Data. You agree that Goldenshores Technologies and its subsidiaries and agents may collect, maintain, process and use diagnostic, technical and related information, including but not limited to information about your computer, system and application software, and peripherals, that is gathered periodically to facilitate the provision of software updates, product support and other services to you (if any) related to the Goldenshores Technologies Software, and to verify compliance with the terms of this License. Goldenshores Technologies may use this information, as long as it is in a form that does not personally identify you, to improve our products or to provide services or technologies to you.

(Exhibit C, screens 14-15)

13. As described in Paragraph 12, the Brightest Flashlight EULA does not disclose or adequately disclose to consumers that the Brightest Flashlight App transmits or allows the transmission of device data, including precise geolocation along with persistent device identifiers, to third parties, including advertising networks.

14. While the "Refuse" button, described in Paragraph 11, appears to give consumers the option to refuse the terms of the Brightest Flashlight EULA, including the terms relating to the collection and use of device data, that choice is illusory. Based upon the statements made in the EULA, as described in Paragraphs 11 and 12, consumers would not expect the application to operate on their mobile devices, including collecting and using their device data, until after they have accepted the terms of the EULA. In fact, while consumers are viewing the Brightest Flashlight EULA, the application transmits or causes the transmission of their device data, including the device's precise geolocation and persistent identifier, even before they accept or refuse the terms of the EULA.

COUNT I

15. Through the means described in Paragraphs 9 and 12, respondents represented, expressly or by implication, that respondents may periodically collect, maintain, process, and use information from users' mobile devices to provide software updates, product support, and other services to users related to the Brightest Flashlight App, and to verify users' compliance with respondents' EULA. In numerous instances, in which respondents have made such representations, respondents have failed to disclose or failed to adequately disclose that, when users run the Brightest Flashlight App, the application transmits, or allows the transmission of, their devices' precise geolocation along with persistent device identifiers to various third parties, including third party advertising networks. These facts would be material to users in their decision to install the application. The failure to disclose, or adequately disclose, these facts, in light of the representation made, was, and is, a deceptive practice.

COUNT II

16. Through the means described in Paragraphs 11 and 12, respondents represented, expressly or by implication, that consumers have the option to refuse the terms of the Brightest Flashlight EULA, including those relating to the collection and use of device data, and thereby prevent the Brightest Flashlight App from ever collecting or using their device's data.

17. In truth and in fact, consumers cannot prevent the Brightest Flashlight App from ever collecting or using their device's data. Regardless of whether consumers accept or refuse the terms of the EULA, the Brightest Flashlight App transmits, or causes the transmission of, device data as soon as the consumer launches the application and before they have chosen to accept or refuse the terms of the Brightest Flashlight EULA. Therefore, the representation set forth in Paragraph 16 was, and is, false or misleading.

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

THEREFORE, the Federal Trade Commission this thirty-first day of March, 2014, has issued this complaint against respondents.

By the Commission.

Complaint

Exhibit A

Exhibit A-1


Apps
Brightest Flashlight Free™


Apps
Brightest Flashlight Free™


Apps
Brightest Flashlight Free™
REVIEWS
4.8


Apps
Brightest Flashlight Free™

Exhibit A-2

Complaint

Exhibit A-3


Modify or delete the contents of your USB storage
Allows the app to write to the USB storage
OK


Apps
Brightest Flashlight Free™
Storage
System tools
Your location
Camera


System tools
Install shortcuts
Allows an app to add shortcuts without user intervention
Uninstall shortcuts
Allows the app to remove shortcuts without user intervention
OK


Apps
Brightest Flashlight Free™
Storage
System tools
Your location
Camera

Exhibit A-4

Complaint

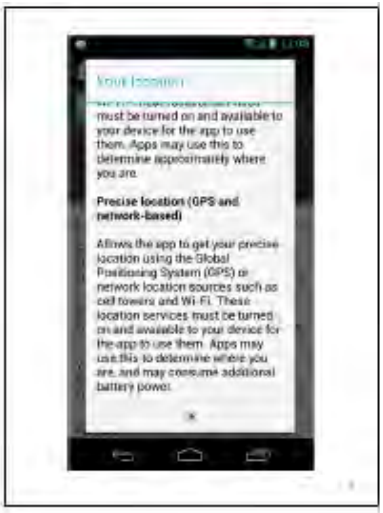


Exhibit A-5


Apps
Brightest Flashlight Free*
Phone calls
Network communication
Hide
System tools
Network communication


Read phone status and identity
Allows the app to access the phone features of the device. This permission allows the app to determine the phone number and device IDs, whether a call is active, and the remote number connected by a call.
OK


Apps
Brightest Flashlight Free*
Phone calls
Network communication
Hide
System tools
Network communication


Full network access
Allows the app to create network sockets and use custom network protocols. The browser and other applications provide means to send data to the internet, so this permission is not required to send data to the internet.
OK

Exhibit A-6

Complaint

Exhibit A-7


Apps
Brightest Flashlight Free*
Network communication
Hide
System tools
Network communication
Affects Battery


Affects Battery
Control flashlight
Allows the app to control the flashlight.
Prevent phone from sleeping
Allows the app to prevent the phone from going to sleep

Exhibit A-8

Complaint

Exhibit B

Exhibit B-1

PLEASE READ THIS SOFTWARE LICENSE AGREEMENT ("LICENSE") CAREFULLY BEFORE USING THE GOLDENSHORES TECHNOLOGIES SOFTWARE. BY USING THE GOLDENSHORES TECHNOLOGIES SOFTWARE, YOU ARE AGREEING TO BE BOUND BY THE TERMS OF THIS LICENSE. IF YOU DO NOT AGREE TO THE TERMS OF THIS LICENSE, DO NOT INSTALL AND/OR USE THE SOFTWARE.

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Exhibit B-2

Complaint

over a network where it could be used by multiple devices at the same time. You may not rent, lease, lend, sell, redistribute or sublicense the Goldenshores Technologies Software.

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Exhibit B-3

Goldenshores Technologies Software or that desired results will be obtained.

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(b) You understand that by using any of the Services, you may encounter content that may be deemed offensive, indecent, or objectionable, which content may or may not be identified as having explicit language, and that the results of any search or entering of a particular URL may automatically and unintentionally generate links or references to objectionable material. Nevertheless, you agree to use the Services at your sole risk and that Goldenshores Technologies shall have no liability to you for content that may be found to be offensive, indecent, or objectionable.

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Exhibit B-4

Complaint

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Exhibit B-5

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6.1 If you are a customer who is a consumer (someone who uses the Goldenshores Technologies Software outside of your trade, business or profession), you may have legal rights in your country of residence which would prohibit the following limitations from applying to you, and where prohibited they will not apply to you. To find out more about rights, you should contact a local consumer advice organization.

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Exhibit B-7

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12. Third Party Acknowledgements. Portions of the

Exhibit B-8

Complaint

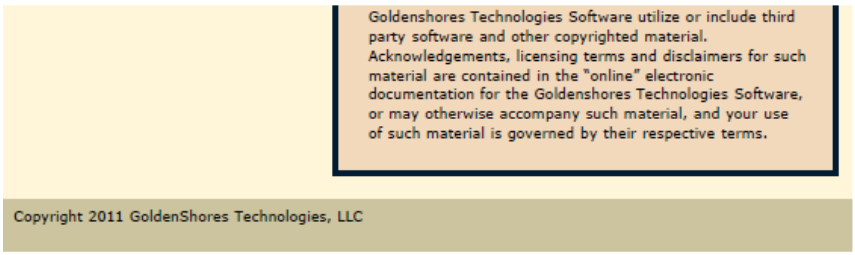
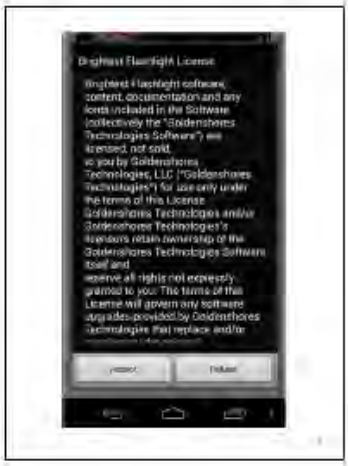


Exhibit B-9

Complaint

Exhibit C

Complaint



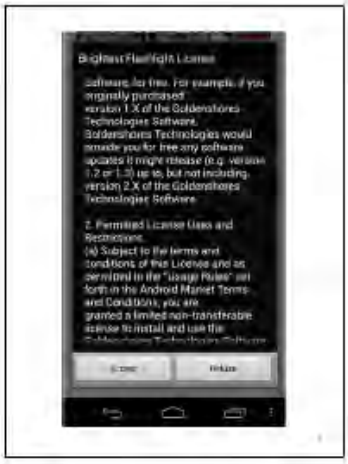


Exhibit C - 2

Complaint

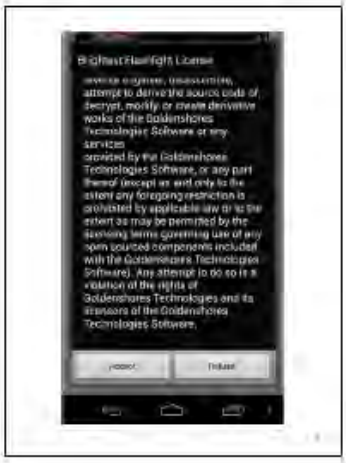


Exhibit C - 3

Complaint

Exhibit C - 4

Complaint

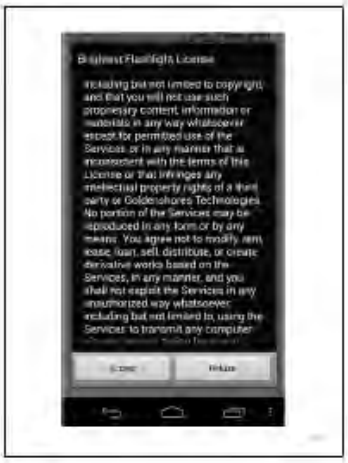


Exhibit C - 5

Complaint

Exhibit C - 6


Brightest Flashlight License
TECHNOLOGIES SOFTWARE AND SERVICES ARE PROVIDED "AS IS" WITH ALL FAULTS AND WITHOUT WARRANTY OF ANY KIND, AND GOLDENSHORES TECHNOLOGIES AND GOLDENSHORES TECHNOLOGIES'S LICENSORS (COLLECTIVELY REFERRED TO AS "GOLDENSHORES TECHNOLOGIES" FOR THE PURPOSES OF SECTIONS 5 AND
7) HEREBY DISCLAIM ALL WARRANTIES AND CONDITIONS WITH RESPECT TO THE GOLDENSHORES TECHNOLOGIES SOFTWARE AND SERVICES, EITHER EXPRESS, IMPLIED OR STATUTORY, INCLUDING, BUT NOT LIMITED TO, THE IMPLIED WARRANTIES AND/OR CONDITIONS OF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CONDITIONS OF MERCHANTABILITY, OF SATISFACTORY QUALITY, OF FITNESS FOR A PARTICULAR PURPOSE, OF ACCURACY, OF QUIET ENJOYMENT, AND NON-INFRINGEMENT OF THIRD PARTY RIGHTS.
5.4 GOLDENSHORES TECHNOLOGIES DOES NOT WARRANT AGAINST INTERFERENCE WITH YOUR ENJOYMENT OF THE GOLDENSHORES TECHNOLOGIES SOFTWARE OR SERVICES, THAT THE FUNCTIONS CONTAINED IN THE GOLDENSHORES TECHNOLOGIES SOFTWARE OR SERVICES WILL MEET YOUR REQUIREMENTS, THAT THE OPERATION OF THE


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THE OPERATION OF THE GOLDENSHORES TECHNOLOGIES SOFTWARE OR SERVICES WILL BE UNINTERRUPTED OR ERROR-FREE, THAT THE GOLDENSHORES TECHNOLOGIES SOFTWARE OR SERVICES WILL BE COMPATIBLE WITH THIRD PARTY SOFTWARE OR THAT DEFECTS IN THE GOLDENSHORES TECHNOLOGIES SOFTWARE OR SERVICES WILL BE CORRECTED.
5.5 YOU FURTHER ACKNOWLEDGE THAT THE GOLDENSHORES TECHNOLOGIES SOFTWARE AND SERVICES ARE NOT INTENDED OR SUITABLE FOR USE IN SITUATIONS OR ENVIRONMENTS WHERE THE


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ENVIRONMENTS WHERE THE FAILURE OF, OR ERRORS OR INACCURACIES IN THE CONTENT, DATA OR INFORMATION PROVIDED BY, THE GOLDENSHORES TECHNOLOGIES SOFTWARE OR SERVICES COULD LEAD TO DEATH, PERSONAL INJURY, OR SEVERE PHYSICAL OR ENVIRONMENTAL DAMAGE, INCLUDING WITHOUT LIMITATION THE OPERATION OF NUCLEAR FACILITIES, AIRCRAFT NAVIGATION OR COMMUNICATION SYSTEMS, AIR TRAFFIC CONTROL, LIFE SUPPORT OR WEAPONS SYSTEMS.
5.6 NO ORAL OR WRITTEN INFORMATION OR ADVICE GIVEN BY GOLDENSHORES TECHNOLOGIES

Exhibit C - 7

Complaint

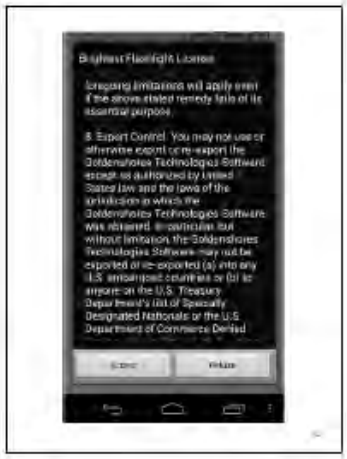
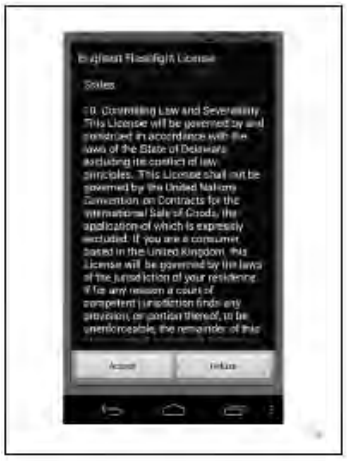


Exhibit C - 8



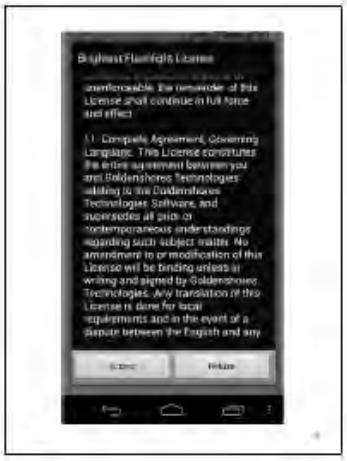


Exhibit C - 9

Complaint

Exhibit C -10

Complaint

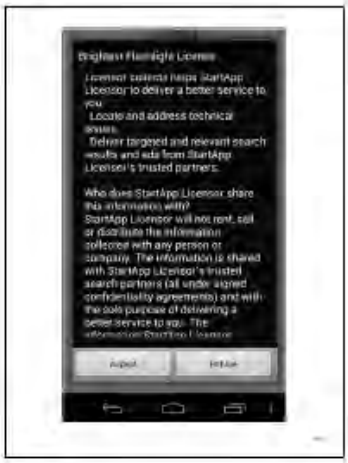
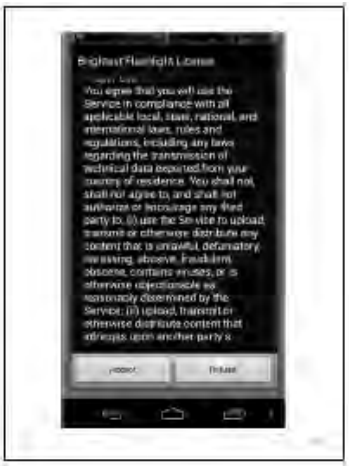


Exhibit C -11

Complaint

Exhibit C -12


Brightest Flashlight License
StartApp Licensor collects
Although taking high standards of
security, no digital information is
100% secure. StartApp Licensor
cannot guarantee the safety of the
information.
Data Retention
StartApp Licensor will retain your
information for as long as your
account is active or as needed to
provide you Services. StartApp
Licensor will retain and use your
information as necessary to comply
with StartApp Licensor's legal
obligations, resolve disputes and
enforce StartApp Licensor's
agreements.
Proper Use
You agree that you will use the


Brightest Flashlight License
You agree that you will use the
Service in compliance with all
applicable local, state, national, and
international laws, rules and
regulations, including any laws
regarding the transmission of
technical data exported from your
country of residence. You shall not,
shall not agree to, and shall not
authorize or encourage any third
party to, (i) use the Service to upload,
transmit or otherwise distribute any
content that is unlawful, defamatory,
harassing, abusive, fraudulent,
obscene, contains viruses, or is
otherwise objectionable as
reasonably determined by the
Service; (ii) upload, transmit or
otherwise distribute content that
infringes upon another party's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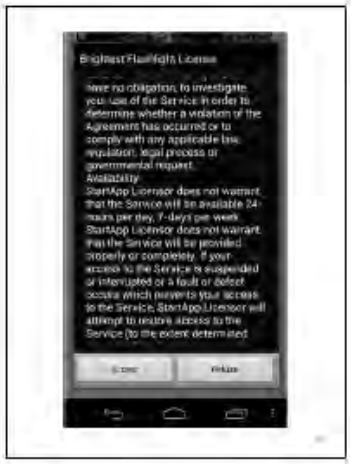
otherwise distribute content that
infringes upon another party's
intellectual property rights or other
proprietary, commercial or fiduciary
rights or obligations, (iii) prevent
others from using the Service; (iv)
use the Service for any fraudulent or
inappropriate purpose; (v) interfere
with, damage, disable, overburden,
impair or disrupt in any way the
Service; (vi) act in any way that
violates the Service policies, as may
be revised from time to time.
Violation of any of the foregoing may
result in immediate termination of
this Agreement, and may subject you
to state and federal penalties and
other legal consequences. StartApp
Licensor reserves the right, but shall
have no obligation, to investigate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have no obligation, to investigate
your use of the Service in order to
determine whether a violation of the
Agreement has occurred or to
comply with any applicable law,
regulation, legal process or
governmental request.
Availability
StartApp Licensor does not warrant
that the Service will be available 24-
hours per day, 7-days per week.
StartApp Licensor does not warrant
that the Service will be provided
properly or completely. If your
access to the Service is suspended
or interrupted or a fault or defect
occurs which prevents your access
to the Service, StartApp Licensor will
attempt to restore access to the
Service (to the extent determined

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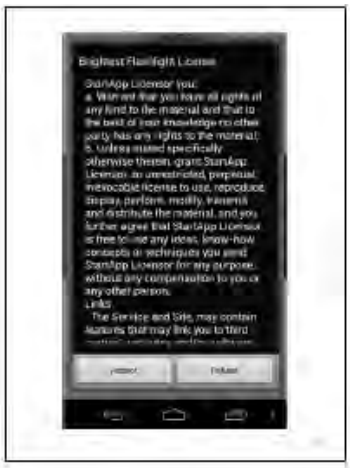
Complaint



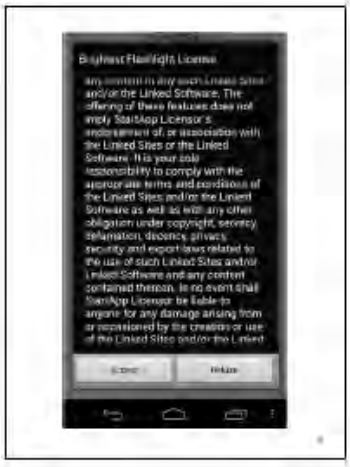


Exhibit C -14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SITE; AND (II) ANY WARRANTIES OF TITLE, WARRANTY OF NON-INFRINGEMENT, WARRANTIES OF MERCHANTABILITY OR FITNESS FOR A PARTICULAR PURPOSE. THIS DISCLAIMER OF LIABILITY APPLIES TO ANY DAMAGES OR INJURY CAUSED BY THE SERVICE OR SITE, INCLUDING WITHOUT LIMITATION AS A RESULT OF ANY FAILURE OF PERFORMANCE, ERROR, OMISSION, INTERRUPTION, DELETION, DEFECT, DELAY IN OPERATION OR TRANSMISSION, VIRUS, COMMUNICATION LINE FAILURE, THEFT OR DESTRUCTION OR UNAUTHORIZED ACCESS TO, ALTERATION OF OR USE OF RECORD, WHETHER FOR BREACH OF CONTRACT, TORT, NEGLIGENCE,

Exhibit C -15

Exhibit C -16

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 of a

complaint which the Western Region-San Francisco proposed to present to the Commission for its consideration and which, if issued, would charge the respondents with violations of the Federal Trade Commission Act; 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 had reason to believe that the respondents have violated the Federal Trade Commission Act, and that a complaint should issue stating its charges in that respect, and having thereupon accepted the executed consent agreement and placed such agreement on the public record for a period of thirty (30) days for the receipt and consideration of public comments, and having duly considered the comments received from interested persons pursuant to Commission Rule 2.34, 16 C.F.R. § 2.34, now in further conformity with the procedure prescribed in Commission Rule 2.34, the Commission hereby issues its complaint, makes the following jurisdictional findings and enters the following order:

1.a. Respondent Goldenshores Technologies, LLC, is a Delaware limited liability company with its principal office or place of business at 1205 Ponderosa Drive, Moscow, ID 83843.

1.b. Respondent Erik M. Geidl is the managing member of the limited liability company. Individually or in concert with others, he formulates, directs, or controls the policies, acts, or practices of the company. His principal office or place of business is the same as that of Goldenshores Technologies, LLC.

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:

A. Unless otherwise specified, "respondents" shall mean Goldenshores Technologies, LLC, its successors and assigns; and Erik M. Geidl, individually and as the managing member of the limited liability company.

B. "Affected Consumers" shall mean persons who, prior to the date of issuance of this order, downloaded and installed the "Brightest Flashlight Free" mobile application on their mobile device.

C. "Clearly and prominently" shall mean:

1. In textual communications (*e.g.*, printed publications or words displayed on the screen of a mobile device or computer), the required disclosures are of a type, size, and location sufficiently noticeable for an ordinary consumer to read and comprehend them, in print that contrasts highly with the background on which they appear;

2. In communications disseminated orally or through audible means (*e.g.*, radio or streaming audio), the required disclosures are delivered in a volume and cadence sufficient for an ordinary consumer to hear and comprehend them;

3. In communications disseminated through video means (*e.g.*, television or streaming video), the required disclosures are in writing in a form 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;

4. In communications made through interactive media, such as the Internet, online services, and software, the required disclosures are unavoidable and presented in a form consistent with subparagraph (A) of this definition, in addition to any audio or video presentation of them; and

5. In all instances, the required disclosures are presented in an understandable language and syntax; 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.

D. "Covered Information" shall mean information from or about an individual consumer, including but not limited to (a) a first and last name; (b) a home or other physical address, including street name and 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 geolocation data of an individual or mobile device, including but not limited to GPS-based, WiFi-based, or cell-based location information ("geolocation information"); (k) an authentication credential, such as a username and password; or (l) any other communications or content stored on a consumer's mobile device.

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

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 advertising, 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 Covered Information is collected, used, disclosed, or shared; and

B. The extent to which users may exercise control over the collection, use, disclosure, or sharing of Covered Information collected from or about them, their computers or devices, or their online activities.

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 the advertising, promotion, offering for sale, sale, or dissemination of any mobile application that collects, transmits, or allows the transmission of geolocation information, in or affecting commerce, shall not collect, transmit, or allow the transmission of such information unless such application:

A. Clearly and prominently, immediately prior to the initial collection of or transmission of such information, and on a separate screen from, any final "end user license agreement," "privacy policy," "terms of use" page, or similar document, discloses to the consumer the following:

1. That such application collects, transmits, or allows the transmission of, geolocation information;

2. How geolocation information may be used;

3. Why such application is accessing geolocation information; and

4. The identity or specific categories of third parties that receive geolocation information directly or indirectly from such application; and

B. Obtains affirmative express consent from the consumer to the transmission of such information.

III.

IT IS FURTHER ORDERED that respondents, within ten (10) days from the date of entry of this Order, shall delete all Covered Information relating to Affected Consumers that is within their possession, custody, or control and was collected at any time prior to the date of entry of this Order.

IV.

IT IS FURTHER ORDERED that respondents shall, for five (5) years from the entry of this order or from the date of preparation, whichever is later, maintain and upon request make available to the Federal Trade Commission for inspection and copying:

A. All advertisements and promotional materials containing any representation covered by this order, including but not limited to respondents' terms of use, end-user license agreements, frequently asked questions, privacy policies, and other documents publicly disseminated relating to: (a) the collection of data; (b) the use, disclosure or sharing of such data; and (c) opt-out practices and other mechanisms to limit or prevent such collection of data or the use, disclosure, or sharing of data;

B. All materials that were relied upon in disseminating any representation covered by this order;

C. Complaints or inquiries relating to any Covered Application, and any responses to those complaints or inquiries; and

D. Documents that are sufficient to demonstrate compliance with each provision of this order.

V.

IT IS FURTHER ORDERED that respondents shall for five (5) years from the entry of this order deliver a copy of this order to all current and future principals, officers, directors, and managers, and to all current and future employees, agents, and representatives having responsibilities with respect to the subject matter of this order, and shall secure from each such person a signed and dated statement acknowledging receipt of the order. Respondents shall deliver this order to current personnel within thirty (30) days after the date of service of this order, and to future personnel within thirty (30) days after the person assumes such position or responsibilities.

VI.

IT IS FURTHER ORDERED that respondent Goldenshores Technologies, LLC, and its successors and assigns, shall notify the Commission at least thirty (30) days prior to any change in the corporation(s) that may affect compliance obligations arising under this order, including but not limited to: a dissolution, assignment, sale, merger, or other action that would result in the emergence of a successor corporation; the creation or dissolution of a subsidiary, parent, or affiliate that engages in any acts or practices subject to this order; the proposed filing of a bankruptcy petition; or a change in the corporate name or address. *Provided, however*, that, with respect to any proposed change in the corporation about which respondent learns less than thirty (30) days prior to the date such action is to take place, respondent shall notify the Commission as soon as is practicable after obtaining such knowledge. 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: *In the Matter of Goldenshores Technologies, LLC*, File No. 132-3087.

VII.

IT IS FURTHER ORDERED that respondent Erik M. Geidl, 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 respondent's new business address and telephone number and a description of the nature of the business or employment and his duties and responsibilities. Unless otherwise directed by a representative of the Commission in writing, all notices required by this Part shall be emailed to Debrief@ftc.gov or sent by overnight courier (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: *In the Matter of Goldenshores Technologies, LLC*, File No. 132-3087.

VIII.

IT IS FURTHER ORDERED that respondents, within sixty (60) days after the date of service of this order, shall each file with the Commission a true and accurate report, in writing, setting forth in detail the manner and form of their own compliance with this order. Within ten (10) days of receipt of written notice from a representative of the Commission, they shall submit additional true and accurate written reports.

IX.

This order will terminate on March 31, 2034, or twenty (20) years from the most recent date that the United States or the Federal Trade Commission files a complaint (with or without an accompanying consent decree) in federal court alleging any violation of the order, whichever comes later; *provided, however*, that the filing of such a complaint will not affect the duration of:

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

B. This order's application to any respondent that is not named as a defendant in such complaint; and

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

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

By the Commission.

ANALYSIS OF CONSENT ORDER TO AID PUBLIC COMMENT

The Federal Trade Commission ("FTC" or "Commission") has accepted, subject to final approval, an agreement containing consent order from Goldenshores Technologies, LLC, and Erik M. Geidl ("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 decide whether it should withdraw from the agreement or make the proposed order final.

Since at least February 2011, respondents have marketed a mobile application called the "Brightest Flashlight Free" mobile application ("Brightest Flashlight App") to consumers for use on their Android mobile devices. The Brightest Flashlight App purportedly works by activating all lights on a mobile device, including, where available, the device's LED camera flash and screen to provide outward-facing illumination. As of May 2013,

users have downloaded the Brightest Flashlight App tens of millions of times.

The Commission's complaint alleges two violations of Section 5(a) of the FTC Act, which prohibits deceptive and unfair acts or practices in or affecting commerce, by respondents. First, according to the complaint, respondents represent in the Brightest Flashlight App's privacy policy statement and end-user license agreement ("EULA") that respondents may periodically collect, maintain, process, and use information from users' mobile devices to provide software updates, product support, and other services to users related to the Brightest Flashlight App, and to verify users' compliance with respondents' EULA. The complaint alleges that this claim is deceptive because respondents fail to disclose, or adequately disclose, that, when users run the Brightest Flashlight App, the application transmits, or allows the transmission of, their devices' precise geolocation along with persistent device identifiers to various third parties, including third party advertising networks.

Second, the complaint alleges that respondents falsely represent in the Brightest Flashlight EULA that consumers have the option to refuse the terms of the Brightest Flashlight EULA, including those relating to the collection and use of device data, and thereby prevent the Brightest Flashlight App from ever collecting or using their device's data. In fact, regardless of whether consumers accept or refuse the terms of the EULA, the Brightest Flashlight App transmits, or causes the transmission of, device data as soon as the consumer launches the application and before they have chosen to accept or refuse the terms of the Brightest Flashlight EULA.

The proposed consent order contains provisions designed to prevent respondents from engaging in similar acts or practices in the future. Specifically, Part I prohibits respondent from misrepresenting (1) the extent to which "covered information" is collected, used, disclosed, or shared and (2) the extent to which users may exercise control over the collection, use, disclosure, or sharing of "covered information" collected from or about them, their computers or devices, or their online activities. "Covered information" is defined as "(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 geolocation data of an individual or mobile device, including but not limited to GPS-based, WiFi-based, or cell-based location information ("geolocation information"); (k) an authentication credential, such as a username and password; or (l) any other communications or content stored on a consumer's mobile device."

Part II requires respondents to give users of their mobile applications a clear and prominent notice and to obtain express affirmative consent prior to collecting their geolocation information. Part III requires respondents to delete any "covered information" in their possession, custody, or control that they collected from users of the Brightest Flashlight App prior to the entry of the order.

Parts IV, V, VI, VII, and VIII of the proposed order require respondent to keep copies of relevant advertisements and materials substantiating claims made in the advertisements; to provide copies of the order to its personnel; to notify the Commission of changes in corporate structure that might affect compliance obligations under the order; and to file compliance reports with the Commission. Part IX provides that the order will terminate after twenty (20) years, with certain exceptions.

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

Complaint

IN THE MATTER OF

THERMO FISHER SCIENTIFIC INC.

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

Docket No. C-4431; File No. 131 0134
Complaint, January 30, 2014 – Decision, April 1, 2014

This consent order addresses the $13.6 billion acquisition by Thermo Fisher Scientific Inc. of certain assets of Life Technologies Corporation. The complaint alleges that the acquisition, if consummated, would violate Section 7 of the Clayton Act and Section 5 of the Federal Trade Commission Act by lessening competition in the markets for: (1) short/small interfering ribonucleic acid ("siRNA") reagents; (2) cell culture media; and (3) cell culture sera. The consent order requires Thermo Fisher is to divest its gene modulation business (which includes siRNA reagents) and its cell culture media and sera business to GE Healthcare.

Participants

For the *Commission*: *Emily J. Kozumbo*, *Jasmine Y. Rosner*, and *James R. Weiss.*

For the *Respondent*: *Mark D. Alexander*, *Morris A. Bloom*, *John D. Harkrider*, and *Michael L. Keeley*, *Axinn Veltrop & Harkrider 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 Thermo Fisher Scientific Inc. ("Thermo Fisher"), a corporation subject to the jurisdiction of the Commission, has agreed to acquire Life Technologies Corp. ("Life"), a corporation subject to the jurisdiction of the Commission, in violation of Section 5 of the FTC Act, as amended, 15 U.S.C. § 45, and that such acquisition, if consummated, would violate Section 7 of the Clayton Act, as amended, 15 U.S.C. § 18, and Section 5 of the FTC Act, as 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. THE RESPONDENT

1. Respondent Thermo Fisher is a corporation organized, existing, and doing business under and by virtue of the laws of the State of Delaware, with its headquarters and principal place of business at 81 Wyman Street, Waltham, Massachusetts 02454.

2. Respondent is engaged in, among other things, the production and sale of cell culture media, cell culture sera, and siRNA reagents, or small/short interfering RNA reagents.

3. 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

4. Life is a corporation organized, existing, and doing business under and by virtue of the laws of the State of Delaware, with its headquarters and principal place of business at 5781 Van Allen Way, Carlsbad, California 92008.

5. Life is engaged in, among other things, the production and sale of cell culture media, cell culture sera, and siRNA reagents.

6. Life 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

7. Under the terms of an Agreement and Plan of Merger (the "Agreement") dated April 14, 2013, Respondent Thermo Fisher

proposes to acquire all of the voting securities of Life for $13.6 billion (the "Acquisition").

IV. THE RELEVANT PRODUCT MARKETS

8. For the purposes of this Complaint, the relevant lines of commerce in which to analyze the effects of the Acquisition are the production and sale of (a) cell culture media, (b) cell culture sera, and (c) siRNA reagents.

a. Cell culture media are mixtures of salts, sugars, amino acids, vitamins, ions, and trace elements that are used to support the growth of cells. Cell culture media are provided in liquid or powder form, and include, but are not limited to, process liquids, standard basal media, customized media, proprietary media, and chemically-defined media.

b. Cell culture serum is an animal blood derivative that is used to propagate mammalian cell lines. Cell culture sera complement media by providing growth factors and other nutrients necessary for mammalian cells. Cell culture sera include, but are not limited to, fetal bovine sera, adult bovine sera, newborn calf sera, calf sera, equine sera, and porcine sera.

c. siRNA reagents are used to study gene function by silencing gene expression and protein synthesis. Individual siRNA reagents are uniquely suited towards specific genes. Collections of siRNA reagents, or siRNA libraries, are used to target a gene family or for full genome screening in, among other things, drug development and disease treatment. The relevant product market includes siRNA libraries as well as individual siRNA reagents.

9. For the purposes of this Complaint, the relevant geographic area in which to analyze the effects of the Acquisition in the relevant lines of commerce is no narrower than the United States and may be as broad as the entire world.

V. THE STRUCTURE OF THE MARKETS

10. The cell culture media market is highly concentrated currently, with only three main suppliers: Life, Thermo Fisher, and Sigma-Aldrich Corp. ("Sigma-Aldrich"). Combined, Thermo Fisher and Life would have more than a 50% share in the cell culture media market. Sigma-Aldrich, the next closest competitor, trails with a market share of approximately 25%. The balance of the cell culture media market is split among several smaller, less significant competitors. The Acquisition substantially increases concentration in the cell culture media market and reduces the number of major suppliers of cell culture media from three to two.

11. Thermo Fisher and Life are two of only three substantial competitors in the market for cell culture sera. Life has a market share in excess of 40%. Thermo Fisher's market share is approximately 20%. Sigma-Aldrich, the next largest competitor, has a market share of approximately 15%. Although other firms participate in this market, their market shares are considerably smaller. As a result, the Acquisition would substantially increase concentration in the cell culture sera market by combining the two most significant competitors and reducing the number of major suppliers from three to two.

12. Thermo Fisher and Life are two of only four significant competitors in the market for siRNA reagents. This is in large part because only these four firms have licenses for critical intellectual property necessary to compete effectively in this market. Thermo Fisher and Life offer the most advanced lines of siRNA reagents and are the only suppliers to offer a portfolio of siRNA reagents for the full human genome. The other license holders, Sigma-Aldrich and Qiagen N.V., do not offer as advanced or as many siRNA reagents as Thermo Fisher and Life. Combined, Thermo Fisher and Life would have a market share of more than 50% for individual siRNA reagents and greater than 90% for siRNA libraries. As a result, the Acquisition would substantially increase concentration in the market for siRNA reagents.

VI. ENTRY CONDITIONS

13. Sufficient and timely entry into the relevant product markets described in Paragraph 8 is unlikely to deter or counteract the anticompetitive effects of the Acquisition. Entry into each of these relevant product markets requires a significant amount of time and resources. In each relevant product market, a firm must develop products with high levels of performance and reliability to establish the brand recognition necessary to compete effectively. A potential entrant must also develop around or obtain licenses for existing intellectual property. Moreover, entry into the cell culture media and sera markets requires substantial upfront investment to build sufficient capacity to supply the needs of large industrial customers, while in the case of cell culture sera, a potential entrant must competitively bid against established market participants for access to limited supplies of raw sera. Finally, a potential entrant must establish a U.S. sales force, offering high-quality technical support.

VII. THE EFFECTS OF THE ACQUISITION

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

a. by eliminating actual, direct, and substantial competition between Respondent Thermo Fisher and Life and reducing the number of competitors for the sale of each relevant product;

b. by increasing the likelihood that Respondent Thermo Fisher would unilaterally exercise market power for each relevant product;

c. by increasing the likelihood and degree of coordinated interaction between or among suppliers for each relevant product;

d. by increasing the likelihood that consumers would experience lower levels of quality and service for each relevant product; and

e. by increasing the likelihood that customers would be forced to pay higher prices for each relevant product.

VIII. VIOLATIONS CHARGED

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

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

WHEREFORE, THE PREMISES CONSIDERED, the Federal Trade Commission on this thirtieth day of January, 2014, issues its Complaint against said Respondent.

By the Commission.

ORDER TO HOLD SEPARATE AND MAINTAIN ASSETS
[Public Record Version]

The Federal Trade Commission ("Commission"), having initiated an investigation of the proposed acquisition of Life Technologies Corporation ("Life"), by Thermo Fisher Scientific Inc. ("Respondent Thermo Fisher"), and Respondent Thermo Fisher 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 Thermo Fisher 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 Thermo Fisher 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 Thermo Fisher 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 thereupon accepted the executed Consent Agreement and placed such agreement on the public record for a period of thirty (30) days, now in conformity with the procedure prescribed in § 3.25(f) of its Rules, the Commission hereby makes the following jurisdictional findings and factual findings and issues the following Order to Hold Separate and Maintain Assets ("Hold Separate Order"):

1. Respondent Thermo Fisher is a corporation organized, existing and doing business under the laws of the State of Delaware with its office and principal headquarters located at 81 Wyman Street, Waltham, Massachusetts 02451.

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

I.

IT IS HEREBY ORDERED that, as used in this Hold Separate Order, the following definitions, and all other definitions used in the Consent Agreement and the Decision and Order, shall apply:

A. "Divestiture Businesses Employee(s)" means any and all employees working, in any capacity and for any amount of time, for the Dharmacon Gene Modulation Business, or the HyClone Cell Culture Business, including all employees who share time between the Divestiture Businesses and businesses that Respondent Thermo Fisher may retain after the divestiture pursuant to the Decision and Order. For purposes of this Hold Separate Order, the Persons not included as Divestiture Businesses Employees are (1) the employees whose time is exclusively dedicated to SUTs; or (2) employees who have no work time devoted to or related to Gene Modulation Products.

B. "Hold Separate Manager(s)" means the Person or Persons appointed pursuant to Paragraph IV of this Hold Separate Order to be the manager(s) of the Divestiture Businesses.

C. "Hold Separate Monitor" means the Person appointed pursuant to Paragraph III of this Hold Separate Order to oversee the Hold Separate Manager(s) and the Divestiture Businesses.

D. "Hold Separate Period" means the period during which the Divestiture Businesses shall be held separate from Respondent Thermo Fisher's other businesses under this Hold Separate Order, which shall begin on the Acquisition Date and terminate on the Closing Date.

E. "Hold Separate Services" means those services provided by the Divestiture Businesses and certain Divestiture Businesses Employees (1) in the ordinary course of each such employee's job, and (2) that are reasonable and necessary to ensure that Respondent Thermo Fisher's businesses -- not a part of the Divestiture Businesses -- are able to continue to operate in the normal course of business, independently of the Divestiture Businesses during the Hold Separate Period, including but not limited to the transition services described in Paragraph VI.B.3 of this Order and in the Schedules to Exhibit C to the

Remedial Agreements. Hold Separate Services shall be subject to review and approval of the Hold Separate Monitor.

F. "Orders" means the Decision and Order and the Hold Separate Order.

II.

IT IS FURTHER ORDERED that:

A. With respect to the Divestiture Businesses, and subject to consultation with the Hold Separate Monitor regarding the Hold Separate Services, during the Hold Separate Period, Respondent Thermo Fisher shall:

1. Hold the Divestiture Businesses separate, apart, and independent of Respondent Thermo Fisher's other businesses and assets as required by this Hold Separate Order and shall vest the Divestiture Businesses with all rights, powers, and authority necessary to conduct business in a manner consistent with the Orders;

2. Not exercise direction or control over, or influence directly or indirectly, the Divestiture Businesses or any of their operations, the Hold Separate Monitor, or the Hold Separate Manager, except to the extent that Respondent Thermo Fisher must exercise direction and control over the Divestiture Businesses as is necessary to assure compliance with this Hold Separate Order, the Consent Agreement, the Decision and Order, and all applicable laws and regulations, including, in consultation with the Hold Separate Monitor, continued oversight of compliance of the Divestiture Businesses with policies and standards concerning safety, health, and environmental aspects of its operations and the integrity of its financial controls. Respondent Thermo Fisher shall have the right in consultation with the Hold Separate Monitor to defend any legal claims,

investigations, or enforcement actions threatened or brought against the Divestiture Businesses;

3. Take all actions necessary to maintain and assure the continued viability, marketability, and competitiveness of the Divestiture Businesses (including, but not limited to, taking such actions as the Hold Separate Monitor, in consultation with Commission staff, might request or direct that are reasonably necessary to maintain and assure the continued viability, marketability, and competitiveness of the Divestiture Businesses), and prevent the destruction, removal, wasting, deterioration, or impairment of the Divestiture Businesses, except for ordinary wear and tear;

4. Not sell, transfer, encumber, or otherwise impair the Divestiture Businesses (except as directed by the Hold Separate Monitor or required by the Orders); and

5. Provide the Divestiture Businesses with sufficient funding and financial resources necessary to maintain the full economic viability, marketability, and competitiveness of the Divestiture Businesses, including, but not limited to, all funding and financing necessary to: (i) operate the Divestiture Businesses in a manner consistent with how it has been operated, and is currently operated, in the normal course of business, and consistent with existing business, capital and strategic plans and operating budgets; (ii) carry out any planned or existing capital projects and physical improvements; (iii) perform maintenance, replacement, or remodeling of assets in the ordinary course of business; and (iv) provide capital, working capital, and reimbursement for any operating expenses, losses, capital losses, or other losses;

B. The purpose of this Hold Separate Order is to: (1) maintain and preserve the Divestiture Businesses as

viable, marketable, competitive, and ongoing businesses independent of Respondent Thermo Fisher until the divestiture required by the Decision and Order is achieved; (2) ensure that no Confidential Business Information is exchanged between Respondent Thermo Fisher and the Divestiture Businesses, except in accordance with the provisions of the Orders; (3) prevent interim harm to competition pending the divestiture and other relief; and (4) remedy any anticompetitive effects of the Acquisition.

III.

IT IS FURTHER ORDERED that:

A. KPMG LLP (Charles A. Riepenhoff, Jr., Managing Director) shall serve as Hold Separate Monitor to monitor and supervise the management of the Divestiture Businesses and ensure that Respondent Thermo Fisher comply with its obligations under the Orders.

B. Respondent Thermo Fisher shall enter into the Hold Separate Monitor Agreement with the Hold Separate Monitor that is attached as Appendix A, with the Hold Separate Monitor compensation attached at Non-Public Appendix A-1. The Hold Separate Monitor Agreement shall become effective on the Acquisition Date. The Hold Separate Monitor Agreement shall transfer to and confer upon the Hold Separate Monitor all rights, powers, and authority necessary to permit the Hold Separate Monitor to perform his duties and responsibilities pursuant to this Hold Separate Order in a manner consistent with the purposes of the Orders and in consultation with Commission staff, and shall require that the Hold Separate Monitor act in a fiduciary capacity for the benefit of the Commission. Further, the Hold Separate Monitor Agreement shall provide that:

1. The Hold Separate Monitor shall have the responsibility for monitoring the organization of

the Divestiture Businesses; supervising the management of the Divestiture Businesses by the Hold Separate Manager; overseeing the on-going Hold Separate Services coming from the Divestiture Businesses and Divestiture Business Employees to Respondent Thermo Fisher; maintaining the independence of the Divestiture Businesses; ensuring continued and adequate funding of the Divestiture Businesses; and monitoring Respondent Thermo Fisher's compliance with its obligations pursuant to this Hold Separate Order and the Decision and Order.

2. The Hold Separate Monitor shall act in a fiduciary capacity for the benefit of the Commission.

3. The Hold Separate Monitor shall have full and complete access to all of Respondent Thermo Fisher's facilities, personnel, and books and records relating to the Divestiture Businesses as may be necessary for or relate to the performance of the Hold Separate Monitor's duties under the Orders and the Hold Separate Monitor Agreement. The Books and Records to which the Hold Separate Monitor shall have access include, but are not limited to, any and all:

   a. Data and databases, including, but not limited to, databases with financial information relating to the Divestiture Businesses;

   b. Regularly-prepared reports relating to the Divestiture Businesses, including, but not limited to, financial, revenue, customer or operating statements or reports prepared daily, weekly, monthly, or on some other regular interval;

   c. Regularly-prepared or periodic reports prepared and filed with any Government Entity;

d. Reports or summaries of marketing and promotional activities by Respondent Thermo Fisher that relate to the Divestiture Businesses;

e. Reports, summaries, records, or documents from the past operations of the Divestiture Businesses sufficient to allow the Hold Separate Monitor to evaluate the performance of the Divestiture Businesses during the Hold Separate Period in comparison to the past performance of the Divestiture Businesses;

f. Other relevant reports, summaries, records documents, or information relating to the Divestiture Businesses as the Hold Separate Monitor may request; and

g. Financial summaries or reports, or other information, reports, or summaries relating to the Divestiture Businesses as the Hold Separate Monitor may request Respondent Thermo Fisher to locate, collect, organize, and develop for the Hold Separate Monitor.

4. The Hold Separate Monitor shall have the authority to employ, at the cost and expense of Respondent Thermo Fisher, such consultants, accountants, attorneys, and other representatives and assistants as are reasonably necessary to carry out the Hold Separate Monitor's duties and responsibilities.

5. The Hold Separate Monitor shall serve, without bond or other security, at the cost and expense of Respondent Thermo Fisher, on reasonable and customary terms commensurate with the person's experience and responsibilities. Respondent Thermo Fisher shall provide compensation to the Hold Separate Monitor, and pay the Hold Separate Monitor's costs and expenses (including, but not limited to, those related to consultants, accountants, attorneys, and other representatives

and assistants) on a monthly or other reasonable periodic basis.

6. Respondent Thermo Fisher shall indemnify the Hold Separate Monitor and hold him harmless against any losses, claims, damages, liabilities, or expenses arising out of, or in connection with, the performance of the Hold Separate Monitor's duties, including all reasonable fees of counsel and other expenses incurred in connection with the preparation for, or defense of, any claim, whether or not resulting in any liability, except to the extent that such losses, claims, damages, liabilities, or expenses result from the Hold Separate Monitor's gross negligence, willful or wanton acts, or bad faith.

7. The Commission may require the Hold Separate Monitor and each of the Hold Separate Monitor's consultants, accountants, attorneys, and other representatives and assistants to sign an appropriate confidentiality agreement relating to materials and information received from the Commission in connection with performance of the Hold Separate Monitor's duties.

8. Respondent Thermo Fisher may require the Hold Separate Monitor and each of the Hold Separate Monitor's consultants, accountants, attorneys, and other representatives and assistants to sign an appropriate confidentiality agreement; *provided, however*, that such agreement shall not restrict the Hold Separate Monitor from providing any information to the Commission.

9. Thirty (30) calendar days after the Hold Separate Order becomes final, and every thirty (30) calendar days thereafter until the Hold Separate Order terminates, and as requested by the Commission or Commission staff, the Hold Separate Monitor shall report in writing to the Commission concerning the efforts to accomplish the purposes of this Hold

Separate Order. Each report shall include, but not be limited to, the Hold Separate Monitor's assessment of the extent to which each of the Divestiture Businesses is meeting (or exceeding) its projected goals as reflected in business planning documents, budgets, projections, or any other regularly prepared financial statements.

10. Respondent Thermo Fisher shall comply with all terms of the Hold Separate Monitor Agreement, and any breach by Respondent Thermo Fisher of any term of the Hold Separate Monitor Agreement shall constitute a violation of this Hold Separate Order. Notwithstanding any paragraph, section, or other provision of the Hold Separate Monitor Agreement, any modification of the Hold Separate Monitor Agreement, without the prior approval of the Commission, shall constitute a failure to comply with the Hold Separate Order and the Decision and Order.

C. If the Hold Separate Monitor ceases to act or fails to act diligently and consistently with the purposes of this Hold Separate Order, the Commission may appoint a substitute Hold Separate Monitor, subject to the consent of Respondent Thermo Fisher, which consent shall not be unreasonably withheld, as follows:

1. If Respondent Thermo Fisher has not opposed in writing, including the reasons for opposing, the selection of the proposed substitute Hold Separate Monitor within five (5) business days after notice by the Commission staff to Respondent Thermo Fisher of the identity of the proposed substitute Hold Separate Monitor, then Respondent Thermo Fisher shall be deemed to have consented to the selection of the proposed substitute Monitor.

2. Respondent Thermo Fisher shall, no later than five (5) business days after the Commission appoints a substitute Hold Separate Monitor, enter into an agreement with the substitute Hold Separate

Monitor that, subject to the prior approval of the Commission, confers on the substitute Hold Separate Monitor all the rights, powers, and authority necessary to permit the substitute Hold Separate Monitor to perform his or her duties and responsibilities on the same terms and conditions as provided in Paragraph III of this Hold Separate Order.

D. The Hold Separate Monitor shall serve through the Hold Separate Period; *provided, however,* that the Commission may extend or modify this period as may be necessary or appropriate to accomplish the purposes of the Orders.

E. The Hold Separate Monitor shall not make any material changes in the ongoing operations or development of the Divestiture Businesses, and shall continue the management and operation of the Divestiture Businesses in a manner intended to ensure continued compliance with the indentures and credit agreements governing Respondent Thermo Fisher's indebtedness (and all notes and agreements related thereto), except with prior approval of the Commission staff, and after providing written notice to, and an opportunity for consultation with, Respondent Thermo Fisher.

F. The Commission may on its own initiative or at the request of the Hold Separate Monitor issue such additional orders or directions as may be necessary or appropriate to ensure compliance with the requirements of this Hold Separate Order.

IV.

IT IS FURTHER ORDERED that:

A. Respondent Thermo Fisher's employees shall not receive, have access to, use or continue to use, or disclose any Confidential Business Information

pertaining to the Divestiture Businesses except in the course of:

1. Performing their obligations as permitted under this Hold Separate Order;

2. Performing their obligations under any Remedial Agreement; or

3. Complying with financial reporting requirements, obtaining legal advice, defending legal claims, investigations, or enforcing actions threatened or brought against the Divestiture Businesses, or as required by law.

For purposes of this Paragraph IV.A., Respondent Thermo Fisher's employees who provide support services under the Hold Separate Order or staff the Divestiture Businesses shall be deemed to be performing obligations under the Order to Hold Separate.

B. If the receipt, access to, use, or disclosure of Confidential Business Information pertaining to the Divestiture Businesses is permitted to Respondent Thermo Fisher's employees under Paragraph IV.A. of this Order, Respondent Thermo Fisher shall limit such information (1) only to those Persons who require such information for the purposes permitted under Paragraph IV.A., (2) only to the extent such Confidential Business Information is required, and (3) only after such Persons have signed an appropriate agreement in writing to maintain the confidentiality of such information.

Respondent Thermo Fisher shall enforce the terms of this Paragraph IV as to any Person other than the Acquirer of the Divestiture Businesses and take such action as is necessary to cause each such Person to comply with the terms of this Paragraph IV, including training of Respondent Thermo Fisher's employees and all other actions that Respondent Thermo Fisher

would take to protect its own trade secrets and proprietary information.

V.

IT IS FURTHER ORDERED that:

A. Effective on the Acquisition Date, Respondent Thermo Fisher shall appoint Mike Deines as the Hold Separate Manager to manage and maintain the operations of the Dharmacon Gene Modulation Business and David Radspinner as the Hold Separate Manager to manage and maintain the operations of the HyClone Cell Culture Business in the regular and ordinary course of business and in accordance with past practice.

B. Respondent Thermo Fisher shall enter into the manager agreement with the Hold Separate Managers attached as Appendix B and Appendix C to this Hold Separate Order. Each manager agreement shall become effective on the Acquisition Date. The manager agreement shall transfer all rights, powers, and authority necessary to permit the Hold Separate Manager to perform his or her duties and responsibilities pursuant to this Hold Separate Order to manage the Divestiture Businesses. Further, the manager agreement shall provide that:

1. Each Hold Separate Manager shall be responsible for managing the operations of the Dharmacon Gene Modulation Business and the HyClone Cell Culture Business, respectively, through the Hold Separate Period, and shall report directly and exclusively to the Hold Separate Monitor and, subject to the Hold Separate Services, shall manage each business independently of the management of Respondent Thermo Fisher and its other businesses.

2. Each Hold Separate Manager shall make no material changes in the ongoing operations or development of the business, and shall continue the

management and operation of each business in a manner intended to ensure continued compliance with the indentures and credit agreements governing the Respondent Thermo Fisher's indebtedness (and all notes and agreements related thereto), except with the approval of the Hold Separate Monitor, in consultation with Commission staff, and after providing written notice to and an opportunity for consultation with Respondent Thermo Fisher, or as otherwise allowed by the Orders.

3. Each Hold Separate Manager, with the approval of the Hold Separate Monitor, shall have the authority to employ such Persons as are reasonably necessary to assist the Hold Separate Manager in managing each business, including, without limitation, consultants, accountants, attorneys, and other representatives, assistants, and employees.

4. Respondent Thermo Fisher shall provide each Hold Separate Manager with reasonable financial incentives to undertake these positions. Such incentives shall include a continuation of all employee benefits, including regularly scheduled raises, bonuses, vesting of pension benefits (as permitted by law), and additional incentives as may be necessary to assure the continuation, and prevent any diminution, of the viability, marketability, and competitiveness of the Divestiture Businesses, and as may otherwise be necessary to secure the Hold Separate Manager's agreement to achieve the purposes of this Hold Separate Order.

5. Each Hold Separate Manager shall serve, without bond or other security, at the cost and expense of Respondent Thermo Fisher, on reasonable and customary terms commensurate with the person's experience and responsibilities, and with any financial incentives that may be reasonable or necessary as described in this Paragraph V.

Respondent Thermo Fisher shall pay each Hold Separate Manager's costs and expenses (including, but not limited to, those related to consultants, accountants, attorneys, and other representatives and assistants) on a monthly or other reasonable periodic basis.

6. Respondent Thermo Fisher shall indemnify the Hold Separate Manager and hold him harmless against any losses, claims, damages, liabilities, or expenses arising out of, or in connection with, the performance of the Manager's duties, including all reasonable fees of counsel and other expenses incurred in connection with the preparation for, or defense of, any claim, whether or not resulting in any liability, except to the extent that such losses, claims, damages, liabilities, or expenses result from the Manager's gross negligence, willful or wanton acts, or bad faith.

7. Nothing contained herein shall preclude each Hold Separate Manager from contacting or communicating directly with the Commission staff, either at the request of the Commission staff or the Hold Separate Monitor, or in the discretion of the Hold Separate Manager.

8. Each Hold Separate Manager shall have the authority, in consultation with the Hold Separate Monitor, to staff the Divestiture Businesses with sufficient employees to maintain the viability and competitiveness of the businesses, including:

    a. Replacing any departing or departed employee with a person who has similar experience and expertise or determine not to replace such departing or departed employee;

    b. Removing any employee who ceases to act or fails to act diligently and consistent with the purposes of this Hold Separate Order, and

replacing or not replacing such employee with another person of similar experience or skills;

c. Ensuring that no employee shall be involved in any way in the operations of Respondent Thermo Fisher's other businesses, unless allowed or required by the Hold Separate Services or otherwise under the Orders;

d. Providing each Divestiture Businesses Employee, with reasonable financial incentives, including continuation of all salaries, employee benefits, and regularly scheduled raises and bonuses, to continue in his or her position during the Hold Separate Period; and

e. Providing each Divestiture Businesses Employee with additional financial incentives, to continue in his or her position throughout the Hold Separate Period.

C. Each Hold Separate Manager may be removed for cause by the Hold Separate Monitor, in consultation with the Commission staff. If a Hold Separate Manager is removed, resigns, or otherwise ceases to act as Hold Separate Manager, the Hold Separate Monitor shall, within three (3) business days of such action, subject to the prior approval of Commission staff, appoint a substitute Hold Separate Manager, and Respondent Thermo Fisher shall enter into an agreement with the substitute Hold Separate Manager on the same terms and conditions as provided in this Hold Separate Order.

VI.

IT IS FURTHER ORDERED that:

A. Respondent Thermo Fisher shall cooperate with, and take no action to interfere with or impede the ability of: (i) the Hold Separate Monitor: (ii) the Hold

Separate Managers; or (iii) any Divestiture Businesses Employee, to perform his or her duties and responsibilities consistent with the terms of the Orders.

B. Respondent Thermo Fisher shall continue to offer and provide any support services and goods (directly or through third-party contracts) to the Divestiture Businesses.

1. For support services and goods that Respondent Thermo Fisher provides to the Divestiture Businesses, Respondent Thermo Fisher may charge no more than the same price, if any, charged by Respondent Thermo Fisher for such support services and goods as of the Acquisition Date.

2. Respondent Thermo Fisher employees who provide support to the Divestiture Businesses shall retain and maintain all Confidential Business Information of the Divestiture Businesses on a confidential basis and, except as is permitted by the Orders, shall not provide, discuss, exchange, circulate, or otherwise furnish any such information to or with any Person whose employment involves any of Respondent Thermo Fisher's other businesses, other than the Divestiture Businesses. Respondent Thermo Fisher employees who provide support to the Divestiture Businesses shall also execute confidentiality agreements prohibiting the disclosure of any Confidential Business Information of the Divestiture Businesses.

3. The services and goods that Respondent Thermo Fisher shall offer the Divestiture Businesses shall include, but not be limited to, the following:

   a. Human resources and administrative support services, including, but not limited to, payroll processing and employee benefits, including health benefits and administration;

b. Preparation of tax returns;

c. Environmental health and safety services, which are used to insure compliance with federal and state regulations and corporate policies;

d. Financial accounting and reporting services;

e. Legal, licensing, and audit services;

f. Federal and state regulatory compliance;

g. Maintenance and oversight of all information technology systems and databases, including, but not limited to, all hardware, software, electronic mail, word processing, document retention, enterprise management systems, financial management systems and databases, customer databases, gaming systems, security systems, and reporting systems;

h. Processing of accounts payable and accounts receivable;

i. Distribution thru Fisher Scientific of products of the Divestiture Businesses on terms and with the level of support at least equivalent to the terms and support before the Acquisition;

j. Procurement of supplies, goods, and services utilized in the ordinary course of business by the Divestiture Businesses;

k. Public relations and public affairs support services;

l. Construction and development services;

m. Procurement and renewal of insurance and related services; and

n. Security and safety services.

4. Notwithstanding the above, the Divestiture Businesses shall have, at the option of the Hold Separate Managers and with the approval of the Hold Separate Monitor following consultation with Commission staff, the right to acquire support services from third parties unaffiliated with Respondent Thermo Fisher.

C. Respondent Thermo Fisher shall not permit:

1. Any of its employees, officers, agents, or directors, other than: (i) the Hold Separate Monitor; (ii) the Hold Separate Managers; and (iii) any Divestiture Businesses employee, to be involved in the operations of the Divestiture Businesses, except to the extent otherwise provided in this Hold Separate Order or required for the provision of Hold Separate Services.

2. The Hold Separate Managers or any of the Divestiture Business Employees to be involved, in any way, in the operations of Respondent Thermo Fisher's businesses other than the Divestiture Businesses, except to the extent required for the provision of Hold Separate Services.

D. Respondent Thermo Fisher shall provide the Divestiture Businesses with sufficient financial and other resources as are appropriate in the judgment of the Hold Separate Monitor, consistent with his obligations and responsibilities in this Hold Separate Order, to:

1. Operate the Divestiture Businesses at least as they are currently operated (including efforts to generate new business and complete development and construction projects) consistent with the practices of the Divestiture Businesses, and Respondent Thermo Fisher's business, capital, and strategic plans, in place as of the Acquisition;

2. Provide each Divestiture Businesses employee with reasonable financial incentives to continue in his or her position consistent with past practices and/or as may be necessary to preserve the marketability, viability, and competitiveness of the Divestiture Businesses pending divestiture. Such incentives shall include a continuation of all salaries, employee benefits, including funding of regularly scheduled raises and bonuses, vesting of pension benefits (as permitted by law), and additional incentives as may be necessary to assure the continuation, and prevent any diminution, of the viability, marketability, and competitiveness of the Divestiture Businesses during the Hold Separate Period, and as may otherwise be necessary to achieve the purposes of this Hold Separate Order;

3. Respondent Thermo Fisher will provide sufficient financial resources to allow the Hold Separate Monitor to provide certain important management or sales personnel of the Divestiture Businesses, at his discretion, with additional financial incentives to continue in his or her position until the termination of the Hold Separate Period;

4. Perform all maintenance to, and replacements or remodeling of, the assets of the Divestiture Businesses in the ordinary course of business, in accordance with past practice, and Respondent Thermo Fisher's business, capital, and strategic plans in place prior to the Acquisition Date;

5. Carry on such capital projects, physical plant improvements, and business plans as are already under way or planned, including, but not limited to, existing or planned renovation, remodeling, and expansion projects, all in accordance with Respondent Thermo Fisher's business, capital, and strategic plans in place prior to the Acquisition Date; and

6. Maintain the viability, competitiveness, and marketability of the Divestiture Businesses.

Such financial resources to be provided to the Divestiture Businesses shall include, but shall not be limited to: (i) general funds; (ii) capital; (iii) working capital; and (iv) reimbursement for any operating expenses, losses, capital losses, or other losses, *provided, however* that, consistent with the purposes of the Orders, the Hold Separate Monitor may, and in consultation with Commission staff, substitute any capital or development project for another of like cost.

E. No later than five (5) business days after the Acquisition Date, Respondent Thermo Fisher shall establish and implement written procedures, subject to the approval of the Hold Separate Monitor and in consultation with Commission staff, regarding the operational independence of the Divestiture Businesses and the independent management by the Hold Separate Monitor and each Hold Separate Manager, consistent with the provisions of this Hold Separate Order, the Decision and Order, the Hold Separate Monitor Agreement (attached as Appendix A to this Hold Separate Order), and the Hold Separate Manager agreements (attached as Appendices B and C to this Hold Separate Order).

F. No later than five (5) business days after the Acquisition Date, Respondent Thermo Fisher shall circulate to Divestiture Businesses employees, and to Respondent Thermo Fisher's employees who have responsibilities associated with businesses that compete with the Divestiture Businesses, the Decision and Order, and to Persons who are employed in Respondent Thermo Fisher's businesses that compete with the Divestiture Businesses, a notice of the Orders, in a form approved by the Hold Separate Monitor in consultation with Commission staff. This notice shall include, but not be limited to, information and directions about the independent operation of the Divestiture Businesses, and the limitations on

Respondent Thermo Fisher's rights to use or have access to Confidential Business Information.

VII.

IT IS FURTHER ORDERED that:

A. During the Hold Separate Period, Respondent Thermo Fisher shall:

1. Not provide, disclose, or otherwise make available any Confidential Business Information to any Person except as required or permitted by the Orders; and

2. Not use any Confidential Business Information for any reason or purpose other than as required or permitted by the Orders.

Provided, however, that nothing in this Paragraph VII shall prevent Respondent Thermo Fisher from using any tangible or intangible property that Respondent Thermo Fisher retains the right to use pursuant to the Orders, *provided, further, however*, that to the extent that the use of such property involves disclosure of Confidential Business Information to another Person, Respondent Thermo Fisher shall require such Person to maintain the confidentiality of such Confidential Business Information under terms no less restrictive than Respondent Thermo Fisher's obligations under the Orders.

B. Notwithstanding Paragraph VII.A. of this Hold Separate Order and subject to the Decision and Order, Respondent Thermo Fisher is permitted to retain a copy of any information used by, necessary for, or relating to Respondent Thermo Fishers businesses other than a Divestiture Businesses and may use Confidential Business Information:

1. For the purpose of performing Respondent Thermo Fisher's obligations under this Hold Separate

Order, the Decision and Order, or the Divestiture Agreement; and

2. As otherwise allowed in the Decision and Order.

C. If access to or disclosure of Confidential Business Information of the Divestiture Businesses to Respondent Thermo Fisher's employees and agents is necessary and permitted under Paragraph VII.B. of this Hold Separate Order, Respondent Thermo Fisher shall:

1. Implement and maintain processes and procedures, as approved by the Hold Separate Monitor and in consultation with Commission staff, pursuant to which Confidential Business Information of the Divestiture Businesses may be disclosed or used by Respondent Thermo Fisher's employees and agents;

2. Limit disclosure or use by its employees or agents to those who require access to such Confidential Business Information for uses permitted by the Orders;

3. Maintain and make available for inspection and copying by the Hold Separate Monitor and Commission staff records of Respondent Thermo Fisher's employees or agents who have accessed or used Confidential Business Information, a reasonable description of the Confidential Business Information to which they had access or used, and the dates upon which they accessed or used such information;

4. Require its employees and agents to sign, and maintain and make available for inspection and copying by the Hold Separate Monitor and Commission staff, appropriate written agreements to maintain the confidentiality of such information and to use such information only as permitted by the Orders; and

5. Enforce the terms of this Paragraph VII as to any of Respondent Thermo Fisher's employees and take such action as is necessary to cause each such employee to comply with the terms of this Paragraph VII. including:

    a. Training of Respondent Thermo Fisher's employees and agents in permitted access to and use of Confidential Business Information;

    b. Appropriate discipline of Respondent Thermo Fisher's employees and agents who fail to comply with processes and procedures established by Respondent Thermo Fisher pursuant to this Paragraph VI. Or any confidentiality agreement; and

    c. All other actions that Respondent Thermo Fisher would take to protect their own trade secrets, proprietary, and other non-public information.

D. Respondent Thermo Fisher shall implement and maintain in operation a system, approved by the Hold Separate Monitor and in consultation with Commission staff, of written procedures covering access and data controls to prevent unauthorized access to, or dissemination or use of, Confidential Business Information of the Divestiture Businesses, including, but not limited to, the opportunity by the Hold Separate Monitor to audit Respondent Thermo Fisher's networks and systems to verify compliance with Respondent Thermo Fisher's systems with the Orders.

E. Neither the Hold Separate Managers nor any Divestiture Businesses' employees shall receive or have access to, or use or continue to use, any Confidential Business Information relating to Respondent Thermo Fisher's businesses (not subject to the Hold Separate Order), except such information as

is necessary to maintain and operate the Divestiture Businesses and provide Hold Separate Services.

VIII.

IT IS FURTHER ORDERED that:

A. Respondent Thermo Fisher shall cooperate with and assist any proposed Acquirer of each of the Divestiture Businesses to evaluate independently and retain any of the Divestiture Businesses employees, such cooperation to include at least to implement the provisions of the Decision and Order relating to employee interviewing and hiring.

B. During the Hold Separate Period, Respondent Thermo Fisher shall waive any corporate policy, rules, and regulations, and waive any written or oral agreement or understanding, that might prevent or limit any Hold Separate Monitor, Hold Separate Manager, or Divestiture Businesses Employee from performing any services, engaging in any activities, or other conduct reasonably related to achieving the purposes of the Orders.

IX.

IT IS FURTHER ORDERED that, within seven (7) calendar days after this Hold Separate Order becomes final, and every seven (7) calendar days thereafter until this Hold Separate Order terminates, Respondent Thermo Fisher shall submit to the Commission, with a copy to the Hold Separate Monitor, a verified written report setting forth in detail the manner and form in which they intend to comply, are complying, and have complied with all provisions of this Hold Separate Order. Respondent Thermo Fisher shall include in their reports, among other things that are required from time to time:

A. A description in reasonable detail of any claim (whether Respondent Thermo Fisher agrees or disagrees with the claim) by any Person (including, but not limited to, any of Respondent Thermo Fisher's

employees or agents) that Respondent Thermo Fisher has failed to comply fully with the Orders, and the name, address, phone number, and email address of such Person; and

B. A description in reasonable detail of any information in Respondent Thermo Fisher's possession, custody, or control (including, but not limited to, information obtained from Respondent Thermo Fisher's monitoring of the compliance of its employees and agents with processes, procedures, and agreements intended to secure Respondent Thermo Fisher's compliance with their obligations under the Orders) relevant to any failure by Respondent Thermo Fisher, its employees, or agents to comply fully with Respondent Thermo Fisher's obligations under the Orders.

X.

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

A. dissolution of Respondent Thermo Fisher;

B. acquisition, merger, or consolidation of Respondent Thermo Fisher; or

C. any other change in the Respondent Thermo Fisher, 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.

XI.

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 Thermo Fisher, with respect to any matter contained in this Order, Respondent Thermo Fisher

shall permit any duly authorized representative of the Commission:

A. Access, during office hours and in the presence of counsel, to all facilities and access to inspect and copy all non-privileged books, ledgers, accounts, correspondence, memoranda and other records and documents in the possession or under the control of Respondent Thermo Fisher related to compliance with the Consent Agreement and the Orders, which copying services shall be provided by Respondent Thermo Fisher at the request of the authorized representative of the Commission and at the expense of Respondent Thermo Fisher;

B. Upon five (5) days' notice to Respondent Thermo Fisher and without restraint or interference from them, to interview officers, directors, or employees of Respondent Thermo Fisher, who may have counsel present.

XII.

IT IS FURTHER ORDERED that this Hold Separate Order shall terminate when all of the obligations relating to the Divestiture Businesses have been performed, and the Divestiture Businesses have been divested pursuant to Paragraph II or Paragraph VII of the Decision and Order.

By the Commission.

APPENDIX A

HOLD SEPARATE MONITOR AGREEMENT

NON-PUBLIC APPENDIX A-1

HOLD SEPARATE MONITOR COMPENSATION

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

APPENDIX B

AGREEMENT OF THE HOLD SEPARATE MANAGER OF THE DHARMACON GENE MODULATION BUSINESS

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

APPENDIX C

AGREEMENT OF THE HOLD SEPARATE MANAGER

OF HYCLONE CELL CULTURE BUSINESS

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

DECISION AND ORDER
[Public Record Version]

The Federal Trade Commission ("Commission"), having initiated an investigation of the proposed acquisition of Life Technologies Corporation ("Life"), by Thermo Fisher Scientific Inc. ("Respondent Thermo Fisher"), and Respondent Thermo Fisher 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 Thermo Fisher 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 Thermo Fisher, its attorneys, and counsel for the Commission having thereafter executed an Agreement Containing Consent Orders ("Consent Agreement"), containing an admission by Respondent Thermo Fisher 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 Thermo Fisher 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 Thermo Fisher 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 Hold Separate and Maintain Assets, and having accepted the executed Consent Agreement and placed such Consent Agreement on the public record for a period of thirty (30) days for the receipt and consideration of public comments, now in further conformity with the procedure described in Commission Rule 2.34, 16 C.F.R. § 2.34, the Commission hereby makes the following jurisdictional findings and issues the following Decision and Order ("Order"):

1. Respondent Thermo Fisher is a corporation organized, existing and doing business under the laws of the State

of Delaware with its office and principal headquarters located at 81 Wyman Street, Waltham, Massachusetts 02451.

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

ORDER

I.

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

A. "Thermo Fisher" or "Respondent" means Thermo Fisher Scientific Inc., its directors, officers, employees, agents, representatives, successors, and assigns; and its joint ventures, subsidiaries, divisions, groups, and affiliates controlled by Thermo Fisher Scientific Inc., and the respective directors, officers, employees, agents, representatives, successors, and assigns of each.

B. "Life" means Life Technologies Corporation, a corporation organized, existing and doing business under the laws of the State of Delaware with its headquarters located at 5791 Van Allen Way, Carlsbad, California 92008.

C. "Commission" means the Federal Trade Commission.

D. "GE Healthcare" means GE Healthcare, a division of General Electric Company, a corporation organized, existing and doing business under the laws of the State of New York with its headquarters located at 3135 Easton Turnpike, Fairfield, Connecticut 06828. GE Healthcare's United States headquarters is located at 9900 W. Innovation Drive, Wauwatosa, Wisconsin 55226.

E. "Aalst, Belgium Facility" means:

1. the warehouse site leased by Respondent Thermo Fisher located at 27 Industrielaan, 9320 Erembodegen-Aalst, Belgium, and

2. the office site leased by Respondent Thermo Fisher located at Clinton Park, 198 Ninovesteenweg, 9320 Erembodegen-Aalst, Belgium.

F. "Acquisition" means the Respondent Thermo Fisher's proposed acquisition of Life.

G. "Acquirer" means the following:

1. a Person specified by name in this Order to acquire particular assets or rights that Respondent Thermo Fisher is required to assign, grant, license, divest, transfer, deliver, or otherwise convey pursuant to this Order; or

2. a Person approved by the Commission to acquire particular assets or rights that Respondent Thermo Fisher is required to assign, grant, license, divest, transfer, deliver, or otherwise convey pursuant to this Order.

H. "Acquisition Date" means the date on which the Acquisition is consummated.

I. "Beijing Facility" means the facility currently leased by Respondent Thermo Fisher located at Area B, Beijing Tianzhu Airport Economic Development Zone, China.

J. "Cell Culture Media" means growth media products used for cell culture, designed to support the growth of cells, in any form, including process liquids, standard basal media, customized media, proprietary media, and chemically defined media; *provided, however,* that Cell Culture Media does not include microbiological culture media.

K. "Cell Culture Sera" means raw or processed animal blood sera used for cell culture, including, but not limited to, fetal bovine serum, adult bovine serum, newborn calf serum, calf serum, equine serum, and porcine serum.

L. "Cell Line Development for Biologics" means the use of molecular biology to create or modify the genome of a biological producing cell line to enhance its production of the biologics, *e.g.*, antibody, EPO, or Factor VIII.

M. "Confidential Business Information" means information owned by, or in the possession or control of, Respondent Thermo Fisher that is not in the public domain and that is directly related to the conduct of the Divestiture Businesses. The term "Confidential Business Information" *excludes* the following:

1. information relating to any of Respondent Thermo Fisher's general business strategies or practices that does not discuss with particularity the Divestiture Businesses;

2. information specifically excluded from the Divestiture Businesses conveyed to the Acquirer;

3. information that is contained in documents, records, or books of Respondent Thermo Fisher that is provided to an Acquirer that is unrelated to the Divestiture Businesses acquired by that Acquirer or that is exclusively related to businesses or products retained by Respondent Thermo Fisher; and

4. information that is protected by the attorney work product, attorney-client, joint defense, or other privilege prepared in connection with the Acquisition and relating to any United States, state, or foreign antitrust or competition law; and

F. information that Respondent Thermo Fisher demonstrates to the satisfaction of the Commission, in the Commission's sole discretion:

a. Was or becomes generally available to the public other than as a result of disclosure by Respondent Thermo Fisher;

b. Is necessary to be included in Thermo Fisher's mandatory regulatory filings; *provided, however,* that Respondent Thermo Fisher shall make all reasonable efforts to maintain the confidentiality of such information in the regulatory filings;

c. Was available, or becomes available, to Respondent Thermo Fisher on a non-confidential basis, but only if, to the knowledge of Respondent Thermo Fisher, the source of such information is not in breach of a contractual, legal, fiduciary, or other obligation to maintain the confidentiality of the information;

d. Is information the disclosure of which is consented to by the Acquirer;

e. Is necessary to be exchanged in the course of consummating the Acquisition or the transaction under the Remedial Agreement;

f. Is disclosed in complying with the Order;

g. Is information the disclosure of which is necessary to allow Respondent Thermo Fisher to comply with the requirements and obligations of the laws of the United States and other countries, and decisions of Government Entities; or

h. Is disclosed in obtaining legal advice.

N. "Closing Date" means the respective dates on which Respondent Thermo Fisher or a Divestiture Trustee divests the HyClone Cell Culture Business and the Dharmacon Gene Modulation Business.

O. "Cramlington Facility" means the two sites located at unit 9, Nelson Park Industrial Estate, Cramlington, United Kingdom, and unit 12, Atley Way, Nelson Park Industrial Estate, Cramlington, United Kingdom, currently owned and leased, respectively, by Respondent Thermo Fisher.

P. "Designated Employees" means all employees of Respondent Thermo Fisher who are working for the Divestiture Businesses, or have worked for the Divestiture Businesses in the last six (6) months including, but not limited to:

1. At the HyClone Cell Culture Leased Facilities;

2. At the HyClone Cell Culture Owned Facilities;

3. At the HyClone Cell Culture Excluded Facilities;

4. At the Lafayette Facility; and

5. Anywhere in the world in the marketing, selling, managing, researching, manufacturing, or otherwise working for the Divestiture Businesses.

provided, *however*, that if the Acquirer is GE Healthcare, the number of "Designated Employees" who can be hired shall be limited as described in Non-Public Appendix B-2 to this Order. *provided, further, however,* that if the Acquirer is GE Healthcare, the "Designated Employees" does not include the employees listed on Non-Public Appendix B-1.

Q. "Dharmacon Divestiture Agreement" means the Remedial Agreement, between Respondent Thermo Fisher and GE Healthcare or an Acquirer for the divestiture of the Dharmacon Gene Modulation

Business. The Dharmacon Divestiture Agreement between Respondent Thermo Fisher and GE Healthcare is attached as part of Non-Public Appendix A.

R. "Dharmacon Gene Modulation Business" means all of Respondent Thermo Fisher's assets, tangible and intangible, businesses and goodwill, related to the research, development, manufacture, distribution, marketing, or sale of Dharmacon Gene Modulation Products including, but not limited to:

1. Dharmacon Gene Modulation Intellectual Property;

2. Dharmacon Gene Modulation Product Marketing Materials;

3. Dharmacon Gene Modulation Products scientific and regulatory material;

4. Dharmacon Gene Modulation Products manufacturing and other equipment located at any facility owned or leased by Respondent Thermo Fisher, or used by Respondent Thermo Fisher or its agents for the production of Dharmacon Gene Modulation Products;

5. inventory; and

6. Confidential Business Information and current and historical product, customer, and supplier information and data, relating to the Dharmacon Gene Modulation Business (to the extent there is shared information, Respondent Thermo Fisher shall provide redacted versions to the Acquirer and retain copies with information redacted relating to the Dharmacon Gene Modulation Business).

S. "Dharmacon Gene Modulation Contracts" means Respondent Thermo Fisher's current customer, licensing, sourcing, or distribution contracts for

Dharmacon Gene Modulation Products to the extent that they pertain to the manufacture, supply, or distribution of Dharmacon Gene Modulation Products. *provided*, *however*, that if such customer, licensing, sourcing, or distribution contract also relates to products other than Dharmacon Gene Modulation Products, then only those portions of such contracts that relate to the sale, supply, or distribution of Dharmacon Gene Modulation Products shall be included for purposes of this Order. *provided, further*, *however*, that Dharmacon Gene Modulation Contracts do not include the contracts listed in Non-Public Appendix H to this Order.

T. "Dharmacon Gene Modulation Intellectual Property" means all Intellectual Property relating to the design, manufacture, and sale of Dharmacon Gene Modulation Products designed, manufactured, or sold by, or on behalf of, Respondent Thermo Fisher, even where such Intellectual Property has not been reduced to practice or commercialized, including, but not limited to, web domain names relating to the Dharmacon Gene Modulation Business. *provided*, *however*, that unless otherwise provided for in this Order, the Dharmacon Gene Modulation Intellectual Property does not include (i) the Gene Sequence Patents, (ii) the Intellectual Property relating to TurboFECT transfection products, and (iii) the Thermo Fisher brand name, or the names of any other divisions, businesses, corporations, or companies owned by Respondent Thermo Fisher.

U. "Dharmacon Gene Modulation Products" means products related to Gene Modulation and Gene Silencing, made by, or being researched and developed but not yet commercialized by, Respondent Thermo Fisher's Dharmacon subsidiary, part of Respondent Thermo Fisher's Molecular Biology Business Unit, and formerly marketed under the Dharmacon or Open Biosystems brand names at any time since January 1, 2012, including, but not limited to, the following product platforms: small/short interfering RNA

(siRNA), Custom RNA, microRNA, RNAi Controls, Transfection, and short hairpin RNA (shRNA), which include, among other products, RNAi Control Reagents, libraries and standalone reagents for siRNA, cDNA, ORFs, DNA oligos, viral packaging vector products, transfection reagents, and RNAi ancillary reagents. *provided, however,* that "Dharmacon Gene Modulation Products" does not include TurboFECT transfection products.

V. "Divestiture Businesses" means the Dharmacon Gene Modulation Business and the HyClone Cell Culture Business.

W. "Gene Modulation" means the use of RNA interference (RNAi), also called post-transcriptional gene silencing, as a biological process in which RNA molecules inhibit gene expression, typically by causing the destruction of specific mRNA molecules, or gene over-expression by inserting cDNA or ORF sequences into a genome causing the cell to express the inserted gene.

X. "Gene Silencing" means the use of nucleic acid (including, but not limited to RNAi, siRNA, shRNA, microRNA, DNA, and ORFs) molecules to inhibit (either partially or totally) gene expression.

Y. "Gene Sequence Patents" means the Patents claiming or disclosing the sequences of synthetic RNA duplexes and their use in RNA interference covered under patent families listed in Non-Public Appendix F.

Z. "Government Entity" means any federal, state, local, or non-U.S. government entity, or any court, legislature, government agency, or government commission, or any judicial or regulatory authority of any government.

AA. "Green Bay Facility" means the facility currently leased by Respondent Thermo Fisher located at 1263 Waube Lane, Green Bay, Wisconsin 54304.

BB. "Hold Separate Monitor" means the person appointed to be the Hold Separate Monitor pursuant to Paragraph III of the Order to Hold Separate and Maintain Assets.

CC. "HyClone Cell Culture Business" means all of Respondent Thermo Fisher's assets, tangible and intangible, businesses and goodwill, related to the research, development, manufacture, distribution, marketing, or sale of HyClone Cell Culture Products including, without limitation, the following:

1. HyClone Cell Culture Owned Facilities;

2. HyClone Cell Culture Intellectual Property;

3. HyClone Cell Culture Product Marketing Materials;

4. HyClone Cell Culture Products scientific and regulatory material;

5. HyClone Cell Culture Products manufacturing equipment, owned by Respondent Thermo Fisher and at the Acquirer's option, located at the HyClone Cell Culture Owned Facilities, HyClone Cell Culture Leased Facilities, and the Excluded Facilities, or at any other facility owned or leased by Respondent Thermo Fisher or used by Respondent Thermo Fisher or its agents for the production of HyClone Cell Culture Products;

6. inventory; and

7. Confidential Business Information and current and historical product, customer, and supplier information and data, relating to the HyClone Cell Culture Business (to the extent there is shared information, Respondent Thermo Fisher shall provide redacted versions to the Acquirer and retain copies with information redacted relating to the HyClone Cell Culture Business).

provided, however, that, unless otherwise provided for in this Order, the HyClone Cell Culture Business does not include SUTs, HyClone Excluded Facilities, the Lanzhou Joint Venture, and the Thermo Fisher Microbiological Culture Media products or business.

DD. "HyClone Cell Culture Contracts" means the current customer, supply, sourcing, or distribution contracts for HyClone Cell Culture Products to the extent that they pertain to the manufacture, supply, or distribution of HyClone Cell Culture Products. *provided, however,* that if such customer, sourcing, or distribution contract also relates to products other than HyClone Cell Culture Products, then only those portions of such contracts that relate to the sale, supply or distribution of HyClone Cell Culture Products shall be included for the purposes of this Order. *provided, further, however,* that HyClone Cell Culture Contracts do not include the contracts listed in Non-Public Appendix H to this Order.

EE. "HyClone Cell Culture Divestiture Agreement" means the Remedial Agreement between Respondent Thermo Fisher and GE Healthcare or an Acquirer for the divestiture of the HyClone Cell Culture Business attached as part of Non-Public Appendix A.

FF. "HyClone Cell Culture Intellectual Property" means all Intellectual Property relating to the design, manufacture, and sale of the HyClone Cell Culture Products designed, manufactured, or sold by, or on behalf of, Respondent Thermo Fisher, even where such Intellectual Property has not been reduced to practice or commercialized including, but not limited to, web domain names relating to the HyClone Cell Culture Business. *provided, however,* that unless otherwise provided for in this Order and the Remedial Agreement, HyClone Cell Culture Intellectual Property does not include (i) Intellectual Property exclusively related to SUTs or Thermo Fisher Microbiological Culture Media products or businesses, (ii) the use of HyClone and HyQ brand names for the

sale or marketing of SUTs, and (iii) the Thermo Fisher brand name or the names of any other divisions, businesses, corporations, or companies owned by Respondent Thermo Fisher.

GG. "HyClone Cell Culture Leased Facilities" means the following facilities used for the manufacture, processing, and distribution of Cell Culture Media and Cell Culture Sera:

1. the Cell Culture facility leased by Respondent Thermo Fisher located at 917 W 600 North, Suite 114, Logan, Utah;

2. the Singapore Facility;

3. the Mordialloc Facility;

4. the Green Bay Facility; and

5. the Aalst, Belgium Facility.

HH. "HyClone Cell Culture Owned Facilities" means the following facilities including all physical assets and equipment for the manufacture, processing, and distribution of Cell Culture Media and Cell Culture Sera as well as operation of the facilities:

1. The General Administration Building currently owned by Respondent Thermo Fisher located at 925 West 1800 South, Logan, Utah;

2. The Sera and Liquid Media Facility currently owned by Respondent Thermo Fisher located at 1725 S Hyclone Road, Logan, Utah;

3. Powder Media and Component Facility currently owned by Respondent Thermo Fisher located at 1665 S Hyclone Road, Logan, Utah;

4. Distribution Warehouse Facility owned by Respondent Thermo Fisher located at 925 West 1800 South, Logan, Utah;

5. the Omaha Facility; and

6. the Omokora Facility.

II. "HyClone Cell Culture Products" means the entire HyClone product line produced, or other HyClone products or product lines being researched or developed but not yet commercialized, at any time since January 1, 2012, including, but not limited to, Australia- and New Zealand-origin fetal bovine serum, U.S.-origin fetal bovine serum, and USDA-approved fetal bovine serum, and all HyClone liquid and dry powder media product lines including, but not limited to, media, sera, and process buffers and reagents, in all packaging options including SUT packaging. For purposes of this Order, "HyClone Cell Culture Products" does not include the Thermo Fisher Microbiological Culture Media products or the SUTs products.

JJ. "HyClone Excluded Facilities" means the following facilities owned or leased by Respondent Thermo Fisher:

1. SUTs Facility, Logan, Utah;

2. the Beijing Facility;

3. the Cramlington Facility; and

4. the Tokyo Facility.

KK. "Intellectual Property" means:

1. Patents;

2. product manufacturing technology, including process technology and technology for equipment;

3. product and manufacturing copyrights;

4. all plans (including proposed and tentative plans, whether or not adopted or commercialized), research and development, specifications, drawings, and other assets (including the non-exclusive right to use Patents, know-how, and other intellectual property relating to such plans);

5. product trademarks, trade dress, trade secrets, technology, know-how, techniques, data, inventions, practices, methods, and other confidential or proprietary technical, business, research, development, and other information, formulas, and proprietary information (whether patented, patentable, or otherwise) related to the manufacture of the products, including, but not limited to, all product specifications, processes, analytical methods, product designs, plans, trade secrets, ideas, concepts, manufacturing, engineering, and other manuals and drawings, standard operating procedures, flow diagrams, chemical, safety, quality assurance, quality control, research records, clinical data, compositions, annual product reviews, regulatory communications, control history, current and historical information associated with any Government Entity approvals and compliance, and labeling and all other information related to the manufacturing process, and supplier lists;

6. licenses including, but not limited to, third party software, if transferrable, and sublicenses to software modified by Respondent Thermo Fisher;

7. recipes and a description of all ingredients, materials, or components used in the manufacture of products;

8. rights to obtain and file for Patents, trademarks, and copyrights and registrations thereof and to bring suit against a Third Party for the past, present, or future infringement, misappropriation, dilution, misuse, or other violations of any of the foregoing; and

9. any other intellectual property used in the past by Respondent Thermo Fisher in the design, manufacture, and sale of products.

provided, however, that unless otherwise provided for in this Order, "Intellectual Property" does not include (i) the corporate names or corporate trade dress of Respondent Thermo Fisher, or the related corporate logos thereof, or the corporate names or corporate trade dress of any other corporations or companies owned or controlled by Respondent Thermo Fisher, and (ii) Respondent Thermo Fisher's licenses with third party vendors for Oracle and Salesforce.com software or databases, and (iii) the software and databases listed in Non-Public Appendix G.

LL. "Lafayette Facility" means the Dharmacon Gene Modulation Product production and distribution facility currently leased by Respondent Thermo Fisher located at 2600 Campus Drive and 2650 Crescent Drive, Lafayette, Colorado 80026.

MM. "Lanzhou Joint Venture" means the National HyClone Bio-engineering Co., Ltd., a joint venture between HyClone Laboratories, Inc. and China Northwest Minorities University in which Respondent Thermo Fisher has a 51% interest.

NN. "Monitor" means any Person appointed pursuant to Paragraph IV of this Order.

OO. "Mordialloc Facility" means the facility currently leased by Respondent Thermo Fisher located at 27A White Street, Melbourne, Victoria, Australia.

PP. "Omaha Facility" means the facility currently owned by Respondent Thermo Fisher located at 3566 South 32nd Avenue, Omaha, Nebraska 68105.

QQ. "Omokora Facility" means the facility currently owned by Respondent Thermo Fisher located at Barrett Road, Whakamarama, Tauranga, New Zealand.

RR. "Order Date" means the date on which this Decision and Order is issued by the Commission.

SS. "Order to Hold Separate and Maintain Assets" means the Order to Hold Separate and Maintain Assets incorporated into and made a part of the Agreement Containing Consent Orders.

TT. "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.

UU. "Patents" means all United States and foreign patents, and any applications for and registrations of such patents, and any renewal, derivation, divisions, reissues, continuation, continuations in-part, modifications, or extensions thereof or, if the patents have already been issued on the basis of said applications, the resulting patents.

VV. "Product Marketing Materials" means all marketing materials used specifically in the marketing or sale of the products of the specified Divestiture Businesses as of the Acquisition Date, including, without limitation, all advertising materials, training materials, product data, mailing lists, sales materials (*e.g.*, detailing reports, vendor lists, sales data), marketing information (*e.g.*, competitor information, research data, market intelligence reports, statistical programs (if any) used for marketing and sales research), customer information (including customer net purchase information to be provided on the basis of either

dollars and/or units for each month, quarter, or year), sales forecasting models, educational materials, and advertising and display materials, speaker lists, promotional and marketing materials, website content and advertising and display materials, artwork for the production of packaging components, television masters, and other similar materials related to the products of the specified Divestiture Businesses.

WW. "Regulatory Approval" means approval required from any Government Entity in order to complete the divestiture of the Dharmacon Gene Modulation Business and/or the HyClone Cell Culture Business.

XX. "Remedial Agreement(s)" means the following:

1. any agreement between Respondent Thermo Fisher and an Acquirer that is specifically referenced and attached to this Order, including all amendments, exhibits, attachments, agreements, and schedules thereto, related to the relevant assets or rights to be assigned, granted, licensed, divested, transferred, delivered, or otherwise conveyed, including without limitation, any agreement to supply specified products or components thereof, and that have been approved by the Commission to accomplish the requirements of the Order in connection with the Commission's determination to make this Order final and effective;

2. any agreement between Respondent Thermo Fisher and an Acquirer (or between a Divestiture Trustee and an Acquirer) that has been approved by the Commission to accomplish the requirements of this Order, including all amendments, exhibits, attachments, agreements, and schedules thereto, related to the relevant assets or rights to be assigned, granted, licensed, divested, transferred, delivered, or otherwise conveyed, including without limitation, any agreement by Respondent Thermo Fisher to supply specified products or components thereof, and that have been approved

by the Commission to accomplish the requirements of this Order. A Remedial Agreement for the Dharmacon Gene Modulation Business and the HyClone Cell Culture Business under this subparagraph may include different or additional assets or provide broader employee access, interview, and hiring provisions related to the Dharmacon Gene Modulation Products and Business and the HyClone Cell Culture Business or Products, than the Dharmacon Divestiture Agreement and HyClone Divestiture Agreement attached as Non-Public Exhibit A to this Order.

YY. "Singapore Facility" means the facility currently leased by Respondent Thermo Fisher located at 25 Tuas South Street 1, Singapore.

ZZ. "SUTs" means Respondent Thermo Fisher's business and products related to single-use technology including, but not limited to, Thermo Fisher's bioprocess container products, such as HyQtainer, HyClone Labtainer, HyClone tankliners, Single Use Bioreactors ("SUBs"), SUB bags, bioprocess container ("BPC") bags or assemblies, Single Use Mixers ("SUM"), SUM bags, HyQ, Harvestainer BPC bags, HyClone PowderTrainer BioProcess containers, and, unless otherwise required in this Order, brand names, licenses, permits, Intellectual Property, know-how, equipment, and facilities related to Respondent Thermo Fisher's single-use technology.

AAA. "SUTs Facilities, Logan, Utah" means the following facilities and buildings, leased or owned by Respondent Thermo Fisher, used for research and development, production, testing and distribution of SUTs, and located at:

1. 3050 North 300 West, Logan, Utah;

2. 881 West 700 North, Suites 104-114, Logan, Utah (Building B);

3. 650 North 870 West, Suites 101-113, Logan, Utah (Building C);

4. 918 West 700 North, Suite 114, Logan, Utah (Building D); and

5. 1726 S. HyClone Road, Logan, Utah (SUT Facility (BioCenter)).

BBB. "Software" means executable computer code and the documentation for such computer code, but does not mean data processed by such computer code.

CCC. "Thermo Fisher Microbiological Culture Media" means Respondent Thermo Fisher's culture media business and products sold and/or developed for microbiology applications including, but not limited to, dehydrated culture media, dehydrated culture media supplements, REMEL, OXOID, VersaTREK REDOX Media, and VersaTREK Myco Media and any licenses, permits, Intellectual Property, know-how, equipment, and facilities related to such products and business.

DDD. "Third Party(ies)" means any non-governmental Person other than the Respondent Thermo Fisher or the Acquirer of particular assets or rights pursuant to this Order.

EEE. "Tokyo Facility" means the facility managed by a third-party logistics provider located at 1-8-26 Horinouchi, Suginami ward, Tokyo 166-0013, Japan.

FFF. "Tuschl Patents" means:

1. the Tuschl I patents (the family of patents and patent applications entitled "RNA Sequence-Specific Mediators of RNA Interference" (attached to this Order as Non-Public Appendix J)), co-owned by the Massachusetts Institute of Technology, The Whitehead Institute for Biomedical Research, the University of Massachusetts, and Max Planck Gesselschaft zur

Förderung der Wissenschaften e.V., and covers the uses of 21-23 sequence specific mediators of double-stranded RNAi as a tool to study gene function and as a gene-specific therapeutic; and

2. the Tuschl II patents (the family of patents and patent applications entitled "RNA Interference Mediating Small RNA Molecules" (attached to this Order as Non-Public Appendix J)) owned by the Max Planck Institute and covers RNAi-mediating small RNA molecules.

II.

IT IS FURTHER ORDERED that:

A. Within (i) forty-five (45) days after the Acquisition Date, or (ii) ten (10) days after all requisite Regulatory Approvals for completion of the divestiture of the Dharmacon Gene Modulation Business to GE Healthcare are obtained, whichever date is earlier, Respondent Thermo Fisher shall:

1. Divest the Dharmacon Gene Modulation Business, absolutely and in good faith, to GE Healthcare pursuant to, and in accordance with, the Dharmacon Divestiture Agreement (which agreement shall not limit or contradict, or be construed to limit or contradict, the terms of this Order, it being understood that this Order shall not be construed to reduce any rights or benefits of GE Healthcare or to reduce any obligations of Respondent Thermo Fisher under such agreement), and such agreement is incorporated by reference into this Order and made a part hereof.

2. grant to GE Healthcare a royalty-free, fully-paid-up, irrevocable, perpetual, (with rights to sublicense):

   a. exclusive license (even as to Respondent Thermo Fisher) to the Gene Sequence Patents, for use in the research, development, manufacture, and sale

of Gene Silencing products for research applications; and

b. a non-exclusive license to the Gene Sequence Patents for use in the field of gene modification and/or gene expression modulation for research purposes and Cell Line Development for Biologics.

3. assign, or otherwise transfer, to GE Healthcare the Dharmacon Gene Modulation Contracts, and with respect to the excluded contracts in Non-Public Appendix H, at the option of the Acquirer, Respondent Thermo Fisher shall use all reasonable commercial efforts to secure for the Acquirer a substantially similar contract on the same terms.

4. assign, or otherwise transfer, to GE Healthcare the license to the Tuschl Patents; and

5. assign, or otherwise transfer, to GE Healthcare the lease to the Lafayette Facility.

provided, however, that for any obligation of Respondent Thermo Fisher pursuant to this Paragraph that is at the option of the Acquirer, Respondent Thermo Fisher need not fulfill such obligation only if the following two conditions are satisfied: (1) the Acquirer exercises its option not to have Respondent Thermo Fisher fulfill the obligation; and (2) the Commission approves the divestiture without the fulfillment of that obligation;

provided, further, however, that if Respondent Thermo Fisher has divested the Dharmacon Gene Modulation Business to GE Healthcare prior to the Order Date, and if, at the time the Commission determines to make this Order final and effective, the Commission notifies Respondent Thermo Fisher that GE Healthcare is not an acceptable purchaser of the Dharmacon Gene Modulation Business, then Respondent Thermo Fisher shall immediately rescind the transaction with GE Healthcare, in whole or in part, as directed by the

Commission, and shall divest the Dharmacon Gene Modulation Business within one hundred eighty (180) days from the Order Date, 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 Thermo Fisher has divested the Dharmacon Gene Modulation Business to GE Healthcare prior to the Order Date, and if, at the time the Commission determines to make this Order final and effective, the Commission notifies Respondent Thermo Fisher that the manner in which the divestiture was accomplished is not acceptable, the Commission may direct Respondent Thermo Fisher, or appoint a Divestiture Trustee, to effect such modifications to the manner of divestiture of the Dharmacon Gene Modulation Business (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. Within (i) forty-five (45) days after the Acquisition Date, or (ii) ten (10) days after all requisite Regulatory Approvals for completion of the divestiture of the HyClone Cell Culture Business to GE Healthcare are obtained, whichever date is earlier, Respondent Thermo Fisher shall:

1. divest the HyClone Cell Culture Business, absolutely and in good faith, to GE Healthcare pursuant to, and in accordance with, the HyClone Cell Culture Divestiture Agreement (which agreement shall not limit or contradict, or be construed to limit or contradict, the terms of this Order, it being understood that this Order shall not be construed to reduce any rights or benefits of GE Healthcare or to reduce any obligations of Respondent Thermo Fisher under such agreement), and such agreement is incorporated by reference into this Order and made a part hereof;

2. assign, or otherwise transfer, to GE Healthcare the HyClone Cell Culture Contracts, and with respect to the excluded contracts in Non-Public Appendix H, at the option of the Acquirer, Respondent Thermo Fisher shall use all reasonable commercial efforts to secure for the Acquirer a substantially similar contract on the same terms, and

3. at the Acquirer's option, assign, or otherwise transfer, to GE Healthcare the HyClone Cell Culture Leased Facilities.

provided, however, that for any obligation of Respondent Thermo Fisher pursuant to this Paragraph that is at the option of the Acquirer, Respondent Thermo Fisher need not fulfill such obligation only if the following two conditions are satisfied: (1) the Acquirer exercises its option not to have Respondent Thermo Fisher fulfill the obligation; and (2) the Commission approves the divestiture without the fulfillment of that obligation;

provided, further, however, that if Respondent Thermo Fisher has divested the HyClone Cell Culture Business to GE Healthcare prior to the Order Date, and if, at the time the Commission determines to make this Order final and effective, the Commission notifies Respondent Thermo Fisher that GE Healthcare is not an acceptable purchaser of the HyClone Cell Culture Business, then Respondent Thermo Fisher shall immediately rescind the transaction with GE Healthcare, in whole or in part, as directed by the Commission, and shall divest the HyClone Cell Culture Business within one hundred eighty (180) days from the Order Date, 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 Thermo Fisher has divested the HyClone Cell Culture Business

to GE Healthcare prior to the Order Date, and if, at the time the Commission determines to make this Order final and effective, the Commission notifies Respondent Thermo Fisher that the manner in which the divestiture was accomplished is not acceptable, the Commission may direct Respondent Thermo Fisher, or appoint a Divestiture Trustee, to effect such modifications to the manner of divestiture of the HyClone Cell Culture Business (including, but not limited to, entering into additional agreements or arrangements) as the Commission may determine are necessary to satisfy the requirements of this Order.

C. Prior to the Closing Date for each of the Divestiture Businesses, Respondent Thermo Fisher shall secure all consents and waivers from all Third Parties that are required for the Acquirer to manufacture and sell products made by the Divestiture Businesses as of the Closing Date. Such consents shall include, but not be limited to:

1. securing requisite assignments to leases to manufacturing and other facilities, if such facilities are being leased to the Acquirer;

2. securing requisite consents to assign customer and supplier contracts to the Acquirer pursuant to this Order;

3. if necessary for transfer, securing a consent to assign the Tuschl Patents license that is part of the Dharmacon Gene Modulation Business to the Acquirer; and

4. any Regulatory Approvals.

provided, however, that Respondent Thermo Fisher may satisfy this requirement by certifying that the relevant Acquirer for each of the Divestiture Businesses has, to the Acquirer's satisfaction, either (i) executed all such agreements directly with each of the relevant Third Parties, or (ii) secured a similar contract

with similar terms from the customer or from a similar supplier supplying such product or service.

D. Any Remedial Agreement that has been approved by the Commission between Respondent Thermo Fisher (or a Divestiture Trustee) and an Acquirer shall be deemed incorporated into this Order, and any failure by Respondent Thermo Fisher to comply with any term of such Remedial Agreement shall constitute a failure to comply with the Order.

E. Respondent Thermo Fisher shall include in each Remedial Agreement related to each of the Divestiture Businesses a specific reference to this Order, the remedial purposes thereof, and provisions to reflect the full scope and breadth of each of Respondent Thermo Fisher's obligations to the Acquirer pursuant to this Order.

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

G. Respondent Thermo Fisher shall not modify or amend any of the terms of any Remedial Agreement without the prior approval of the Commission, except as otherwise provided in Rule 2.41(f)(5) of the Commission's Rules of Practice and Procedure, 16 C.F.R. § 2.41(f)(5). Notwithstanding any term of the Remedial Agreement(s), any modification or amendment of any Remedial Agreement made 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.

H. Respondent Thermo Fisher shall include, as part of the Remedial Agreement(s), any transition services agreement or agreements under which Respondent

Thermo Fisher shall provide services or assistance to the Acquirer, at the Acquirer's option. Such agreements shall include, but not be limited to:

1. A royalty-free, fully-paid-up, irrevocable, non-exclusive license for no more than two (2) years from Respondent Thermo Fisher to the Acquirer solely to use the "Thermo Scientific" brand name for the sale of HyClone Cell Culture Products inventory bearing that brand name, to the extent such inventory was transferred by Respondent Thermo Fisher as part of the Remedial Agreement.

2. A supply contract to provide up to two (2) years of HyClone Cell Culture media manufacturing at the Thermo Fisher media production facilities in Cramlington, UK, and Beijing, China. Such agreement shall include a provision for the orderly transfer of the media manufacturing equipment used in the production of HyClone Cell Culture Media to the Acquirer.

3. Transition services agreements to cover, among other things and if requested by the Acquirer, administrative assistance to assist the Acquirer in the divestiture and transfer of the Divestiture Businesses, the transfer or replication of information technology and computer systems, the distribution of products acquired by the Acquirer as part of the divestiture, and the transfer of data divested pursuant to this Order to the Acquirer.

4, A transition services agreement to cover:

    a. The supply of laboratory services at Respondent Thermo Fisher's Logan, Utah, facilities, for up to two (2) years, related to Cell Culture Media and Cell Culture Sera; and

    b. The purchase of new laboratory equipment, and the creation of a laboratory at a facility of Acquirer's choice in Logan, Utah, related to

Cell Culture Media and Cell Culture Sera, and comparable in size and capabilities of the Respondent Thermo Fisher laboratory currently supplying laboratory services related to Cell Culture Media and Cell Culture Sera.

I. Respondent Thermo Fisher shall not terminate any agreement that is part of a Remedial Agreement before the end of the term approved by the Commission without:

1. Prior approval of the Commission;

2. The written agreement of the Acquirer and thirty (30) days prior notice to the Commission; or

3. In the case of a proposed unilateral termination by Respondent Thermo Fisher due to an alleged breach of an agreement by the Acquirer, sixty (60) days notice of such termination. *provided, however,* that such sixty (60) days notice shall be given only after the parties have:

   a. Attempted to settle the dispute between themselves, and

   b. Either engaged in arbitration and received an arbitrator's decision, or received a final court decision after all appeals.

J. Until Respondent Thermo Fisher or the Divestiture Trustee complete the divestitures and other obligations to transfer the Divestiture Businesses as required by this Order:

1. Respondent Thermo Fisher shall take actions as are necessary to:

   a. maintain the full economic viability and marketability of the Divestiture Businesses;

b. minimize any risk of loss of competitive potential for each Divestiture Business;

c. prevent the destruction, removal, wasting, deterioration, or impairment of any of the assets related to the Divestiture Businesses; and

2. Respondent Thermo Fisher shall not sell, transfer, encumber, or otherwise impair the Divestiture Businesses (other than in the manner prescribed in this Order) nor take any action that lessens the full economic viability, marketability, or competitiveness of the Divestiture Businesses.

K. The purpose of the divestiture of the Divestiture Businesses and other obligations to transfer the Divestiture Businesses to the Acquirer is:

1. to ensure the continued operation of the Divestiture Businesses;

2. to minimize the loss of competitive potential for the Divestiture Businesses;

3. to minimize the risk of disclosure and unauthorized use of Confidential Business Information related to the Divestiture Businesses;

4. to prevent the destruction, removal, wasting, deterioration, or impairment of the Divestiture Businesses, except for ordinary wear and tear;

5. to create a viable and effective competitor that is independent of Respondent Thermo Fisher in the Divestiture Businesses; and

6. to remedy the lessening of competition resulting from the Acquisition as alleged in the Commission's Complaint.

III.

IT IS FURTHER ORDERED that:

A. Respondent Thermo Fisher shall:

1. Deliver all Confidential Business Information related to the Divestiture Businesses being acquired by that Acquirer to that Acquirer:

   a. in good faith;

   b. in a timely manner, *i.e.*, as soon as practicable, avoiding any delays in transmission of the respective information; and

   c. in a manner that ensures its completeness and accuracy and that fully preserves its usefulness.

2. Pending complete delivery of all such Confidential Business Information to the relevant Acquirer, provide that Acquirer, the Hold Separate Monitor, and the Monitor (if any has been appointed) with access to all such Confidential Business Information and employees who possess or are able to locate such information for the purposes of identifying the books, records, and files directly related to the relevant Divestiture Businesses that contain such Confidential Business Information and facilitating the delivery in a manner consistent with this Order

B. Respondent Thermo Fisher 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, except the Acquirer of the particular Divestiture Business, the Hold Separate Monitor, the Monitor, the Divestiture Trustee (if appointed), or Commission staff or other Persons specifically authorized by that Acquirer, the Hold Separate Monitor, the Monitor, Divestiture Trustee, or Commission staff to receive such

information. Among other things, Respondent Thermo Fisher shall not use such Confidential Business Information:

1. to assist or inform Respondent Thermo Fisher employees who research, develop, manufacture, solicit for sale, sell, or service Respondent Thermo Fisher products acquired in the Acquisition that compete with the products of the Divested Businesses, including Gene Modulation, Cell Culture Media, and Cell Culture Sera products acquired from Life;

2. to interfere with any suppliers, distributors, resellers, or customers of the Acquirer;

3. to interfere with any contracts divested, assigned, or extended to the Acquirer pursuant to this Order; or

4. to interfere in any way with the Acquirer pursuant to this Order or with the Divested Businesses.

C. Respondent Thermo Fisher shall:

1. institute procedures and requirements to ensure that:

   a. Respondent Thermo Fisher employees with access to Confidential Business Information do not provide, disclose or otherwise make available Confidential Business Information as in contravention with this Order; and

   b. Respondent Thermo Fisher employees associated with the products acquired in the Acquisition that compete with the products of the Divested Businesses, including Gene Modulation, Cell Culture Media, and Cell Culture Sera products acquired from Life, do not, for any purpose, solicit, access, or use any

Confidential Business Information that this Order prohibits them from receiving.

D. As part of the procedures and requirements, above, require all Designated Employees not hired by the Acquirer, and all other employees who managed or otherwise were engaged in the research, development, manufacture, marketing, or sale of products of the Divestiture Businesses, to sign a non-disclosure agreement within ten (10) days of the Closing Date agreeing to comply with the confidentiality requirements of this Order. A draft copy of that non-disclosure agreement is attached at Appendix I to this Order.

E. The requirements in Paragraph III.A., III.B., III.C. do not apply to Confidential Business Information that Respondent Thermo Fisher 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 Thermo Fisher;

2. necessary to be included in mandatory regulatory filings; *provided, however*, that Respondent Thermo Fisher shall make all reasonable efforts to maintain the confidentiality of such information, and to obtain a protective order for such information, in the regulatory filings;

3. was available, or becomes available, to Respondent Thermo Fisher on a non-confidential basis, but only if, to the knowledge of Respondent Thermo Fisher, 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 transaction under the Remedial Agreement;

6. is disclosed in complying with the Order;

7. is information the disclosure of which is necessary to allow Respondent Thermo Fisher to comply with the requirements and obligations of the laws of the United States and other countries; *provided, however*, that Respondent Thermo Fisher shall make all reasonable efforts to maintain the confidentiality of such information, and to obtain a protective order for such information, in such disclosures;

8. is disclosed in defending legal claims, investigations, or enforcement actions threatened or brought against Respondent Thermo Fisher or the Divestiture Businesses; *provided, however*, that Respondent Thermo Fisher shall make all reasonable efforts to maintain the confidentiality of such information, and to obtain a protective order for such information, in such actions or claims; or

9. is disclosed in obtaining legal advice; *provided, however*, that Respondent Thermo Fisher shall make all reasonable efforts to maintain the confidentiality of such information, and to obtain a protective order for such information, in such advice.

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

IV.

IT IS FURTHER ORDERED that:

A. KPMG LLP (Charles A. Riepenhoff, Jr., Managing Director) shall serve as the Monitor pursuant to the agreement executed by the Monitor and Respondent Thermo Fisher and attached as Appendix C ("Monitor Agreement") and Non-Public Appendix D ("Monitor Compensation"). The Monitor is appointed to assure that Respondent Thermo Fisher expeditiously complies with all of its obligations and performs all of its responsibilities as required by this Order and the Order to Hold Separate and Maintain Assets.

B. No later than one (1) day after the Acquisition Date, the Monitor Agreement shall require that Respondent Thermo Fisher transfer to the Monitor all rights, powers, and authorities necessary to permit the Monitor to perform his/her duties and responsibilities, pursuant to this Order and the Order to Hold Separate and Maintain Assets and consistent with the purposes of this Order, and Respondent Thermo Fisher shall effectuate such transfer.

C. Respondent Thermo Fisher 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 Thermo Fisher's compliance with the divestiture and asset maintenance obligations and related requirements of the Order, and shall exercise such power and authority and carry out the duties and responsibilities of the Monitor in a manner consistent with the purposes of the Order and in consultation with the Commission.

2. The Monitor shall act in a fiduciary capacity for the benefit of the Commission.

D. Subject to any demonstrated legally recognized privilege, the Monitor shall have full and complete access to Respondent Thermo Fisher's personnel, books, documents, records kept in the ordinary course of business, facilities and technical information, and such other relevant information as the Monitor may reasonably request, related to Respondent Thermo Fisher's compliance with its obligations under the Order, including, but not limited to, its obligations related to the Divestiture Businesses.

E. Respondent Thermo Fisher 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 Thermo Fisher's compliance with the Order.

F. The Monitor shall serve, without bond or other security, at the expense of Respondent Thermo Fisher, on such reasonable and customary terms and conditions as the Commission may set. The Monitor shall have the authority to employ, at the expense of Respondent Thermo Fisher, such consultants, accountants, attorneys, and other representatives and assistants as are reasonably necessary to carry out the Monitor's duties and responsibilities.

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

H. Respondent Thermo Fisher shall report to the Monitor in accordance with the requirements of this Order and as otherwise provided in the agreement approved by

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

I. Respondent Thermo Fisher may require the Monitor and each of the Monitor's consultants, accountants, and other representatives and assistants to sign a customary confidentiality agreement; *provided, however,* that such agreement shall not restrict the Monitor from providing any information to the Commission.

J. The Commission may, among other things, require the Monitor and each of the Monitor's consultants, accountants, attorneys, and other representatives and assistants to sign an appropriate confidentiality agreement related to Commission materials and information received in connection with the performance of the Monitor's duties.

K. 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 Thermo Fisher, which consent shall not be unreasonably withheld. If Respondent Thermo Fisher has not opposed, in writing, including the reasons for opposing, the selection of a proposed Monitor within ten (10) days after the notice by the staff of the Commission to Respondent Thermo Fisher of the identity of any proposed Monitor, Respondent Thermo Fisher shall be deemed to

have consented to the selection of the proposed Monitor.

2. Not later than ten (10) days after the appointment of the substitute Monitor, Respondent Thermo Fisher shall execute an 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 Thermo Fisher's compliance with the relevant terms of the Order in a manner consistent with the purposes of the Order.

L. 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.

M. The Monitor appointed pursuant to this Order may be the same Person appointed as a Divestiture Trustee pursuant to the relevant provisions of this Order or as the Hold Separate Monitor pursuant to the relevant provisions of the Order to Hold Separate and Maintain Assets.

V.

IT IS FURTHER ORDERED that:

A. Beginning no later than the time Respondent Thermo Fisher signs the Consent Agreement in this matter until one-hundred-twenty (120) days after the Closing Date:

1. Respondent Thermo Fisher 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 Thermo Fisher until the Designated Employee has been hired by the Acquirer, 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 Divestiture Businesses to the Acquirer.

2. Respondent Thermo Fisher 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 Thermo Fisher that may deter, or otherwise prevent or discourage the Designated Employees from accepting employment with the Acquirer including, but not limited to, any non-compete provisions of employment or other contracts with Respondent Thermo Fisher that would affect the ability or incentive of those individuals to be employed by the Acquirer. In addition, Respondent Thermo Fisher shall not make any offer for a new or different employment or a 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, or that the Acquirer has decided not to hire the Designated Employee and sent such notice to Respondent Thermo Fisher.

3. Respondent Thermo Fisher 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; and

c. 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 products of the Divestiture Businesses; and

(4) unless alternative arrangements are agreed upon with the Acquirer, pay, and 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 shall not prohibit Respondent Thermo Fisher 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 Thermo Fisher shall not, for a period of two (2) years following the Closing Date, directly or indirectly, solicit, induce, or attempt to solicit or induce any Person employed by the Acquirer and working in or for the Divestiture Businesses, to terminate his or her employment relationship with the Acquirer.

provided, *however*, that Respondent Thermo Fisher 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*, that Respondent Thermo Fisher may hire Designated Employees who apply for employment with Respondent Thermo Fisher as long as such employees were not solicited by Respondent Thermo Fisher in violation of this Paragraph IV.

VI.

IT IS FURTHER ORDERED that, for a period of ten (10) years from the Order Date, Respondent Thermo Fisher shall not, without providing advance written notification to the Commission in the manner described in this Paragraph VI, 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 Cell Culture Media, Cell Culture Sera, or Gene Modulation products in or into the United States;

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 Cell Culture Media, Cell Culture Sera, or Gene Modulation 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 Thermo Fisher and not of any other party to the transaction. Respondent Thermo Fisher shall provide the Notification to the Commission at least thirty (30) days prior to consummating the transaction (hereinafter referred to as the "first waiting period"). If, within the first waiting period, representatives of the Commission make a written request for additional information or documentary material (within the meaning of 16 C.F.R. § 803.20), Respondent Thermo Fisher shall not consummate the transaction until thirty (30) days after submitting such additional information or documentary material. Early termination of the waiting periods in this paragraph may be requested and, where appropriate, granted by letter from the Bureau of Competition.

provided, however, that prior notification shall not be required by this paragraph for a transaction for which Notification is required to be made, and has been made, pursuant to Section 7A of the Clayton Act, 15 U.S.C. § 18a.

provided, further, however, that prior notification shall not be required by this Paragraph V for any acquisition

after which Respondent Thermo Fisher would hold no more than one percent (1%) of the outstanding securities or other equity interest in any Person described in this Paragraph VI.

VII.

IT IS FURTHER ORDERED that:

A. If Respondent Thermo Fisher has not fully complied with the obligations to assign, grant, license, divest, transfer, deliver, or otherwise convey the Divestiture Businesses required by this Order, the Commission may appoint a trustee ("Divestiture Trustee") to assign, grant, license, divest, transfer, deliver, or otherwise convey these assets in a manner that satisfies the requirements of this Order. In the event that the Commission or the Attorney General brings an action pursuant to§ 5(*l*) of the Federal Trade Commission Act, 15 U.S.C. § 45(*l*), or any other statute enforced by the Commission, Respondent Thermo Fisher shall consent to the appointment of a Divestiture Trustee in such action to assign, grant, license, divest, transfer, deliver, or otherwise convey these assets. Neither the appointment of a Divestiture Trustee nor a decision not to appoint a Divestiture Trustee under this Paragraph shall preclude the Commission or the Attorney General from seeking civil penalties or any other relief available to it, including a court-appointed Divestiture Trustee, pursuant to § 5(*l*) of the Federal Trade Commission Act, or any other statute enforced by the Commission, for any failure by Respondent Thermo Fisher to comply with this Order.

B. The Commission shall select the Divestiture Trustee, subject to the consent of Respondent Thermo Fisher, which consent shall not be unreasonably withheld. The Divestiture Trustee shall be a Person with experience and expertise in acquisitions and divestitures. If Respondent Thermo Fisher 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 Thermo Fisher of the identity of any proposed Divestiture Trustee, Respondent Thermo Fisher shall be deemed to have consented to the selection of the proposed Divestiture Trustee.

C. Not later than ten (10) days after the appointment of a Divestiture Trustee, Respondent shall execute a trust agreement that, subject to the prior approval of the Commission, transfers to the Divestiture Trustee all rights and powers necessary to permit the Divestiture Trustee to effect the divestiture required by this Order.

D. If a Divestiture Trustee is appointed by the Commission or a court pursuant to this Paragraph, Respondent shall consent to the following terms and conditions regarding the Divestiture Trustee's powers, duties, authority, and responsibilities:

1. Subject to the prior approval of the Commission:

   a. The Divestiture Trustee shall have the exclusive power and authority to assign, grant, license, divest, transfer, deliver, or otherwise convey the assets that are required by this Order to be assigned, granted, licensed, divested, transferred, delivered, or otherwise conveyed.

   b. The Divestiture Trustee may divest the Divestiture Businesses in a manner different from the Dharmacon Divestiture Agreement or the HyClone Cell Culture Divestiture Agreement between Respondent Thermo Fisher and GE Healthcare, described and incorporated into this Order. For example, the Divestiture Trustee may, in his or her sole discretion, change the number of employees interviewed and hired, and the terms of the patents, licenses, transitions services, related to the Divestiture Businesses.

2. The Divestiture Trustee shall have one (1) year after the date the Commission approves the trust agreement described herein to accomplish the divestiture, which shall be subject to the prior approval of the Commission. If, however, at the end of the one (1) year period, the Divestiture Trustee has submitted a plan of divestiture or the Commission believes that the divestiture can be achieved within a reasonable time, the divestiture period may be extended by the Commission; *provided, however*, that the Commission may extend the divestiture period only two (2) times.

3. Subject to any demonstrated legally recognized privilege, the Divestiture Trustee shall have full and complete access to the personnel, books, records, and facilities related to the relevant assets that are required to be assigned, granted, licensed, divested, delivered, or otherwise conveyed by this Order and to any other relevant information, as the Divestiture Trustee may request. Respondent Thermo Fisher shall develop such financial or other information as the Divestiture Trustee may request and shall cooperate with the Divestiture Trustee. Respondent Thermo Fisher shall take no action to interfere with or impede the Divestiture Trustee's accomplishment of the divestiture. Any delays in divestiture caused by Respondent Thermo Fisher 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 Thermo Fisher'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*, that if the

Divestiture Trustee receives bona fide offers from more than one acquiring Person, and if the Commission determines to approve more than one such acquiring Person, the Divestiture Trustee shall divest to the acquiring Person selected by Respondent Thermo Fisher from among those approved by the Commission; *provided, further, however,* that Respondent Thermo Fisher shall select such Person within five (5) days after receiving notification of the Commission's approval.

5. The Divestiture Trustee shall serve, without bond or other security, at the cost and expense of Respondent Thermo Fisher, 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 Thermo Fisher, 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 Thermo Fisher, 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 Thermo Fisher 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 Monitor pursuant to the relevant provisions of this Order or the Order to Hold Separate and Maintain Assets in this matter.

8. The Divestiture Trustee shall report in writing to Respondent Thermo Fisher and to the Commission every sixty (60) days concerning the Divestiture Trustee's efforts to accomplish the divestiture.

9. Respondent Thermo Fisher 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.

10. 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 related 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.

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.

VIII.

IT IS FURTHER ORDERED that:

A. Within thirty (30) days after the Order Date, and every thirty (30) days thereafter until Respondent Thermo Fisher has fully complied with Paragraphs II.A., II.B., II.C., II.D., II.E., II.H., II.I., III.A., V.A., Respondent Thermo Fisher 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 Thermo Fisher shall submit at the same time a copy of its report concerning compliance with this Order to the Monitor, if any Monitor has been appointed. Respondent Thermo Fisher shall include in its reports, among other things that are required from time to time, a full description of the efforts being made to comply with the relevant paragraphs of the Order, including a full description of all substantive contacts or negotiations related to the divestiture of the relevant assets and/or the agreement to supply relevant Products and the identity of all Persons contacted, including copies of all written communications to and from such Persons, all internal memoranda, and all reports and recommendations concerning completing the obligations.

B. One (1) year after the Order Date, annually for the next nine (9) years on the anniversary of the Order Date, and at other times as the Commission may require, Respondent Thermo Fisher 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.

IX.

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

A. any proposed dissolution of Respondent Thermo Fisher;

B. any proposed acquisition, merger, or consolidation of the Respondent Thermo Fisher; or

C. any other change in Respondent Thermo Fisher 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.

X.

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

A. access, during business office hours of Respondent Thermo Fisher 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 Thermo Fisher related to compliance with this Order, which copying services shall be provided by Respondent Thermo Fisher at the request of the authorized representative(s) of the Commission and at the expense of Respondent Thermo Fisher; and

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

XI.

IT IS FURTHER ORDERED that this Order shall terminate on April 1, 2024.

By the Commission.

NON-PUBLIC APPENDIX A

DHARMACON GENE MODULATION AND HYCLONE CELL CULTURE

DIVESTITURE AGREEMENT

BETWEEN RESPONDENT THERMO FISHER AND GE HEALTHCARE

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

NON-PUBLIC APPENDIX B-1

EXCLUDED EMPLOYEES

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

NON-PUBLIC APPENDIX B-2

SHARED EMPLOYEES

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

APPENDIX C

APPENDIX C

MONITOR AGREEMENT

MONITOR AGREEMENT (this **"Agreement"**) entered into this 27th day of January 2014 by and between KPMG LLP (the "Monitor") and Thermo Fisher Scientific Inc., ("Respondent Thermo Fisher") provides as follows:

PRELIMINARY STATEMENT

WHEREAS the Federal Trade Commission (the **"Commission"**) is considering for public comment an Agreement Containing Consent Orders with Respondent Thermo Fisher, which provides, among other things, that Respondent Thermo Fisher divest the HyClone Cell Culture Business and Dharmacon Gene Modulation Business, and engage a monitor to monitor Respondent Thermo Fisher's compliance with its obligations under (a) the Decision and Order and (b) and Order to Hold Separate and Maintain Assets (collectively, the "Orders");

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

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

WHEREAS, this Agreement, although executed by Monitor and Respondent Thermo Fisher, is not effective for any purpose, including but not limited to imposing rights and responsibilities on Respondent Thermo Fisher or Monitor under the Orders, until the Order to Hold Separate and Maintain Assets has been issued and this Agreement has been approved by the Commission;

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

DEFINITIONS

1. **"Thermo Fisher" or "Respondent"** means Thermo Fisher Scientific Inc., its directors, officers, employees, agents, representatives, successors, and assigns; and its joint ventures, subsidiaries, divisions, groups, and affiliates controlled by Thermo Fisher Scientific Inc., and the respective directors, officers, employees, agents, representatives, successors, and assigns of each.

2. **"Acquirer"** means the following:

   a. a Person specified by name in this Order to acquire particular assets or rights that Respondent Thermo Fisher is required to assign, grant, license, divest, transfer, deliver, or otherwise convey pursuant to this Order; or

b. a Person approved by the Commission to acquire particular assets or rights that Respondent Thermo Fisher is required to assign, grant, license, divest, transfer, deliver, or otherwise convey pursuant to this Order.

3. **"Remedial Agreement(s)"** means the following:

a. any agreement between Respondent Thermo Fisher and an Acquirer that is specifically referenced and attached to this Order, including all amendments, exhibits, attachments, agreements, and schedules thereto, related to the relevant assets or rights to be assigned, granted, licensed, divested, transferred, delivered, or otherwise conveyed, including without limitation, any agreement to supply specified products or components thereof, and that have been approved by the Commission to accomplish the requirements of the Order in connection with the Commission's determination to make this Order final and effective;

b. any agreement between Respondent Thermo Fisher and an Acquirer (or between a Divestiture Trustee and an Acquirer) that has been approved by the Commission to accomplish the requirements of this Order, including all amendments, exhibits, attachments, agreements, and schedules thereto, related to the relevant assets or rights to be assigned, granted, licensed, divested, transferred, delivered, or otherwise conveyed, including without limitation, any agreement by Respondent Thermo Fisher to supply specified products or components thereof, and that have been approved by the Commission to accomplish the requirements of this Order. A Remedial Agreement for the Dharmacon Gene Modulation Business and the HyClone Cell Culture Business under this subparagraph may include different or additional assets or provide broader employee access, interview, and hiring provisions related to the Dharmacon Gene Modulation Products and Business and the HyClone Cell Culture Business or Products, than the Dharmacon Divestiture Agreement and HyClone Divestiture Agreement attached as Non-Public Exhibit A to the Decision and Order.

4. All other capitalized words or phrases appearing in this Agreement that are not otherwise defined herein are deemed to have the defined meanings assigned to them in the Orders.

ARTICLE I

1.1 Powers of the Monitor. Monitor shall have the rights, duties, powers and authority conferred upon Monitor by the Orders that are necessary for Monitor to monitor Respondent Thermo Fisher's compliance with the Orders. No later than the Acquisition Date, Thermo Fisher hereby transfers to Monitor all rights, powers, and authorities necessary to permit Monitor to perform its duties and responsibilities pursuant to the Decision and Order and Order to Hold Separate and Maintain Assets and consistent with the purposes of the Decision and Order. Any descriptions thereof contained in this Agreement in no way modify Monitor's powers and authority or Respondent Thermo Fisher's obligations under the Orders.

1.2 Exercise of Monitor's Power. The Monitor shall have the power and authority to monitor Respondent Thermo Fisher's compliance with the divestiture and asset maintenance obligations and related requirements of the Decision and 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 Decision and Order and in consultation with the Commission.

1.3 Monitor's Duties. The Monitor shall act in a fiduciary capacity for the benefit of the Commission, notwithstanding the fact that Respondent Thermo Fisher is the party to this Agreement and responsible for compensating the Monitor hereunder. The Monitor shall monitor Respondent Thermo Fisher's compliance with the Orders, including, but not limited to:

a. Assuring that Respondent Thermo Fisher expeditiously complies with all of the obligations, and performs all of the responsibilities, of Respondent Thermo Fisher as required by the Orders in this matter;

b. Monitoring Remedial Agreements; and

c. Assuring that Confidential Business Information is not received or used by Respondent Thermo Fisher or the Acquirer, except as allowed in the Orders in this matter.

1.4 Duration of Monitor's Authority. Monitor shall have all powers and duties described above and consistent with the Orders for the term set forth in the Orders.

1.5 Confidential and Proprietary Information. The Monitor shall maintain the confidentiality of all information provided by Respondent Thermo Fisher, all Confidential Business Information of the Divestiture Businesses and all confidential aspects of the performance of its duties under this Agreement (collectively, "Confidential Materials"). Except as provided in this Agreement, such information may be disclosed only to (i) Persons employed by or working with the Monitor under this Monitor Agreement including persons working at Monitor or other members of the KPMG network of independent firms, (ii) Persons employed at Smith & Williamson LLP with regard to Regulatory Approvals by the European Commission or other Government Entities, (iii) any other Person to whom disclosure is reasonably necessary for the Monitor to fulfill its duties (provided that such Person shall execute a confidentiality agreement prior to receiving Confidential Materials), or (iv) persons employed at the Commission, the European Commission or any other Government Entity. When providing Confidential Materials to a third party pursuant to this Paragraph, the Monitor shall label such information "Confidential." The Monitor shall request confidential treatment by the Commission and staff of any Confidential Materials turned over to the Commission, including any information labeled "Confidential" by Respondent Thermo Fisher. The Monitor shall also request confidential treatment by the European Commission or any other Government Entity of any Confidential Materials turned over to the European Commission or any other Government Entity, respectively, including any information labeled "Confidential" by Respondent Thermo Fisher. The Monitor shall use the Confidential Materials provided by Respondent Thermo Fisher pursuant to this Agreement or learned in connection with performing its obligations under this Agreement only in performance of the duties set forth herein or in connection with any decision by a Government Entity. At no time shall the Monitor use such information for any other purpose or for the benefit of any other Person. For the avoidance of doubt, it shall not be a breach hereof for the Monitor, or any of the persons permitted to be used or

employed under Section 2.1 below, to disclose Confidential Materials to the extent that it is otherwise required to be disclosed pursuant to a statutory or regulatory provision or court or administrative order, or, subject to appropriate conditions of confidentiality, to fulfill professional obligations and standards (including quality and peer review) or to submit and process an insurance claim. The confidentiality obligations of this Paragraph shall survive the termination of this Agreement.

1.6 Confidentiality Agreements. Respondent Thermo Fisher may require the Monitor and each of the Monitor's consultants, accountants, attorneys, and other representatives and assistants to sign an appropriate confidentiality agreement; provided, however, that such agreement shall not restrict the Monitor from providing any information to the Commission.

1.7 Confidentiality of Commission Materials. The Commission may require the Monitor and each of the Monitor's consultants, accountants, attorneys, and other representatives and assistants to sign an appropriate confidentiality agreement related to Commission materials and information received in connection with the performance of the Monitor's duties.

1.8 Restrictions. Monitor shall not be involved in any way in the management, production, supply and trading, sales marketing, and financial operations of any products of Respondent Thermo Fisher that compete with the products sold by the HyClone Cell Culture Business or Dharmacon Gene Modulation Business except to the extent permitted by the Orders.

1.9 Reports. Respondent Thermo Fisher shall report to the Monitor in accordance with the requirements of the Decision and Order. Monitor shall report to the Commission pursuant to the terms of the Orders and as otherwise requested by the Commission staff.

1.10 Access to Records, Documents and Facilities. Subject to any demonstrated legally recognized privilege, Monitor and any of the persons permitted to be used or employed under Section 2.1 below shall have full and complete access to Respondent Thermo Fisher's personnel, to include those employees designated to be transferred to an acquirer, books, documents, records kept in the normal course of business, facilities and technical information, and such other relevant information as Monitor may reasonably request, related to Respondent Thermo Fisher's compliance with the obligations of Respondent Thermo Fisher under the Orders in this matter. Documents, records and other relevant information are to be provided in an electronic format if they exist in that form. Respondent Thermo Fisher shall cooperate with any reasonable request of Monitor and shall take no action to interfere with or impede Monitor's ability to monitor Respondent Thermo Fisher's compliance with the Orders.

ARTICLE II

2.1 Retention and Payment of Counsel, Consultants, and other Assistants. Monitor shall have the authority to use or employ, at the cost and expense of the Respondent Thermo Fisher, such personnel of Monitor or other members of the KPMG network of independent firms, or such other attorneys, consultants, accountants, and other representatives and assistants as are necessary to carry out the Monitor's duties and responsibilities as allowed pursuant to the Orders.

2.2 Compensation. The Monitor shall serve, without bond or other security, at the expense of Respondent Thermo Fisher. Where Monitor is reimbursed for expenses, it is its policy to bill clients the amount incurred at the time the good or service is purchased. If Monitor subsequently receives a volume rebate or other incentive payment from a vendor relating to such expenses, Monitor does not credit such payment to its client. Instead, Monitor applies such payments to reduce its overhead costs, which costs are taken into account in determining its standard billing rates and certain transaction charges that may be charged to clients. Monitor shall be compensated by Respondent Thermo Fisher for its services under this Agreement, including all work in connection with the negotiation and preparation of this Monitor Agreement, pursuant to the fee schedule attached hereto and to the Decision and Order as Non-Public Appendix D for time spent in connection with the discharge of its duties under this Agreement and the Orders. Compensation paid to Monitor by Respondent Thermo Fisher will include amounts for costs and expenses incurred by other members of the KPMG network of independent firms retained by Monitor in connection herewith, and those related to other persons engaged by the Monitor under Section 2.1 above. In addition, Respondent Thermo Fisher will pay: (a) out-of-pocket expenses reasonably incurred by Monitor in the performance of its duties under the orders; and (b) fees and disbursements reasonably incurred by any advisor appointed by the Monitor pursuant to the first paragraph in Article II. At its own expense, Respondent Thermo Fisher may retain an independent auditor to verify such invoices. Monitor shall provide Respondent Thermo Fisher with monthly invoices for time and expenses that include details and an explanation of all matters for which Monitor submits an invoice to Respondent Thermo Fisher. Respondent Thermo Fisher shall pay such invoices within thirty (30) days of receipt. Monitor shall retain fee and expense records for two years after the completion or termination of the Monitor's duties hereunder and shall make such records available to Thermo Fisher during normal business hours upon reasonable advance written notice. Monitor shall cooperate in any verification audit of such records that Thermo Fisher may undertake; provided, however, that: (i) no such audit may occur more than once in any twelve (12) month period; and (ii) Monitor shall have the right to approve any third party independent auditor used for any such audit, with such approval not to be unreasonably withheld. The Monitor and Respondent Thermo Fisher shall submit any disputes about invoices to the Commission for assistance in resolving such disputes.

2.3 To the extent available, Respondent Thermo Fisher will provide the Monitor with temporary workspace and access to office equipment owned or used by Respondent Thermo Fisher at sites the Monitor is required to visit in order to fulfill its obligations under this Agreement. Monitor agrees to comply with all of Respondent Thermo Fishers' safety and security regulations, instructions and procedures while at Respondent Thermo Fisher's sites.

ARTICLE III

3.1 Monitor's Liabilities and Indemnification. Respondent Thermo Fisher shall indemnify the Monitor and its partners or principals and any other persons used or employed under Section 2.1 above (collectively, "Monitor Indemnified Persons") and hold Monitor Indemnified Persons harmless against any losses, claims, damages, liabilities, or expenses arising out of, or in connection with, the performance of Monitor's duties, including all reasonable fees of counsel and other expenses incurred in connection with the preparation for, or defense of any claim, whether or not resulting in any liability, except to the extent that such losses, claims, damages, liabilities, or expenses result from gross negligence, willful or wanton acts, or bad faith by Monitor. The Monitor's maximum liability to Respondent Thermo Fisher relating to services rendered in accordance with this Agreement (regardless

of form of action, whether in contract, statutory law, or tort including without limitation negligence) shall be limited to an amount equal to the total sum of the fees paid to the Monitor by the Respondent Thermo Fisher. Any claim arising from this Agreement that Respondent Thermo Fisher may have against the Monitor must be brought no later than one (1) year following the termination or expiration of this Agreement. In the performance of its duties under this Agreement, the Monitor shall exercise the standard of care and diligence that would be expected of a reasonable person in the conduct of his own business affairs. The Monitor shall not be liable for any delays or other failures to perform resulting from circumstances or causes beyond its reasonable control, including, without limitation, fire or other casualty, act of God, strike or labor dispute, war or other violence, or any law, order or requirement of any governmental agency or authority. The Monitor warrants that it will perform its obligations hereunder in good faith. Monitor disclaims other warranties, expressed or implied, other than those expressly agreed to in writing between the Parties.

3.2 In the event of a disagreement or dispute between Respondent Thermo Fisher and the Monitor, and in the event that such disagreement or dispute cannot be resolved by the Parties, either Party may seek the assistance of the Assistant Director of the Commission's Compliance Division, to resolve the issue. In the event that such disagreement or dispute cannot be resolved by the Parties, the Parties shall submit the matter to binding arbitration before the American Arbitration Association under its Commercial Arbitration Rules, and judgment on the award rendered by the arbitrators may be entered in any court having jurisdiction thereof. For the avoidance of doubt, each party shall have the right to appoint one arbitrator, and the two arbitrators so chosen shall select a third. Binding arbitration shall not be available, however, to resolve any disagreement or dispute concerning Respondent Thermo Fisher's obligations pursuant to any Consent Agreement entered by the Commission.

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

3.4 Approval by the Commission. This Agreement shall have no force or effect until approved by the Commission.

3.5 Termination. This Agreement shall terminate the earlier of: (a) thirty (30) days following the termination date set forth in the applicable Order; (b) Respondent Thermo Fisher's receipt of written notice from the Commission that the Commission has determined that Monitor has ceased to act or failed to act diligently, or is unwilling or unable to continue to serve as Monitor; (c) with at least thirty (30) days advance notice to be provided by Monitor to Respondent Thermo Fisher and to the Commission, upon resignation of the Monitor; or (d) when Respondent Thermo Fisher Thermo Fisher's last obligation under the Orders and the Remedial Agreements that pertains to the Monitor's service has been fully performed; provided, however, that the Commission may require that Respondent Thermo Fisher Thermo Fisher extend this Agreement or enter into an additional agreement with Monitor as may be necessary or appropriate to accomplish the purposes of the Orders. If this Agreement is terminated for any reason, the confidentiality obligations set forth in this Agreement will remain in force. The foregoing shall not be construed to require Monitor or its subcontractors to return or destroy copies of Confidential Materials retained in work paper files or records in order to comply with applicable professional standards, or anything that may be stored in back up media

or other electronic data storage systems, latent data and metadata. Any Confidential Materials so retained shall remain subject to the confidentiality obligations hereof.

3.6 Conflicts of Interest. If Monitor becomes aware during the term of this Agreement that it has or may have a conflict of interest that may affect or could have the appearance of affecting performance by the Monitor of any of its duties under this Agreement, Monitor shall promptly inform Respondent Thermo Fisher and the Commission of any such conflict. Monitor and one or more members of the KPMG network of independent firms perform audit, tax and advisory services to GE Healthcare [defined in the Orders]. Respondent Thermo Fisher agrees that such relationships do not constitute a conflict of interest for the purposes of this matter.

3.7 Governing Law. This Agreement shall be deemed to have been entered into and shall be construed and enforced in accordance with the laws of the State of New York.

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

Decision and Order

MONITOR

By: _____

Charles A. Riepenhoff, Jr.

Managing Director

KPMG LLP

303 Peachtree St., NE

Suite 2000

Atlanta, GA 30308

Fax:

E-mail: criepenhoffjr@kpmg.com

RESPONDENT THERMO FISHER

By: _____

Seth H. Hoogasian

Senior Vice President, General Counsel & Secretary

Thermo Fisher Scientific Inc.

81 Wyman Street

Waltham, Massachusetts 02455

Fax:

E-mail: seth.hoogasian@thermofisher.com

NON-PUBLIC APPENDIX D

MONITOR COMPENSATION

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

APPENDIX E

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NON-PUBLIC APPENDIX F

GENE SEQUENCE PATENTS

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

NON-PUBLIC APPENDIX G

EXCLUDED SOFTWARE AND DATABASES

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

NON-PUBLIC APPENDIX H

NON-ASSIGNED CONTRACTS

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

APPENDIX I

APPENDIX I

NOTICE OF FTC ORDERS AND REQUIREMENT TO MAINTAIN CONFIDENTIALITY

AND

DRAFT NON-DISCLOSURE AGREEMENT

Thermo Fisher Scientific Inc. ("Thermo Fisher"), sometimes referred to as "Respondent Thermo Fisher," has entered into an Agreement Containing Consent Orders ("Consent Agreement") with the Federal Trade Commission ("Commission") providing for divestiture of certain businesses and other relief in connection with Thermo Fisher's acquisition of Life Technologies Corporation ("Life") (the "Acquisition"). The Consent Agreement includes two orders: the Decision and Order and the Order to Hold Separate and Maintain Assets ("Orders"). Both Orders are attached to this notice. The Commission has appointed Charles A. Riepenhoff, Jr., Managing Director, KPMG US (the "Monitor") to monitor Thermo Fisher's compliance with the Orders.

Complete definitions of all capitalized terms in this notice can be found in Section I of the attached Decision and Order or Section I of the Order to Hold Separate and Maintain Assets.

Pursuant to the requirements of the Decision and Order, and pursuant to a Purchase and Sale Agreement dated December 24, 2013 with General Electric Company ("GE"), Thermo Fisher has agreed to divest its cell culture and gene modulation businesses ("Divestiture Businesses") to GE. During the Hold Separate Period, which begins on the date Thermo Fisher acquires Life and ends after Thermo Fisher has completed the required divestitures, Thermo Fisher must hold the Divestiture Businesses separate, apart, and independent from Thermo Fisher's other businesses. Until the required divestitures occur, Thermo Fisher must take such actions as are necessary to maintain the economic viability, marketability, and competitiveness of each of the businesses and assets to be divested, and must prevent the destruction, removal, wasting, deterioration, sale, disposition, transfer, or impairment of these businesses and assets except for ordinary wear and tear. Pending the divestitures to GE, the Commission has appointed Mr. Riepenhoff to also serve as Hold Separate Trustee with responsibilities including the supervision of the management of the Divestiture Businesses and the maintenance of the Divestiture Businesses' independence.

The Orders require Thermo Fisher to restrict its use of "Confidential Business Information," which is information owned by, or in the possession or control of Thermo Fisher that is not in the public domain and that is directly related to the conduct of the Divestiture Businesses during the Hold Separate Period and after the required divestitures to GE.

You are receiving this notice because you are an employee who was identified as a Designated Employee under the Decision and Order and/or a Thermo Fisher employee who is or was directly engaged in the research, development, manufacture, marketing, or sale of products of the Divestiture Businesses and may have Confidential Business Information.

Confidential Business Information does not include: (i) information relating to any of Thermo Fisher's general business strategies or practices that does not discuss with particularity the Divestiture Businesses; (ii) information specifically excluded from the Divestiture Businesses conveyed to GE; (iii) information that is contained in documents, records or books of Thermo Fisher, that is provided to GE that is unrelated to the Divestiture Businesses acquired by GE or that is exclusively related to businesses or products retained by Thermo Fisher; and (iv) information that is protected by the attorney work product, attorney-client, joint defense, or other privilege prepared in connection with the Acquisition and relating to any United States, state, or foreign antitrust or competition law. When documents or data contain information related to the Divestiture Businesses and other products and topics, only the portion of the document or data related to the Divestiture Businesses is Confidential Business Information. Public information about the Divestiture Businesses is not Confidential Business Information.

Confidential Business Information also does not include information (that Thermo Fisher demonstrates to the satisfaction of the Commission) that: (i) was or becomes generally available to the public other than as a result of disclosure by Thermo Fisher; (ii) is necessary to be included in Thermo Fisher's mandatory regulatory filings, provided that Thermo Fisher makes all reasonable efforts to maintain the confidentiality of such information in the regulatory filings; (iii) was available, or becomes available to Thermo Fisher on a non-confidential basis, but only if, to the knowledge of Thermo Fisher, the source of such information is not in breach of a contractual, legal, fiduciary, or other obligation to maintain the confidentiality of the information; (iv) is information the disclosure of which is consented to by GE; (v) is necessary to be exchanged in the course of consummating the Acquisition or Thermo Fisher's divesture agreements with GE; (vi) is disclosed in complying with the Decision and Order; (vii) is information the disclosure of which is necessary to allow Thermo Fisher to comply with the requirements and obligations of the laws of the United States and other countries, and to comply with decisions by Government Entities; or (viii) is disclosed in obtaining legal advice.

During the Hold Separate Period, all Confidential Business Information must be retained and maintained on a confidential basis by the persons who have been and continue to be involved in the operations or sale of the Divestiture Businesses. Except as provided in the Decision and Order or the Order to Hold Separate and Maintain Assets, all such persons are prohibited from disclosing, providing, discussing, exchanging, circulating, or otherwise furnishing any such information to or with any other person employed by Thermo Fisher or whose employment relates to any of Thermo Fisher's businesses other than the Divestiture Businesses. Similarly, persons involved in similar activities with respect to Thermo Fisher's businesses are prohibited from disclosing, providing, discussing, exchanging, circulating, or otherwise furnishing any similar

Thermo Fisher information to or with any other person whose employment involves the Divestiture Businesses, except as otherwise provided in the Decision and Order or Order to Hold Separate and Maintain Assets.

Even after the Hold Separate Period, the Decision and Order requires Thermo Fisher to commit that, except in limited circumstances, no Confidential Business Information will be sought, received, obtained, disclosed, shared or otherwise used by any employee who works for Thermo Fisher after the Acquisition. In particular, this is to protect Confidential Business Information from being used in any way:

- to assist or inform Thermo Fisher employees who research, develop, manufacture, solicit for sale, sell, or service Thermo Fisher products acquired in the Acquisition that compete with the products of the Divestiture Businesses, including Gene Modulation, Cell Culture Media and Cell Culture Sera products acquired from Life;
- to interfere with any suppliers, distributors, resellers, or customers of GE;
- to interfere with any contracts divested, assigned, or extended to GE pursuant to the Orders; or
- to interfere in any way with GE pursuant to the Orders or with the Divestiture Businesses.

The Orders also require Thermo Fisher to provide GE and the Monitor/Hold Separate Trustee with access to all such Confidential Business Information along with current and historical product, customer and supplier information and data relating to the Divestiture Businesses. To the extent this includes information relating to the Divestiture Businesses and Thermo Fisher's retained businesses, the Decision and Order requires Thermo Fisher to redact information relating to the retained businesses it provides to GE and redact information relating to the Divestiture Businesses in copies it retains.

Thermo Fisher must also provide GE and the Monitor/Hold Separate Trustee with access to employees who possess or are able to locate such information for the purposes of identifying books, records, and files directly related to the relevant Divestiture Businesses that contain such information and facilitate the delivery in a manner consistent with the Orders.

The Decision and Order further requires that Thermo Fisher make commercially reasonable efforts to assure that in any instance wherein its own counsel (including its own in-house counsel) under appropriate confidentiality agreements retains Confidential Business Information related to the Divestiture Businesses provided to GE or accesses original documents containing Confidential Business Information related to the Divestiture Businesses (under circumstances where copies of documents are insufficient or otherwise unavailable), that Thermo Fisher's counsel does so only for the following purposes: (i) to assure Thermo Fisher's compliance with its divesture agreements with GE, the Decision and Order, any law (including, without limitation, any requirement to obtain regulatory licenses or approvals, and rules

promulgated by the Commission), any data retention requirement of any applicable Government Entity, or any taxation requirements; or (ii) to defend against, respond to, or otherwise participate in any litigation, investigation, audit, process, subpoena or other proceeding relating to the divestiture or any other aspect of the Divestiture Businesses or the assets or products associated with the Divestiture Businesses. The Decision and Order permits Thermo Fisher to disclose information necessary for the purposes of this paragraph pursuant to an appropriate confidentiality order, agreement or arrangement. If Thermo Fisher, however, needs, pursuant to this paragraph, such access to original documents, it must: (i) require those who view such unredacted documents or other materials to enter into confidentiality agreements with GE, (however, Thermo Fisher will not be deemed to have violated this requirement if GE withholds such agreement unreasonably) and (ii) use its best efforts to obtain a protective order to protect the confidentiality of such information during any adjudication.

Except as permitted under the Orders, you must keep Confidential Business Information confidential and must not provide, discuss, exchange, circulate, or otherwise disclose any Confidential Business to or with any other person whose job responsibilities relate to the products Thermo Fisher acquired in the Acquisition that compete with the products of the Divestiture Businesses, including Gene Modulation, Cell Culture Media and Cell Culture Sera products acquired from Life. Finally, if you have documents that might contain Confidential Business Information and you have not received specific instructions as to how these documents should be delivered to GE, you should contact Jonathan Wilk, Vice President, General Counsel Analytical Instruments Group, Deputy General Counsel at Thermo Fisher.

Any violation of the Orders may subject Thermo Fisher to civil penalties and other relief as provided by law. If you have any questions regarding the contents of this notice, the confidentiality of information, or the Orders, you should contact Jonathan Wilk, Vice President, General Counsel Analytical Instruments Group, Deputy General Counsel at Thermo Fisher.

AGREEMENT

I, _____(print name), hereby acknowledge that I have read the above notification, agree to abide by its provisions and to comply with the confidentiality requirements of the Orders.

EMPLOYEE	THERMO FISHER
By: _____	By:_____
[Print Name]	[Print Name]

[Title]

Date: _____

[Title]
Thermo Fisher Scientific Inc.
81 Wyman Street
Waltham, Massachusetts 02455

Date: _____

NON-PUBLIC APPENDIX J

TUSCHL PATENTS

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

ANALYSIS OF CONSENT ORDER TO AID PUBLIC COMMENT

INTRODUCTION

The Federal Trade Commission ("Commission") has accepted from Thermo Fisher Scientific Inc. ("Thermo Fisher"), subject to final approval, an Agreement Containing Consent Order ("Consent Agreement"), which is designed to remedy the anticompetitive effects likely to result from Thermo Fisher's proposed acquisition of Life Technologies Corporation ("Life"). Pursuant to an agreement signed on April 14, 2013, Thermo Fisher plans to acquire Life for approximately $13.6 billion. The Commission's Complaint alleges that the proposed acquisition, if consummated, would violate Section 7 of the Clayton Act, as amended, 15 U.S.C. § 18, and Section 5 of the Federal Trade Commission Act, as amended, 15 U.S.C. § 45, by lessening competition in the markets for: (1) short/small interfering ribonucleic acid ("siRNA") reagents; (2) cell culture media; and (3) cell culture sera. Under the terms of the Consent Agreement, Thermo Fisher is required to divest its gene modulation business (which includes siRNA reagents) and its cell culture media and sera business to GE Healthcare.

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 decide whether it should withdraw from the Consent Agreement, modify it, or make it final.

THE PARTIES

Thermo Fisher, headquartered in Waltham, Massachusetts, is a leading global manufacturer and distributor of scientific products, laboratory equipment, and laboratory consumables. Thermo Fisher supplies siRNA reagents under its Dharmacon brand, and cell culture media and sera under its HyClone brand.

Headquartered in Carlsbad, California, Life manufactures and supplies a wide range of laboratory equipment and consumables to customers worldwide. Life sells siRNA reagents under its Ambion brand, and cell culture media and sera under its Gibco brand.

THE RELEVANT PRODUCTS AND MARKET STRUCTURES

siRNA Reagents

siRNA reagents are used to study gene function by selectively turning off or "silencing" gene expression and inhibiting protein synthesis. Scientists use siRNA reagents in connection with a number of important applications, including the study of the cause of disease, genetic research, and agricultural research and crop production. Customers, which consist of biopharmaceutical companies, universities, and other research institutions, can purchase siRNA reagents either individually or as "libraries," which are curated collections of reagents used to study the effect of gene silencing on particular groups of interrelated genes.

The market for siRNA reagents is currently highly concentrated. It is effectively limited to four significant suppliers of siRNA reagents worldwide—Thermo Fisher, Life, Sigma-Aldrich Corp. ("Sigma-Aldrich"), and Qiagen N.V. ("Qiagen")—each of which holds a license for intellectual property (the "Tuschl patents") necessary to manufacture and supply high-quality siRNA reagents. Thermo Fisher and Life currently dominate the supply of siRNA reagents both in the United States

and worldwide due to the breadth of their product offerings and their reputation for superior quality. Only Thermo Fisher and Life offer a siRNA library for the full human genome, as well as technologically advanced second-generation siRNA reagents. For sales of individual siRNA reagents, Thermo Fisher and Life have a combined market share exceeding 50%, whether measured by U.S. or worldwide sales. For siRNA libraries, Thermo Fisher and Life combine for a market share in excess of 90%.

In addition to the four suppliers of siRNA reagents with licenses to the Tuschl patents, there is a fringe group of suppliers that offers "design-around" siRNA reagents. None of these companies, however, has a full set of individual siRNA reagents, nor do they have library offerings. Because customers view design-around siRNA reagents as significantly less reliable, there is substantially less demand for these products than for Tuschl siRNA reagents. The combined sales by, and market share of, these fringe suppliers are very low.

Cell Culture Media and Sera

Living cells in an organism obtain necessary nutrients directly from the blood and biological tissues that surround them. To grow cells for use and study outside the body, scientists utilize cell culture products like media and sera. Cell culture media are mixtures of a variety of components—including salts, sugars, amino acids, and vitamins—that create a healthy environment for cells to grow. Cell culture serum, derived from animal blood, is rich in nutrients and growth factors and is used as a supplement to cell culture media for propagating mammalian cells. Serum is primarily a byproduct of the cattle industry, since bovine blood is extracted as cattle are slaughtered. The most common and widely used type of cell culture serum is fetal bovine serum ("FBS") due to its high quality and low risk for contamination, although other types of sera, including adult bovine sera, newborn calf sera, calf sera, equine sera, and porcine sera are used to a limited degree. Many areas of research depend on cell culture media and sera, including immunology, oncology, pathology, stem cell research, neuroscience, and virology.

The cell culture media market is currently concentrated, with three suppliers worldwide, Thermo Fisher, Life, and Sigma-

Aldrich, controlling a combined share of more than 80% of the market. These three firms have the largest market shares because customers, especially large biopharmaceutical companies, view them as having the best reputations for high-quality products and the necessary production scale to meet their needs. Other market participants in the cell culture media market include Lonza Group Ltd., a distant fourth player, and a fringe of other firms that collectively account for a small share of the market. Post-acquisition, Thermo Fisher and Life would have at least a 50% share of the cell culture media market, whether measured by U.S. or worldwide sales.

The market for cell culture sera is also highly concentrated and controlled by three major players: Thermo Fisher, Life, and Sigma-Aldrich. Life's market share is approximately 40%, while Thermo Fisher's is approximately 20%. Sigma-Aldrich is a somewhat smaller player than Thermo Fisher. Other than these three firms, there are fringe suppliers that participate in the cell culture sera market, but they are of limited competitive significance because, among other things, they lack reputations and track records for quality and reliability.

RELEVANT GEOGRAPHIC MARKET

The relevant geographic market in which to evaluate the competitive effects of Thermo Fisher's proposed acquisition of Life in each of the relevant product markets is no narrower than the United States and may be as broad as the entire world. While some of the relevant products are subject to U.S. federal regulation and protected by patents, sophisticated foreign suppliers with existing products—in the case of siRNA reagents, those with a license to the Tuschl patents—can establish reputations for high-quality products and good customer service and compete for business in the United States. Further, foreign suppliers who lack a U.S. presence are able to contract with third-party service and distribution partners and compete for sales opportunities in the United States.

ENTRY

It is highly unlikely that new entry or repositioning, or expansion by current market participants would deter or

counteract the anticompetitive effects of the proposed transaction, let alone in a timely manner. The most significant barrier to entry and expansion in the market for siRNA reagents is access to the Tuschl patents technology, which only Thermo Fisher, Life, Qiagen, and Sigma-Aldrich are currently licensed to use. No additional firms are likely to gain access to Tuschl patents licenses in the future. Additional barriers to entry include the technical difficulty of designing and producing siRNA reagents and the substantial upfront investment required to compete effectively in the market. Similarly, timely entry into the markets for cell culture media and sera is unlikely because of the premium customers place on suppliers' track records and reputations for reliable, high-quality products. In addition, the cost of building sufficient capacity to supply large customers, like biopharmaceutical companies, is substantial and largely unrecoverable, making entering either of these markets, which have only limited sales opportunities for an untested entrant, unattractive.

EFFECTS OF THE ACQUISITION

The proposed acquisition likely would cause significant competitive harm to consumers in the markets for siRNA reagents, cell culture media, and cell culture sera. Thermo Fisher and Life, the two leading suppliers of siRNA reagents, are particularly close competitors, targeting the same customers and frequently cutting prices specifically to gain an advantage against one another. Moreover, Thermo Fisher and Life compete directly to develop improved, higher-quality siRNA reagents. The elimination of this close competition and the significant increase in concentration in the siRNA reagent market generally, is likely to result in substantial anticompetitive effects, including in the form of higher prices and reduced choice and innovation.

The proposed acquisition would also likely result in substantial anticompetitive effects in the cell culture media and sera markets by eliminating the close competition between Thermo Fisher and Life, which has benefited consumers significantly. Customers currently benefit from this head-to-head competition by leveraging Thermo Fisher and Life against each other to receive better pricing and higher quality products and services. By eliminating Life as an independent competitor and

substantially increasing concentration in the cell culture media and sera markets, the proposed acquisition would likely result in increased prices and reduced services to customers, as well as diminished innovation.

THE CONSENT AGREEMENT

The Consent Agreement eliminates the competitive concerns raised by Thermo Fisher's proposed acquisition of Life by requiring Thermo Fisher to divest assets and provide necessary transitional services to acquirer GE Healthcare. The divested assets include Thermo Fisher's gene modulation business, Dharmacon, which includes its siRNA reagents business, and HyClone, Thermo Fisher's cell culture media and sera business.

GE Healthcare, the proposed acquirer, has the relevant industry experience, reputation, and resources to restore the benefits of competition that would be lost through the proposed transaction. GE Healthcare is headquartered in the United Kingdom and has operations in North America, Europe, Asia, South America, and Australia. GE Healthcare manufactures and sells a wide variety of life sciences products. It currently has a very small cell culture business, which sells both media and sera, providing it with relevant experience in the cell culture space. Although GE Healthcare does not currently sell siRNA, it has plans to integrate Dharmacon into its existing life sciences product portfolio.

Pursuant to the Consent Agreement, GE Healthcare will acquire substantially all of the HyClone cell culture media and sera assets, except assets relating to single-use-technology, which is a plastics and consumables business and not an area of competitive overlap between the merging parties. GE Healthcare will also acquire all gene modulation and siRNA reagents-related assets necessary to replace the loss of competition presented by the proposed acquisition. As part of the proposed divestiture, GE Healthcare will receive all relevant intellectual property — including licenses to the Tuschl patents—know-how, and information required to produce and sell siRNA reagents and cell culture media and sera. It also will have the right to interview and offer employment to employees associated with the divested businesses. In addition, Thermo Fisher will provide GE

Healthcare with transition services for a limited period to enable it to immediately compete in the relevant markets with the divested assets.

The proposed divestiture to GE Healthcare is sufficiently large that it will be reportable to several foreign competition authorities in suspensory jurisdictions. Thus, the proposed Consent Agreement provides forty-five days from the date Thermo Fisher consummates its acquisition of Life to accomplish the divestiture to GE Healthcare, with the proviso that if the foreign approvals are secured earlier, the divestiture must be accomplished within ten days of receipt of the final approval. The proposed Consent Agreement provides that the Commission may appoint a trustee to accomplish the divestitures to another approved acquirer if the divestitures to GE Healthcare are not accomplished within the specified time period.

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.

Complaint

IN THE MATTER OF

MUSIC TEACHERS NATIONAL ASSOCIATION, INC.

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

Docket No. C-4448; File No. 131 0118
Complaint, April 3, 2014 – Decision, April 3, 2014

This consent order addresses Music Teachers National Association, Inc.'s ("MTNA") restraining through the non-solicitation provision of its Code of Ethics the ability of its members to solicit the clients of competing music teachers. The complaint alleges that MTNA, acting as a combination of its members and in agreement with at least some of its members, restrained competition among its members and others in violation of Section 5 of the Federal Trade Commission Act by adopting and maintaining a provision in its Code of Ethics that restrains solicitation of teaching work. The consent order requires MTNA to cease and desist from restricting solicitation among its members, and is required to disaffiliate any music teachers association that adopts or maintains provisions in its code of ethics or similar documents that restrain solicitation, advertising, or price-related competition.

Participants

For the *Commission*: *Armando Irizarry* and *Karen Mills.*

For the *Respondent*: *T. Scott Gilligan, Gilligan Law Offices.*

COMPLAINT

The Federal Trade Commission ("Commission"), 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, having reason to believe that Music Teachers National Association, Inc. ("Respondent" or "MTNA"), a corporation, has violated and is violating 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:

I. RESPONDENT

1. Respondent Music Teachers National Association, Inc. is a non-profit corporation organized, existing, and doing business under, and by virtue of, the laws of the State of Ohio, with its office and principal place of business located at 441 Vine Street, Suite 3100, Cincinnati, Ohio 45202-3004.

2. Respondent is a professional association of music teachers with over 20,000 members. Many of Respondent's members provide music-teaching services for a fee, or are employed at schools, universities and music studios as music teachers. Except to the extent that competition has been restrained as alleged herein, many of Respondent's members have been and are now in competition among themselves and with other music teachers.

3. Respondent has over 500 state and local music teachers associations as affiliates ("MTNA Affiliates"), including one affiliate for each state. Members of MTNA Affiliates are also members of Respondent.

II. JURISDICTION

4. Respondent conducts business for the pecuniary benefit of its members and is therefore a "corporation," as defined in Section 4 of the Federal Trade Commission Act, as amended, 15 U.S.C. § 44.

5. The acts and practices of Respondent, 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.

III. NATURE OF THE CASE

6. Respondent maintains a Code of Ethics applicable to the commercial activities of its members, and encourages its members to follow its Code of Ethics. Some MTNA Affiliates have the same Code of Ethics that MTNA has, and some have adopted different codes of ethics.

7. Respondent has acted as a combination of its members, and in agreement with at least some of those members, to restrain competition by restricting through its Code of Ethics the ability of its members to solicit the customers of competing music teachers. Specifically, in 2004 MTNA added the following provision to the section of its Code of Ethics titled "Commitment to Colleagues":

> The teacher shall respect the integrity of other teachers' studios and shall not actively recruit students from another studio.

8. In furtherance of the combination alleged in Paragraph 7, Respondent established a process for resolving alleged violations of the Code of Ethics, including by encouraging its members to resolve privately disputes arising out of the Code of Ethics, and also by establishing a mechanism by which Respondent may sanction violations of the Code of Ethics.

IV. VIOLATION CHARGED

9. The purpose, effects, tendency, or capacity of the combination, agreement, acts and practices alleged in Paragraphs 7 and 8 has been and is to restrain competition unreasonably and to injure consumers by discouraging and restricting competition among music teachers, and by depriving consumers and others of the benefits of free and open competition among music teachers.

10. The combination, agreement, acts and practices alleged in Paragraphs 7 and 8 constitute unfair methods of competition in violation of Section 5 of the Federal Trade Commission Act, as amended, 15 U.S.C. § 45. Such combination, agreement, acts and practices, or the effects thereof, are continuing and will continue or recur in the absence of the relief requested herein.

WHEREFORE, THE PREMISES CONSIDERED, the Federal Trade Commission on this third day of April, 2014, issues its Complaint against Respondent.

By the Commission.

DECISION AND ORDER

The Federal Trade Commission, having initiated an investigation of certain acts and practices of Music Teachers National Association, Inc. ("Respondent" or "MTNA") 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 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 a consent order, an admission by respondent of all the jurisdictional facts set forth in the aforesaid draft of complaint, a statement that the signing of said agreement is for settlement purposes only and does not constitute an admission by Respondent that the law has been violated as alleged in such complaint, or that the facts as alleged in such complaint, other than jurisdictional facts, are true, and waivers and other provisions as required by the Commission's Rules; and

The Commission having thereafter considered the matter and having determined that it had reason to believe that Respondent has violated the said Acts, and that a complaint should issue stating its charges in that respect, and having accepted the executed consent agreement and placed such agreement on the public record for a period of thirty (30) days for the receipt and consideration of public comments, now in further conformity with the procedure described in § 2.34 of its Rules, the Commission hereby issues its complaint, makes the following jurisdictional findings and enters the following order ("Order"):

1. Respondent Music Teachers National Association, Inc., is a non-profit corporation organized, existing, and doing business under, and by virtue of, the laws of the State of Ohio, with its office and principal place of business located at 441 Vine Street, Suite 3100, Cincinnati, Ohio 45202.

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

ORDER

I.

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

A. "Respondent" or "MTNA" means Music Teachers National Association, Inc., its directors, boards, officers, employees, agents, representatives, councils, committees, foundations, divisions, successors, and assigns.

B. "Affiliate" means any state or local music teachers association that is affiliated with MTNA.

C. "Antitrust Compliance Officer" means a person appointed under Paragraph IV.A. of this Order.

D. "Antitrust Counsel" means a lawyer admitted to practice law in one or more of the judicial districts of the courts of the United States.

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. "Certification" means the document attached to this Order as Appendix A.

G. "Code of Ethics" means a statement setting forth the principles, values, standards, or rules of behavior that guide the conduct of an organization and its members.

H. "Extension of Time" means the document attached to this Order as Appendix B.

I. "FTC Settlement Statement" means the statement attached to this Order as Appendix C.

J. "Leaders" means MTNA's board of directors, officers, committee chairs, council chairs, and state presidents.

K. "Member" means a member of MTNA, including active, state, local, collegiate, international, corporate, institutional, international, patron, retired, and six-month members.

L. "Notification Date" means the date on which Respondent makes the notification required by Paragraph III.A.3. of this Order.

M. "Organization Documents" means any documents relating to the governance, management, or direction of the relevant organization, including, but not limited to, bylaws, rules, regulations, Codes of Ethics, policy statements, interpretations, commentaries, or guidelines.

N. "Prohibited Practice" means Regulating, restricting, restraining, impeding, declaring unethical or unprofessional, interfering with or advising against any of the activities described in Paragraph II.B.1, II.B.2., and II.B.3.

O. "Regulating" means (1) adopting, maintaining, recommending, or encouraging that Members follow any rule, regulation, interpretation, ethical ruling, policy, commentary, or guideline; (2) taking or threatening to take formal or informal disciplinary action; or (3) conducting formal or informal investigations or inquiries.

II.

IT IS FURTHER ORDERED that Respondent, directly or indirectly, or through any corporate or other device, in or in connection with Respondent's activities as a professional association in or affecting commerce, as "commerce" is defined in Section 4 of the Federal Trade Commission Act, 15 U.S.C. § 44, do forthwith cease and desist from:

A. Regulating, restricting, restraining, impeding, declaring unethical or unprofessional, interfering with or advising against solicitation of teaching work, through any means, by any Member or any organization with which Members are affiliated; and

B. Accepting as an Affiliate, or maintaining a relationship with any Affiliate, that MTNA knows engages in conduct Regulating, restricting, restraining, impeding, declaring unethical or unprofessional, interfering with or advising against:

1. Solicitation of teaching work, through any means, by any Member or any organization with which Members are affiliated;

2. Advertising or publishing the prices, terms or conditions of sale of teaching services, or information about teaching services that are offered for sale or made available by Members or by any organization with which Members are affiliated; and

3. Price-related competition by its Members, including, but not limited to, restricting the provision of free or discounted services, restricting terms of payment, or restricting Members from offering their services unless they conform to rules established by MTNA;

Provided, however, that nothing in this Paragraph II shall prohibit Respondent from adopting and enforcing, or

accepting as an Affiliate or maintaining an affiliate relationship with any Affiliate that adopts and enforces, reasonable principles, rules, guidelines, or policies governing: (i) the conduct of its Members with respect to representations that Respondent reasonably believes would be false or deceptive within the meaning of Section 5 of the Federal Trade Commission Act or (ii) the conduct of judges during music competitions sponsored or held by Respondent or any Affiliate.

III.

IT IS FURTHER ORDERED that:

A. No later than thirty (30) days from the date this Order is issued, Respondent shall:

1. Post and maintain for five years on the Code of Ethics page of MTNA's website, together with a link from Respondent's home or menu page that is entitled "Antitrust Compliance," the following items:

   a. An announcement that states "MTNA agreed to change its Code of Ethics and will not adopt, encourage its members to follow, or enforce any Code of Ethics provision relating to solicitation of teaching work that does not comply with the FTC Consent Order,"

   b. The FTC Settlement Statement; and

   c. A link to the Federal Trade Commission's website that contains the press release issued by the Commission in this matter; and

2. Distribute electronically or by other means a copy of the FTC Settlement Statement to its Leaders, employees, and Affiliates; and

3. Notify each Affiliate that, as a condition of continued affiliation with MTNA, such Affiliate must execute and return a Certification to Respondent no later than one hundred twenty (120) days from the date Respondent notifies such Affiliate.

B. No later than sixty (60) days from the date this Order is issued Respondent shall:

1. Remove from MTNA's Organization Documents and MTNA's website any statement that is inconsistent with Paragraph II. of this Order, and

2. Publish on MTNA's website any revisions of MTNA's Organization Documents, the press release issued by the Commission in this matter, and the FTC Settlement Statement.

C. Respondent shall publish, in the font that is customarily used for feature articles:

1. Any revisions of MTNA's Organization Documents, the press release issued by the Commission in this matter, and the FTC Settlement Statement in the next available edition of the "American Music Teacher" magazine; and

2. The FTC Settlement Statement in the edition of the "American Music Teacher" magazine, or any successor publication, on or as close as possible to the first and second anniversary dates of first publication of the FTC Settlement Statement.

D. For a period of five (5) years after this Order is issued, distribute electronically or by other means, a copy of the FTC Settlement Statement to each:

1. New Affiliate no later than thirty (30) days after the date the organization becomes an Affiliate;

2. New Member no later than thirty (30) days after the date of commencement of the membership; and

3. Member who receives a membership renewal notice at the time the Member receives such notice.

E. Respondent shall:

1. Immediately terminate any Affiliate that fails to provide an executed Certification no later than one hundred twenty (120) days from the Notification Date and shall not permit the terminated Affiliate to use the phrase "Affiliated with Music Teachers National Association" until such time as the Affiliate provides an executed Certification;

   Provided, however, that Respondent may allow an Affiliate to file an Extension of Time to provide Respondent an executed Certification no later than than two hundred fifty (250) days from the Notification Date ("Extended Time Period");

   Provided further that if such Affiliate does not provide Respondent the executed Certification within the Extended Time Period, Respondent shall proceed against the Affiliate pursuant to Paragraph III.E.2. of this Order; and

2. Terminate for a period of one (1) year, no later than one hundred twenty (120) days after Respondent learns or obtains information that would lead a reasonable person to conclude that the Affiliate has, following the date this Order is issued, engaged in any Prohibited Practice; unless, prior to the expiration of the one hundred twenty (120) day period, said Affiliate informs Respondent in a verified written statement of an officer that the Affiliate has eliminated and will not reengage in such Prohibited Practice, and Respondent has no reasonable grounds to believe otherwise.

F. Respondent shall include with the 2014-2015 dues statement sent to each Member a copy of the FTC Settlement Statement.

G. Respondent shall maintain and make available to Commission staff for inspection and copying upon reasonable notice records adequate to describe in detail any:

1. Action against any Member or Affiliate taken in connection with the activities covered by Paragraph II. of this Order, including but not limited to enforcement, advisory opinions, advice or interpretations rendered; and

2. Complaint received from any person relating to Respondent's compliance with this Order.

IV.

IT IS FURTHER ORDERED that Respondent shall design, maintain, and operate an antitrust compliance program to assure compliance with this Order and the Antitrust Laws:

A. No later than thirty (30) days from the date this Order is issued, Respondent shall appoint and retain an Antitrust Compliance Officer for the duration of this Order to supervise Respondent's antitrust compliance program.

B. For a period of three (3) years from the date this Order is issued, the Antitrust Compliance Officer shall be the Chief Executive Officer of Respondent after which a new Antitrust Compliance Officer may be appointed who shall be Antitrust Counsel, a member of the Board of Directors, or employee of Respondent.

C. For a period of five (5) years from the date this Order is issued, Respondent shall provide in-person annual training to its Leaders and employees concerning Respondent's obligations under this Order and an

overview of the Antitrust Laws as they apply to Respondent's activities, behavior, and conduct.

D. Respondent shall implement policies and procedures to:

1. Enable persons (including, but not limited to, its Leaders, employees, Members, and agents) to ask questions about, and report violations of, this Order and the Antitrust Laws, confidentially and without fear of retaliation of any kind; and

2. Discipline Leaders, employees, and agents for failure to comply fully with this Order.

E. For a period of five (5) years from the date this Order is issued, Respondent shall:

1. Conduct a presentation at each annual meeting of (i) MTNA, and (ii) the State Presidents Advisory Council, that summarizes Respondent's obligations under this Order and provides context-appropriate guidance on compliance with the Antitrust Laws; and

2. Provide an antitrust compliance guide to Affiliates to use at each annual meeting of such Affiliates that summarizes Respondent's obligations under this Order and provides context-appropriate guidance on compliance with the Antitrust Laws.

V.

IT IS FURTHER ORDERED that Respondent shall file a verified written report with the Commission setting forth in detail the manner and form in which it intends to comply, is complying, and has complied with this Order:

A. No later than (i) ninety (90) days after the date this Order is issued, (ii) one hundred eighty (180) days after the date this Order is issued; and

B. No later than one (1) year after the date this Order is issued and annually thereafter for four (4) years on the anniversary of the date on which this Order is issued, and at such other times as the Commission staff may request.

VI.

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

A. Dissolution of Respondent;

B. Acquisition, merger, or consolidation of Respondent; or

C. Any other change in Respondent, including, but not limited to, assignment and the creation or dissolution of subsidiaries, if such change might affect compliance obligations arising out of this Order.

VII.

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

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

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

VIII.

IT IS FURTHER ORDERED that this Order shall terminate on April 3, 2034.

By the Commission.

APPENDIX A

CERTIFICATION

_____

Name of Music Teacher Association

As a condition of being affiliated with the Music Teachers National Association, Inc. ("MTNA"), the music teacher association named above (the "Association") makes the following representations to MTNA:

1. NO RESTRICTIONS ON STUDENT OR JOB SOLICITATIONS: As of the date this Certification is executed, the Association does not maintain in its bylaws, rules, regulations, code of ethics, policies, or website any type of rule, interpretation, ethical ruling, guideline or recommendation which would restrict, restrain, impede, declare unethical or unprofessional, or interfere with or advise against a member of the Association from soliciting teaching work. Examples of the type of provisions that restrict solicitation include any of the following:

- Restricting a member from soliciting a pupil of another teacher.

- Restricting a member from enrolling a pupil of another teacher unless the pupil's financial obligations to the former teacher have been satisfied and the relationship with the teacher has been severed.

- Restricting a member from seeking a job opening unless notice has been given of impending vacancy.

- Restricting a member from writing or publishing reviews or criticisms of the performance or skills of other teachers or their students.

- Restricting a member from writing or publishing for public media.

2. NO RESTRICTIONS ON ADVERTISING PRICES OR TERMS OF TEACHING SERVICES: As of the date this Certification is executed, the Association does not maintain in its bylaws, rules, regulations, code of ethics, policies, or website any type of rule, interpretation, ethical ruling, guideline or recommendation which would restrict, impede, declare unethical or unprofessional, or interfere with or advise against a member of the Association from advertising prices or other terms of teaching services. Examples of the type of provisions that restrict advertising include any of the following:

- Restricting a member from advertising free scholarships or tuition.

- Restricting a member from offering opportunities for study to gifted but underprivileged students in the form of free lessons or scholarships as inducements to study with a particular teacher.

3. NO RESTRICTIONS ON COMPETING ON PRICE-RELATED TERMS: As of the date this Certification is executed, the Association does not maintain in its bylaws, rules, regulations, code of ethics, policies, or website any type of rule, interpretation,

ethical ruling, guideline or recommendation which would restrict, restrain, impede, declare unethical or unprofessional, or interfere with or advise against a member of the Association from competing on price-related terms. Examples of the type of provisions that restrict competing on price-related terms include any of the following:

- Restricting a member from charging fees that are lower than the average fees being charged in the community.

- Restricting a member from allowing a student to pay tuition in terms other than in advance by the month or term.

- Restricting a member from offering make-up lessons for lessons missed unless the student provides sufficient notice or reasonable excuse.

On behalf of the Association named above, the undersigned officer certifies that all of the foregoing representations are accurate as of the date listed below:

Officer's Signature _____

Officer's Name _____

Officer's Title _____

Date: _____

EXTENSION OF TIME. Due to scheduling of annual membership meetings and various constitution and bylaw requirements, some state and local music teacher associations may not be able to take the necessary action to eliminate the prohibited provisions described in the above Certification from their organizational documents or policies by the deadline set forth for the return of the Certification. If the Association faces such obstacles, but is taking all necessary steps to eliminate the prohibited provisions as soon as practical under the Association's organizational documents, it may execute the Extension of Time set forth on the next page and return it by the deadline.

APPENDIX B

EXTENSION OF TIME

_____

Name of Music Teacher Association

The Association certifies that (i) before it can make the required Certification, it has to eliminate certain prohibited provisions from its organizational documents, (ii) it is precluded from doing so by the deadline imposed for the return of the Certification because of time constraints set by the Association's organizational documents, (ii) it shall not enforce any prohibited provision, and (iv) it is taking all necessary steps to eliminate the prohibited provisions as set forth below:

(a) Description of the prohibited provision(s) (attach a copy):

_____

_____

(b) Description of the Association action required to eliminate prohibited provision (attach copy of the rules or bylaws that contain the procedure the Association must follow):

_____

_____

(c) Schedule for the required action and the date by which action to eliminate the prohibited provision(s) will be completed:

_____

The Association understands that it must provide the Certification within fifteen (15) days of the date listed in Section (c) above that the prohibited provision(s) has been eliminated.

On behalf of the Association named above, the undersigned officer certifies that all of the foregoing representations are accurate as of the date listed below:

Officer's Signature: _____ Date: _____
Officer's Name: _____
Officer's Title: _____

APPENDIX C

(Letterhead of MTNA)

Dear Member:

As you may know, the Federal Trade Commission conducted an investigation concerning the provision in MTNA's Code of Ethics that stated:

> The teacher shall respect the integrity of other teachers' studios and shall not actively recruit students from another studio.

The Federal Trade Commission alleges that this provision violates the Federal Trade Commission Act because it unnecessarily restricts members of MTNA from competing for students, thereby depriving students from the benefits of competition among music teachers.

To end the investigation expeditiously and to avoid disruption to its core functions, MTNA voluntarily agreed, without admitting any violation of the law, to the entry of a Consent Agreement and a Decision and Order by the Federal Trade Commission. As a result, MTNA has removed, and will not enforce, the above provision from its Code of Ethics.

In general, the Federal Trade Commission has prohibited MTNA from engaging in certain activities that restrict members from soliciting students or other teaching work, including activities that restrict members from offering services directly to students who may be receiving similar services from other music teachers.

Some state and local music teacher associations that are affiliated with MTNA have codes of ethics or similar documents that contain provisions that restrict its members from: (a) advertising prices or other terms of teaching services, (b) competing on price-related terms, or (c) soliciting students or other teaching work. The Federal Trade Commission has prohibited MTNA from accepting or maintaining as an affiliate any association that has such a code of ethics or similar document that contains these prohibited restrictions.

In order to maintain their affiliation with MTNA, each state and local music teacher association must review its constitution and bylaws, code of ethics, operational policies, and membership requirements to determine if they contain any of these prohibited restrictions on members. Examples of these prohibited restrictions would include the following:

- An association restricting a member from offering opportunities for study to gifted students in the form of free lessons or scholarships as inducements to study with a particular member.
- An association restricting a member from engaging in advertising free scholarships or tuition.
- An association restricting a member from soliciting the pupil of another music teacher by inducments or other acts.
- An association restricting a member from enrolling a pupil of another teacher unless the pupil's financial obligations to the former teacher have been satisfied and relations with that teacher have been severed.
- An association restricting a member from charging fees that are lower than the average in the community.
- An association restricting how members accept tuition payments from pupils.

- An association imposing restrictions or requirements on members regarding make-up lessons or missed lessons.
- An association restricting a member from writing or publishing for public media or from reviewing or criticizing colleagues or colleagues' students for any purpose whatsoever.
- An association retricting a member from seeking a job opportunity unless notice has been given of an impending vacancy.

State and local music teacher associations that are affiliated with MTNA and which have any of these prohibited restrictions in their constitution and bylaws, codes of ethics, operational policies, membership requirements, or elsewhere will have the opportunity to remove them. If they do not certify to MTNA that they do not have any such restrictions prior to the deadline set forth in the Decision and Order, MTNA will have to disaffiliate from them until such time as they comply with the Decision and Order.

The Decision and Order does not prohibit MTNA or its affiliates from adopting and enforcing codes of ethics or similar documents that govern the conduct of its members with respect to representations that MTNA or its affiliates reasonably believe would be false or deceptive within the meaning of the Federal Trade Commission Act, or the conduct of judges during music competitions sponsored or held by MTNA or any affiliate.

The Decision and Order also requires that MTNA implement an antitrust compliance program.

A copy of the Decision and Order is enclosed. It is also available on the Federal Trade Commission website at www.FTC.gov, and through the MTNA web site.

ANALYSIS OF CONSENT ORDER TO AID PUBLIC COMMENT

The Federal Trade Commission ("Commission") has accepted, subject to final approval, an Agreement Containing Consent Order ("Consent Agreement") from the Music Teachers National Association, Inc. (hereinafter "MTNA"). The Commission's complaint ("Complaint") alleges that MTNA, acting as a combination of its members and in agreement with at least some of its members, restrained competition among its members and others in violation of Section 5 of the Federal Trade Commission Act, as amended, 15 U.S.C. § 45, by adopting and maintaining a provision in its Code of Ethics that restrains solicitation of teaching work.

Under the terms of the proposed Consent Agreement, MTNA is required to cease and desist from restricting solicitation among its members, and is required to disaffiliate any music teachers association that adopts or maintains provisions in its code of ethics or similar documents that restrain solicitation, advertising, or price-related competition.

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 Consent Agreement. 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 Proposed 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 Proposed Order or in any way to modify their terms.

Analysis to Aid Public Comment

The Consent Agreement is for settlement purposes only and does not constitute an admission by MTNA 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 Respondent

MTNA is a non-profit professional association of more than 20,000 music teachers. Many of MTNA's members provide music-teaching services for a fee, or are employed at schools, universities and music studios as music teachers. Respondent has over 500 state and local music teachers associations as affiliates, including one affiliate for each state. Members of MTNA affiliates are also members of MTNA.

MTNA maintains a Code of Ethics applicable to the commercial activities of its members, and encourages its members to follow its Code of Ethics. In 2004, MTNA added the following non-solicitation provision to the section of its Code of Ethics titled "Commitment to Colleagues":

> The teacher shall respect the integrity of other teachers' studios and shall not actively recruit students from another studio.

Some MTNA affiliates have the same Code of Ethics that MTNA has, and some have adopted different codes of ethics. Leaders of several state affiliates have exhorted MTNA members to comply with the non-solicitation restraints.

B. The Anticompetitive Conduct

The Complaint alleges that MTNA has violated Section 5 of the Federal Trade Commission Act by restraining through the non-solicitation provision of its Code of Ethics the ability of its members to solicit the clients of competing music teachers. MTNA also established a process for resolving alleged violations

of the Code of Ethics, including by encouraging its members to resolve privately disputes arising out of the Code of Ethics, and by establishing a mechanism by which MTNA may sanction violations of the Code of Ethics.

The Complaint alleges that the purpose, effect, tendency, or capacity of the combination, agreement, acts and practices of MTNA has been and is to restrain competition unreasonably and to injure consumers by discouraging and restricting competition among music teachers.

II. The Proposed Order

The Proposed Order has the following substantive provisions. Paragraph II requires MTNA to cease and desist from restraining or declaring unethical the solicitation of teaching work by its members. It also requires MTNA to cease and desist from maintaining a relationship with an affiliate that MTNA knows engages in conduct that restrains solicitation, advertising, or price-related competition by its members.

The Proposed Order does not prohibit MTNA from adopting and enforcing, or maintaining an affiliate relationship with an affiliate that adopts and enforces, reasonable principles (i) to prevent false or deceptive representations, or (ii) to govern the conduct of judges during music competitions sponsored or held by MTNA or its affiliates. The conduct of judges is exempt from the Proposed Order because MTNA has a valid justification for prohibiting solicitation in competitions. MTNA is concerned that if judges could solicit the students they are judging, it could give judges an unfair advantage over other MTNA members, and could adversely affect the integrity of competitions. This exemption is limited to the duration of a competition; prohibitions on pre or post-competition solicitation would violate the Proposed Order.

Paragraph III of the Proposed Order requires MTNA to remove from its organization documents and website any statement inconsistent with the Proposed Order. MTNA also must publicize to MTNA's members, new members, affiliates, new affiliates, leaders, employees, and the public the changes that

MTNA must make to the Code of Ethics and a statement describing the Consent Agreement.

Paragraph III also requires MTNA to notify each of its affiliates that, as a condition of continued affiliation with MTNA, each affiliate must execute and return to MTNA a Certification that the affiliate does not have restrictions on student or job solicitations, advertising, or price-related competition. For example, the Certification, which is Appendix A to the Proposed Order, specifies that an affiliate does not restrict its members from publishing criticisms of other teachers, advertising free scholarships or tuition, or charging fees that are lower than the average fees in their community.

MTNA must disaffiliate any affiliate that does not provide an executed Certification within one hundred and twenty days of when MTNA gave notice to the affiliate. However, MTNA may allow an affiliate to execute an Extension of Time to avoid disaffiliation if the affiliate is not able to execute the Certification within the time allowed due to scheduling of its annual membership meetings or constitution or bylaw requirements. Thereafter, the Proposed Order requires MTNA to terminate an affiliate for one year after learning that the affiliate has restrained or declared unethical solicitation, advertising, or price-related competition, unless the affiliate informs MTNA that the affiliate has eliminated and will not reengage in such practices.

Paragraph IV of the Proposed Order requires MTNA to design, maintain, and operate an antitrust compliance program. MTNA will have to appoint an Antitrust Compliance Officer for the duration of the Proposed Order. For a period of five years, MTNA will have to provide in-person annual training to its leaders and employees, conduct a presentation at its annual meeting and to the presidents of the state affiliates, and provide an antitrust compliance guide to affiliates to use at their annual meeting concerning the antitrust laws and MTNA's obligations under the Proposed Order. MTNA must also implement policies and procedures to enable persons to ask questions about, and report violations of, the Proposed Order and the antitrust laws confidentially and without fear of retaliation, and to discipline its

leaders, employees and agents for failure to comply with the Proposed Order.

Paragraphs V-VII of the Proposed Order impose certain standard reporting and compliance requirements on MTNA.

The Proposed Order will expire in 20 years.

* * *

Statement of the Federal Trade Commission

The Federal Trade Commission is today issuing for public comment proposed consent orders with two professional associations, the Music Teachers National Association, Inc. ("MTNA") and California Association of Legal Support Professionals ("CALSPro").[1] We take this step because we have reason to believe that these professional associations and their respective members have violated the antitrust laws by agreeing not to engage in fundamental forms of competitive activity.

MTNA, the umbrella organization for about 500 state and local music teacher associations across the country, is a professional association of over 20,000 private music teachers. Collectively, MTNA members generate an estimated $500 million in annual revenues. In 2004, MTNA revised its code of ethics and imposed a ban on solicitations, prohibiting teachers from actively recruiting students from one another. A number of MTNA affiliates have adopted even more aggressive competitive restrictions, including prohibitions on certain advertising, charging less than the community average, and offering

[1] Both MTNA and CALSPro are non-profits but it is well established that the Commission has jurisdiction over non-profit organizations that confer, or are organized for the purpose of conferring, economic benefits to their for-profit members. *See Cal. Dental Ass'n v. FTC*, 526 U.S. 756, 767 n.6 (1999).

scholarships or free music lessons. CALSPro, a California association of legal support service providers, is comprised of more than 350 company and individual members. CALSPro's code of ethics prohibits its members from offering discounted rates to rivals' clients, engaging in certain comparative advertising, and recruiting employees of competitors without first notifying the competitor.

Professional associations like MTNA and CALSPro typically serve many important and procompetitive functions, including adopting rules governing the conduct of their members that benefit competition and consumers. But, because trade organizations are by their nature collaborations among competitors, the Commission and courts have long been concerned with anticompetitive restraints imposed by such organizations under the guise of codes of ethical conduct.[2]

Competing for customers, cutting prices, and recruiting employees are hallmarks of vigorous competition. Agreements among competitors not to engage in these activities injure consumers by increasing prices and reducing quality and choice. Absent a procompetitive justification, these types of restrictions on competition are precisely the kind of unreasonable restraints of trade that the Sherman Act was designed to combat. *See, e.g.*, *Nat'l Soc'y of Prof'l Eng'rs v. United States*, 435 U.S. 679 (1978) (condemning ethics restriction on competitive bidding). For a professional association to proscribe honest competition as "unethical" behavior is particularly problematic because, as the Supreme Court has recognized, association members can be "expected to comply in order to assure that they [do] not discredit themselves by departing from professional norms." *Goldfarb v. Va. State Bar*, 421 U.S. 773, 792-93 (1975). Here, neither

[2] *See, e.g., Inst. of Store Planners*, 135 F.T.C. 793 (2003) (challenging restraints on price competition); *Nat'l Acad. of Arbitrators*, 135 F.T.C. 1 (2003) (restraints on solicitation and advertising); *Am. Inst. for Conservation of Historic & Artistic Works*, 134 F.T.C. 606 (2002) (restraints on price competition); *Cmty. Ass'ns Inst.*, 117 F.T.C. 787 (1994) (restraints on solicitation); *Nat'l Soc'y of Prof'l Eng'rs,* 116 F.T.C. 787 (1993) (restraints on advertising); *Nat'l Ass'n of Social Workers*, 116 F.T.C. 140 (1993) (restraints on solicitation and advertising); *Am. Psychological Ass'n*, 115 F.T.C. 993 (1992) (same).

association advanced a legitimate business rationale for its restrictions. We therefore conclude that the principal tendency and likely effect of the challenged restraints is to harm consumers through higher prices, lower quality, and less choice.

Our proposed remedies will restore competition without imposing an undue burden on the parties or interfering with the legitimate functions of either organization. We have required MTNA and CALSPro to modify their codes of ethics and to cease any efforts to impede members of these associations from freely competing with one another. The MTNA order also requires the association to take affirmative steps to discourage anticompetitive conduct on the part of its state and local affiliates.

As with all of the Commission's enforcement activity, our goal in these cases is to stop the anticompetitive conduct at issue and remedy any anticompetitive effects associated with the challenged behavior. We also seek to provide guidance more broadly and deter other professional and trade organizations from imposing unjustified limits on competition. Maintaining a competitive marketplace requires that we monitor behavior among rivals and take action whenever we see competition being compromised to the detriment of consumers.

Complaint

IN THE MATTER OF

CALIFORNIA ASSOCIATION OF LEGAL SUPPORT PROFESSIONALS

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

Docket No. C-4447; File No. 131 0205
Complaint, April 3, 2014 – Decision, April 3, 2014

This consent order addresses California Association of Legal Support Professionals' ("CALSPro") restraining through its Code of Ethics the ability of its members to compete on price, to solicit legal support professionals for employment, and to advertise. The complaint alleges that CALSPro restrained competition among its members and others in violation of Section 5 of the Federal Trade Commission Act by adopting and maintaining provisions in its Code of Ethics that restrain its members from competing on price, advertising, and soliciting legal support professionals for employment. The consent order requires CALSPro to cease and desist from restricting its members from competing on price, advertising, and soliciting legal support professionals for employment.

Participants

For the *Commission*: *Armando Irizarry.*

For the *Respondent*: *Michael Belote*, *California Advocates, Inc.*

COMPLAINT

The Federal Trade Commission ("Commission"), 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, having reason to believe that California Association of Legal Support Professionals ("Respondent" or "CALSPro"), a corporation, has violated and is violating 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:

RESPONDENT

1.Respondent California Association of Legal Support Professionals is a non-profit corporation organized, existing, and doing business under, and by virtue of, the laws of the State of California, with its office and principal place of business located at 2520 Venture Oaks Way, Suite 150, Sacramento, California 95833.

2.Respondent is a non-profit, professional association of over 350 company and individual members. Respondent's members are in the business of providing support services to the legal community, including but not limited to serving process, copying documents, filing documents with a court, preparing subpoenas, searching court records, locating persons, and conducting private investigations.

JURISDICTION

3.Respondent conducts business for the pecuniary benefit of its members and is therefore a "corporation," as defined in Section 4 of the Federal Trade Commission Act, as amended, 15 U.S.C. § 44.

4.The acts and practices of Respondent, 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.

NATURE OF THE CASE

5.Respondent maintains a Code of Ethics applicable to the commercial activities of its members. Respondent's members agree to abide by the Code of Ethics as a condition of membership.

6.Respondent has acted as a combination of its members, and in agreement with at least some of those members, to restrain competition by restricting through its Code of Ethics the ability of its members to compete on price, to solicit legal support

professionals for employment, and to advertise. Specifically, Respondent maintains the following provisions in its Code of Ethics:

- "It is not ethical to cut the rates you normally and customarily charge when soliciting business from a member firm's client . . ."

- "It is not ethical to . . . speak disparagingly of another member."

- "Never discuss the bad points of your competitor."

- "It is unethical to contact an employee of another member firm to offer him employment with your firm without first advising the member of your intent."

7.In furtherance of the combination alleged in Paragraph 6, Respondent established a Dispute Resolution Committee to uphold and maintain industry standards and ethical business practices as set forth in Respondent's Bylaws, Code of Ethics and Manual of Policies and Procedures. The Dispute Resolution Committee provides an avenue for resolving alleged violations of the Code of Ethics, including by encouraging Respondent's members to resolve privately disputes arising out of the Code of Ethics, and also by establishing a mechanism by which Respondent may sanction violations of the Code of Ethics.

VIOLATION CHARGED

8.The purpose, effect, tendency, or capacity of the combination, agreement, acts and practices alleged in Paragraphs 6 and 7 has been and is to restrain competition unreasonably and to injure consumers by discouraging and restricting competition among legal support professionals, and by depriving consumers and others of the benefits of free and open competition among legal support professionals.

9.The combination, agreement, acts and practices alleged in Paragraphs 6 and 7 constitute unfair methods of competition in

violation of Section 5 of the Federal Trade Commission Act, as amended, 15 U.S.C. § 45. Such combination, agreement, acts and practices, or the effects thereof, are continuing and will continue or recur in the absence of the relief requested herein.

WHEREFORE, THE PREMISES CONSIDERED, the Federal Trade Commission on this third day of April, 2014, issues its Complaint against Respondent.

By the Commission.

DECISION AND ORDER

The Federal Trade Commission, having initiated an investigation of certain acts and practices of California Association of Legal Support Professionals ("Respondent" or "CALSPro") 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 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 a consent order, an admission by respondent of all the jurisdictional facts set forth in the aforesaid draft of complaint, a statement that the signing of said agreement is for settlement purposes only and does not constitute an admission by Respondent that the law has been violated as alleged in such complaint, or that the facts as alleged in such complaint, other than jurisdictional facts, are true, and waivers and other provisions as required by the Commission's Rules; and

The Commission having thereafter considered the matter and having determined that it had reason to believe that Respondent has violated the said Acts, and that a complaint should issue stating its charges in that respect, and having accepted the executed consent agreement and placed such agreement on the public record for a period of thirty (30) days for the receipt and consideration of public comments, now in further conformity with the procedure described in § 2.34 of its Rules, the Commission hereby issues its complaint, makes the following jurisdictional findings and enters the following order ("Order"):

1. Respondent California Association of Legal Support Professionals is a non-profit corporation organized, existing, and doing business under, and by virtue of, the laws of the State of California, with its office and principal place of business located at 2520 Venture Oaks Way, Suite 150, Sacramento, California 95833.

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

ORDER

I.

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

A. "Respondent" or "CALSPro" means California Association of Legal Support Professionals, its directors, boards, officers, employees, agents, representatives, councils, committees, foundations, divisions, successors, and assigns.

B. "Antitrust Compliance Officer" means a person appointed under Paragraph IV.A. of this Order.

C. "Antitrust Counsel" means a lawyer admitted to practice law in one or more of the judicial districts of the courts of the United States.

D. "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.*

E. "Code of Ethics" means a statement setting forth the principles, values, standards, or rules of behavior that guide the conduct of an organization and its members.

F. "FTC Settlement Statement" means the statement attached to this Order as Appendix A.

G. "Member" means a member of CALSPro, including company, individual, associate, and vendor members.

H. "Organization Documents" means any documents relating to the governance, management, or direction of Respondent, including, but not limited to, bylaws, rules, regulations, Codes of Ethics, policy statements, interpretations, commentaries, or guidelines.

I. "Regulating" means (1) adopting, maintaining, recommending, or encouraging that Members follow any rule, regulation, interpretation, ethical ruling, policy, commentary, or guideline; (2) taking or threatening to take formal or informal disciplinary action; or (3) conducting formal or informal investigations or inquiries.

II.

IT IS FURTHER ORDERED that Respondent, directly or indirectly, or through any corporate or other device, in or in connection with Respondent's activities as a professional association in or affecting commerce, as "commerce" is defined in Section 4 of the Federal Trade Commission Act, 15 U.S.C. § 44, do forthwith cease and desist from Regulating, restricting,

restraining, impeding, declaring unethical or unprofessional, interfering with or advising against:

A. Price competition by its Members, including, but not limited to, restraining Members from offering discounts when soliciting business;

B. Solicitation of employees by its Members, including, but not limited to, restraining Members from contacting employees unless they conform to any Code of Ethics, rule, or regulation established by Respondent; and

C. Advertising or publishing by Members of the prices, terms or conditions of sale of legal support services, including, but not limited to, restraining its Members from making statements about competitors' products, services, or business or commercial practices;

Provided, however, that nothing in this Paragraph II shall prohibit Respondent from adopting and enforcing reasonable principles, Codes of Ethics, rules, regulations, guidelines, or policies governing the conduct of its Members with respect to representations that Respondent reasonably believes would be false or deceptive within the meaning of Section 5 of the Federal Trade Commission Act.

III.

IT IS FURTHER ORDERED that:

A. No later than thirty (30) days from the date this Order is issued, Respondent shall:

1. Post and maintain for five years on the Code of Ethics page of CALSPro's website, the following items:

a. An announcement that states "CALSPro agreed to change its Code of Ethics and will not adopt, encourage its Members to follow, or enforce

any Code of Ethics provision relating to price competition, solicitation of employees, or advertising that does not comply with the FTC Consent Order,"

b. The FTC Settlement Statement; and

c. A link to the Federal Trade Commission's website that contains the press release issued by the Commission in this matter; and

2. Distribute electronically or by other means a copy of the FTC Settlement Statement to its board of directors, officers, employees, and Members.

B. No later than sixty (60) days from the date this Order is issued, Respondent shall:

1. Remove from CALSPro's Organization Documents and website any statement that is inconsistent with Paragraph II. of this Order; and

2. Publish on CALSPro's website any revisions of CALSPro's Organization Documents, the press release issued by the Commission in this matter, and the FTC Settlement Statement.

C. Respondent shall publish, in the font that is customarily used for feature articles:

1. Any revisions of CALSPro's Organization Documents, the press release issued by the Commission in this matter, and the FTC Settlement Statement in the next available edition of the "CALSPro Press" newsletter; and

2. The FTC Settlement Statement in the edition of the "CALSPro Press" newsletter, or any successor publication, on or as close as possible to the first and second anniversary dates of first publication of the FTC Settlement Statement.

D. For a period of five (5) years after this Order is issued, distribute electronically or by other means, a copy of the FTC Settlement Statement to each:

1. New Member no later than thirty (30) days after the date of commencement of the membership; and

2. Member who receives a membership renewal notice at the time the Member receives such notice.

E. Respondent shall maintain and make available to Commission staff for inspection and copying upon reasonable notice records adequate to describe in detail any:

1. Action against any Member taken in connection with the activities covered by Paragraph II. of this Order, including but not limited to enforcement, advisory opinions, advice or interpretations rendered; and

2. Complaint received from any person relating to Respondent's compliance with this Order.

IV.

IT IS FURTHER ORDERED that Respondent shall design, maintain, and operate an antitrust compliance program to assure compliance with this Order and the Antitrust Laws:

A. No later than thirty (30) days from the date this Order is issued, Respondent shall appoint and retain an Antitrust Compliance Officer for the duration of this Order to supervise Respondent's antitrust compliance program.

B. For a period of three (3) years from the date this Order is issued, the Antitrust Compliance Officer shall be Michael Belote, Esq., after which a new Antitrust Compliance Officer may be appointed who shall be

Antitrust Counsel, a member of the Board of Directors, or an employee of Respondent.

C. For a period of five (5) years from the date this Order is issued, Respondent shall provide in-person annual training to its board of directors, officers, and employees concerning Respondent's obligations under this Order and an overview of the Antitrust Laws as they apply to Respondent's activities, behavior, and conduct.

D. Respondent shall implement policies and procedures to:

1. Enable persons (including, but not limited to, its board of directors, officers, employees, Members, and agents) to ask questions about, and report violations of, this Order and the Antitrust Laws, confidentially and without fear of retaliation of any kind; and

2. Discipline its board of directors, officers, employees, Members, and agents for failure to comply fully with this Order.

E. For a period of five (5) years from the date this Order is issued, Respondent shall conduct a presentation at each of its annual conferences that summarizes Respondent's obligations under this Order and provides context-appropriate guidance on compliance with the Antitrust Laws.

V.

IT IS FURTHER ORDERED that Respondent shall file a verified written report with the Commission setting forth in detail the manner and form in which it intends to comply, is complying, and has complied with this Order:

A. No later than (i) ninety (90) days after the date this Order is issued, (ii) one hundred eighty (180) days after the date this Order is issued; and

B. No later than one (1) year after the date this Order is issued and annually thereafter for four (4) years on the anniversary of the date on which this Order is issued, and at such other times as the Commission staff may request.

VI.

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

A. Dissolution of Respondent;

B. Acquisition, merger, or consolidation of Respondent; or

C. Any other change in Respondent, including, but not limited to, assignment and the creation or dissolution of subsidiaries, if such change might affect compliance obligations arising out of this Order.

VII.

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

A. Access, during business office hours of the Respondent and in the presence of counsel, to all facilities, and access to inspect and copy all books, ledgers, accounts, correspondence, memoranda and all other records and documents in the possession, or under the control, of the Respondent related to compliance with this Order, which copying services

shall be provided by the Respondent at its expense; and

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

VIII.

IT IS FURTHER ORDERED that this Order shall terminate on April 3, 2034.

By the Commission.

APPENDIX A

(Letterhead of CALSPro)

Dear Member:

As you may know, the Federal Trade Commission conducted an investigation concerning the provisions in CALSPro's Code of Ethics that stated:

> It is not ethical to cut the rates you normally and customarily charge when soliciting business from a member firm's client, or to speak disparagingly of another member. . . . Never discuss the bad points of your competitor.
>
> It is unethical to contact an employee of another member firm to offer him employment with your firm without first advising the member of your intent.

The Federal Trade Commission alleges that these provisions violate the Federal Trade Commission Act because they, without

sufficient justification, restrain legal support professionals from competing for clients and employees, thereby depriving clients and employees of the benefits of competition among legal support professionals.

To end the investigation expeditiously and to avoid disruption to its core functions, CALSPro voluntarily agreed, without admitting any violation of the law, to the entry of a Consent Agreement and a Decision and Order by the Federal Trade Commission. As a result, CALSPro will not enforce, and will remove, the above provisions from its Code of Ethics.

More generally, the Federal Trade Commission has prohibited CALSPro from certain activities that restrain members from engaging in price competition, soliciting employees, and advertising. CALSPro may not restrain its members from offering discounts when soliciting business. CALSPro may not restrain its members from soliciting employees, including, but not limited to, restraining its members from contacting employees unless they conform to any Code of Ethics, rule, or regulation established by CALSPro. Finally, CALSPro may not restrain its members from advertising or publishing the prices, terms or conditions of sale of legal support products and services, including, but not limited to, restraining members from making statements about competitors' products, services, or business or commercial practices. However, CALSPro is not prohibited from adopting and enforcing reasonable principles, rules, guidelines, or policies governing the conduct of its members with respect to representations that CALSPro reasonably believes would be false or deceptive within the meaning of Section 5 of the Federal Trade Commission Act.

The Decision and Order also requires that CALSPro implement an antitrust compliance program.

A copy of the Decision and Order is enclosed. It is also available on the Federal Trade Commission website at www.FTC.gov, and through the CALSPro web site.

ANALYSIS OF CONSENT ORDER TO AID PUBLIC COMMENT

The Federal Trade Commission ("Commission") has accepted, subject to final approval, an Agreement Containing Consent Order ("Consent Agreement") from the California Association of Legal Support Professionals (hereinafter "CALSPro"). The Commission's complaint ("Complaint") alleges that CALSPro, acting as a combination of its members and in agreement with at least some of its members, restrained competition among its members and others in violation of Section 5 of the Federal Trade Commission Act, as amended, 15 U.S.C. § 45, by adopting and maintaining provisions in its Code of Ethics that restrain its members from competing on price, advertising, and soliciting legal support professionals for employment.

Under the terms of the proposed Consent Agreement, CALSPro is required to cease and desist from restricting its members from competing on price, advertising, and soliciting legal support professionals for employment.

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 Consent Agreement. 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 Proposed 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 Proposed Order or in any way to modify their terms.

The Consent Agreement is for settlement purposes only and does not constitute an admission by CALSPro 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 Respondent

CALSPro is a non-profit professional association of over 350 company and individual members. CALSPro's members are in the business of providing support services to the legal community, including but not limited to serving process, copying documents, filing documents with a court, preparing subpoenas, searching court records, locating persons, and conducting private investigations.

CALSPro maintains a Code of Ethics applicable to the commercial activities of its members. CALSPro's members agree to abide by the Code of Ethics as a condition of membership. CALSPro maintains the following provisions in its Code of Ethics:

- "It is not ethical to cut the rates you normally and customarily charge when soliciting business from a member firm's client ..."

- "It is not ethical to ... speak disparagingly of another member."

- "Never discuss the bad points of your competitor."

- "It is unethical to contact an employee of another member firm to offer him employment with your firm without first advising the member of your intent."

B. The Anticompetitive Conduct

The Complaint alleges that CALSPro has violated Section 5 of the Federal Trade Commission Act by restraining through its Code of Ethics the ability of its members to compete on price, to

solicit legal support professionals for employment, and to advertise. CALSPro also established a Dispute Resolution Committee to uphold and maintain industry standards and ethical business practices as set forth in Respondent's Bylaws, Code of Ethics and Manual of Policies and Procedures. The Dispute Resolution Committee provides an avenue for resolving alleged violations of the Code of Ethics, including by encouraging CALSPro's members to resolve privately disputes arising out of the Code of Ethics, and also by establishing a mechanism by which Respondent may sanction violations of the Code of Ethics.

The Complaint alleges that the purpose, effect, tendency, or capacity of the combination, agreement, acts and practices of CALSPro has been and is to restrain competition unreasonably and to injure consumers by discouraging and restricting competition among legal support professionals, and by depriving consumers and others of the benefits of free and open competition among legal support professionals.

II. The Proposed Order

The Proposed Order has the following substantive provisions. Paragraph II requires CALSPro to cease and desist from restraining its members from engaging in price competition, solicitation of employees, or advertising. The Proposed Order does not prohibit CALSPro from adopting and enforcing reasonable restraints with respect to representations that CALSPro reasonably believes would be false or deceptive within the meaning of Section 5 of the Federal Trade Commission Act.

Paragraph III of the Proposed Order requires CALSPro to remove from its website and organization documents any statement inconsistent with the Proposed Order. CALSPro must publish an announcement that it has changed its Code of Ethics, and a statement describing the Consent Agreement ("the Settlement Statement"). CALSPro must distribute the Settlement Statement to CALSPro's board of directors, officers, employees, and members. Paragraph III also requires CALSPro to provide all new members and all members who receive a membership renewal notice with a copy of the Settlement Statement.

Statement of the Commission

Paragraph IV of the Proposed Order requires CALSPro to design, maintain, and operate an antitrust compliance program. CALSPro will have to appoint an Antitrust Compliance Officer for the duration of the Proposed Order. For a period of five years, CALSPro will have to provide in-person annual training to its board of directors, officers, and employees, and conduct a presentation at its annual conference that summarizes CALSPro's obligations under the Proposed Order and provides context-appropriate guidance on compliance with the antitrust laws. CALSPro must also implement policies and procedures to enable persons to ask questions about, and report violations of, the Proposed Order and the antitrust laws confidentially and without fear of retaliation, and to discipline its leaders, employees and agents for failure to comply with the Proposed Order.

Paragraphs V-VII of the Proposed Order impose certain standard reporting and compliance requirements on CALSPro.

The Proposed Order will expire in 20 years.

* * *

Statement of the Federal Trade Commission

The Federal Trade Commission is today issuing for public comment proposed consent orders with two professional associations, the Music Teachers National Association, Inc. ("MTNA") and California Association of Legal Support Professionals ("CALSPro").[1] We take this step because we have reason to believe that these professional associations and their

[1] Both MTNA and CALSPro are non-profits but it is well established that the Commission has jurisdiction over non-profit organizations that confer, or are organized for the purpose of conferring, economic benefits to their for-profit members. *See Cal. Dental Ass'n v. FTC*, 526 U.S. 756, 767 n.6 (1999).

respective members have violated the antitrust laws by agreeing not to engage in fundamental forms of competitive activity.

MTNA, the umbrella organization for about 500 state and local music teacher associations across the country, is a professional association of over 20,000 private music teachers. Collectively, MTNA members generate an estimated $500 million in annual revenues. In 2004, MTNA revised its code of ethics and imposed a ban on solicitations, prohibiting teachers from actively recruiting students from one another. A number of MTNA affiliates have adopted even more aggressive competitive restrictions, including prohibitions on certain advertising, charging less than the community average, and offering scholarships or free music lessons. CALSPro, a California association of legal support service providers, is comprised of more than 350 company and individual members. CALSPro's code of ethics prohibits its members from offering discounted rates to rivals' clients, engaging in certain comparative advertising, and recruiting employees of competitors without first notifying the competitor.

Professional associations like MTNA and CALSPro typically serve many important and procompetitive functions, including adopting rules governing the conduct of their members that benefit competition and consumers. But, because trade organizations are by their nature collaborations among competitors, the Commission and courts have long been concerned with anticompetitive restraints imposed by such organizations under the guise of codes of ethical conduct.[2]

Competing for customers, cutting prices, and recruiting employees are hallmarks of vigorous competition. Agreements

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[2] *See, e.g.*, *Inst. of Store Planners*, 135 F.T.C. 793 (2003) (challenging restraints on price competition); *Nat'l Acad. of Arbitrators*, 135 F.T.C. 1 (2003) (restraints on solicitation and advertising); *Am. Inst. for Conservation of Historic & Artistic Works*, 134 F.T.C. 606 (2002) (restraints on price competition); *Cmty. Ass'ns Inst.*, 117 F.T.C. 787 (1994) (restraints on solicitation); *Nat'l Soc'y of Prof'l Eng'rs,* 116 F.T.C. 787 (1993) (restraints on advertising); *Nat'l Ass'n of Social Workers*, 116 F.T.C. 140 (1993) (restraints on solicitation and advertising); *Am. Psychological Ass'n*, 115 F.T.C. 993 (1992) (same).

among competitors not to engage in these activities injure consumers by increasing prices and reducing quality and choice. Absent a procompetitive justification, these types of restrictions on competition are precisely the kind of unreasonable restraints of trade that the Sherman Act was designed to combat. *See, e.g.*, *Nat'l Soc'y of Prof'l Eng'rs v. United States*, 435 U.S. 679 (1978) (condemning ethics restriction on competitive bidding). For a professional association to proscribe honest competition as "unethical" behavior is particularly problematic because, as the Supreme Court has recognized, association members can be "expected to comply in order to assure that they [do] not discredit themselves by departing from professional norms." *Goldfarb v. Va. State Bar*, 421 U.S. 773, 792-93 (1975). Here, neither association advanced a legitimate business rationale for its restrictions. We therefore conclude that the principal tendency and likely effect of the challenged restraints is to harm consumers through higher prices, lower quality, and less choice.

Our proposed remedies will restore competition without imposing an undue burden on the parties or interfering with the legitimate functions of either organization. We have required MTNA and CALSPro to modify their codes of ethics and to cease any efforts to impede members of these associations from freely competing with one another. The MTNA order also requires the association to take affirmative steps to discourage anticompetitive conduct on the part of its state and local affiliates.

As with all of the Commission's enforcement activity, our goal in these cases is to stop the anticompetitive conduct at issue and remedy any anticompetitive effects associated with the challenged behavior. We also seek to provide guidance more broadly and deter other professional and trade organizations from imposing unjustified limits on competition. Maintaining a competitive marketplace requires that we monitor behavior among rivals and take action whenever we see competition being compromised to the detriment of consumers.

Complaint

IN THE MATTER OF

N.E.W. PLASTICS CORP.
D/B/A
RENEW PLASTICS

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

Docket No. C-4449; File No. 132 3126
Complaint, April 3, 2014 – Decision, April 3, 2014

This consent order addresses N.E.W. Plastics Corp.'s green claims made while promoting two brands of plastic lumber products, Evolve and Trimax, to retailers, independent distributors and end-use consumers. The complaint alleges that Respondent falsely claimed (1) Evolve products as made from 90% or more recycled content; (2) Trimax products as made from mostly post-consumer recycled content; and (3) both Trimax and Evolve as recyclable. The complaint further alleges that Respondent did not possess or rely upon a reasonable basis to substantiate these representations. The consent order prohibits N.E.W. from making representations regarding the recycled content, the post-consumer recycled content, or the environmental benefit of any product or package unless they are true, not misleading, and substantiated by competent and reliable evidence.

Participants

For the *Commission*: *Robert Frisby* and *Elisa K. Jillson.*

For the *Respondent*: *Nelson W. Phillips III, Davis & Kuelthau, S.C.*

COMPLAINT

The Federal Trade Commission, having reason to believe that N.E.W. Plastics Corp., a corporation ("Respondent"), has violated the provisions of the Federal Trade Commission Act, and it appearing to the Commission that this proceeding is in the public interest, alleges:

1. Respondent N.E.W. Plastics Corp., also doing business as Renew Plastics, is a Wisconsin corporation with its principal office or place of business at 112 Fourth Street, Luxemburg, Wisconsin 54217.

2. Respondent has manufactured, advertised, offered for sale, sold, and distributed Evolve plastic lumber products ("Evolve") and Trimax plastic lumber products ("Trimax") to independent distributors and retailers located throughout the United States. Respondent advertises Evolve and Trimax through promotional materials, including brochures, DVDs, and the websites http://www.renewplastics.com and http://www.trimaxbp.com. Respondent's distributors and retailers have disseminated, or have caused the dissemination of, the advertising claims in these promotional materials to end-use consumers. In addition, Respondent has directly disseminated the advertising claims in these promotional materials to end-use consumers through its websites.

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. Since at least March 2011, Respondent has disseminated to independent distributors, retailers, or end-use consumers, or has caused to be disseminated to end-use consumers, the promotional materials referenced in Paragraph 2, including but not limited to the attached Exhibits A through E. These materials contain the following statements:

a. Renew Website (Exhibit A, excerpt from http://www.renewplastics.com)

"When you build with EVOLVE recycled plastic lumber, you demonstrate your commitment to the environment and sustainable living. EVOLVE recycled plastic lumber products are 100% plastic and generally contain over 90% recycled high density polyethylene (ReHDPE) material." (*Id*. at 1)

"[Evolve is] 100% recyclable[.]" (*Id*. at 1, 3)

"EVOLVE is a plastic composite material that consists of at least 90% recycled Type 2 High Density Polyethylene (HDPE) with the remainder of the

material being foaming agents and color with UV inhibitors." (*Id*. at 4)

"The composite mixture of the end product [EVOLVE lumber] is at least 90% ReHDPE, utilizing both post-consumer and post-industrial materials." (*Id.* at 7)

b. Trimax Website (Exhibit B, excerpt from http://www.trimaxbp.com)

"Trimax Structural Lumber is a patented formulation of fiberfill and recycled milk jugs." (*Id*. at 1)

"Trimax Structural Lumber is a high-performance construction material consisting of a patented formula of recycled plastics, fiberglass, and select additives. The plastic raw material utilized in Structural Lumber is derived from post-consumer bottle waste such as milk and detergent bottles." (*Id*. at 2)

c. Trimax Promotional Material (Exhibit C, Doc. No. 04_01_2010)

"The product [Trimax] is recyclable[.]" (*Id*. at 1)

d. Evolve Speed Bump Brochure (Exhibit D, Doc. No. 02_10_2009)

"The composite mixture of the end product [EVOLVE speed bump] is at least 90% ReHDPE, utilizing both post-consumer and post-industrial materials." (*Id.* at 1)

e. ICC-ES Evaluation Report for Evolve (Exhibit E, Doc. No. 07_01_2009)

"EVOLVE . . . is made of a plastic composite material that consists of 90 percent recycled high-density polyethylene (HDPE), with the remaining 10 percent being foaming agents and color with ultraviolet inhibitors." (*Id*. at 1)

5. From September 15, 2012 to March 17, 2013, Evolve contained, at most, 58% recycled plastic.

6. During the period from March 2011 to March 2013, the recycled plastic in Trimax, on average, contained less than 12% post-consumer recycled content.

7. By representing that a product is recyclable, respondent implies to reasonable consumers that facilities that will recycle the item are available to a substantial majority of consumers or communities where the item is sold.

8. Local recycling centers do not recycle Evolve and Trimax due to their non-plastic content and size and weight greater than that of household items typically recycled in such centers. The cost to consumers of shipping Evolve and Trimax to Respondent's factory for re-use in the manufacturing process generally exceeds the amount Respondent will pay consumers for returning the item. Facilities that will recycle Evolve and Trimax are thus not available to a substantial majority of consumers or communities where these products are sold.

Count I
False or Misleading Claims

9. Through the means described in Paragraph 4, Respondent has represented, directly or indirectly, expressly or by implication, that:

a. Evolve generally contains over 90% recycled plastic;

b. Evolve is at least 90% recycled plastic;

c. Evolve is 90% recycled plastic;

d. The recycled plastic in Trimax is all or virtually all post-consumer recycled content such as milk jugs or detergent bottles; and

e. Evolve and Trimax are recyclable at recycling facilities available to a substantial majority of consumers or communities where N.E.W. sells them.

10. In truth and in fact:

a. From September 15, 2012 to March 17, 2013, Evolve did not generally contain over 90% recycled plastic;

b. From September 15, 2012 to March 17, 2013, Evolve was not at least 90% recycled plastic;

c. From September 15, 2012 to March 17, 2013, Evolve was not 90% recycled plastic;

d. The recycled plastic in Trimax is not all or virtually all post-consumer recycled content such as milk jugs or detergent bottles; and

e. Evolve and Trimax are not recyclable at recycling facilities available to a substantial majority of consumers or communities where N.E.W. sells them.

11. Therefore, the representations set forth in Paragraph 9 are false or misleading.

Count II
Unsubstantiated Claims

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

13. In truth and in fact, Respondent did not possess and rely upon a reasonable basis that substantiated the representations set forth in Paragraph 9 at the time the representations were made. Therefore, the representation set forth in Paragraph 12 was, and is, false or misleading.

Count III
Means and Instrumentalities

14. In connection with the advertising, promotion, offering for sale, or sale of Evolve and Trimax, Respondent has distributed promotional materials making the representations set forth in Paragraph 4 to retailers and independent distributors. In so doing, Respondent has provided them with the means and instrumentalities for the commission of deceptive acts or practices.

Violations of Section 5

15. Respondent's false or misleading representations constitute deceptive acts or practices in or affecting commerce, in violation of Section 5(a) of the Federal Trade Commission Act, 15 U.S.C. § 45(a).

THEREFORE, the Federal Trade Commission this third day of April, 2014, has issued this Complaint against Respondent.

By the Commission.

Complaint

Exhibit A

Complaint

Deck/Dock/Porch
CONSUMER

PRODUCT FEATURES
Colors and Finishes
Profiles
Environmental Impact
Lifetime Warranty
Care and Maintenance
FAQs

APPLICATIONS
Decks
Docks
Porches and Restoration
Featured Project
Product Comparison
Building Guide
Information Download Center

LOCATE A DEALER

FAQs - Consumer

For additional information and construction details, visit the FAQ Professional page.

Q. What is EVOLVE® high-density plastic lumber?
A. EVOLVE high-density plastic lumber is a solid, non-hollow foamed recycled plastic made from recycled high density polyethylene (ReHDPE) plastic, with no fillers. Common HDPE (recycling code # 2) products are gallon style milk, water and juice containers, as well as some detergent and shampoo bottles.

Q. What percentage of EVOLVE high-density plastic lumber is made from recycled plastic?
A. EVOLVE plastic lumber is 100% plastic with no wood fillers to rot, peel, weather or blister, and generally contains over 90% recycled HDPE plastic material.

Q.How much does EVOLVE alternative plastic decking weigh?
A. EVOLVE® plastic decking is comparable in weight to a good hardwood such as oak.

Q. What standard decking colors are available in inventory?
A. Standard colors in our deck and dock profiles are Dove Gray, Cedar, Weatherwood, and some railing material in White. Standard decking profile colors are subject to change over time.

Q. Are the EVOLVE plastic lumber boards colored throughout?
A. Yes, even when cut or routered, the exposed product is colored.

Q. Will my EVOLVE plastic lumber boards have consistent color and texture?
A. We make every effort to maintain color consistency. However, due to utilizing recycled materials, and the standard allowable variances in the color we purchase, shade variations can occur in our lumber. The texture may be slightly different from board to board due to the manufacturing process.

Q. Can an EVOLVE deck be stained or painted?
A. Staining or painting will not harm alternative decking material from EVOLVE. However, EVOLVE was designed to eliminate the need for such work. Stain or paint, if applied to the boards, will not penetrate the surface because the product doesn't absorb moisture. Therefore, stains or paints will tend to flake off the surface of the material over time.

Q. Will EVOLVE plastic lumber fade over time?
A. All of our EVOLVE high density plastic lumber has ultra-violet (UV) stabilizers added to help protect the color and the integrity of the HDPE.

Q. Do you have any minimum order requirements?
A. Yes. Please see the Profile Chart for minimum order quantities.

Q. Does EVOLVE plastic lumber have a grain pattern?
A. EVOLVE high density plastic lumber is very durable, and yet flexible. It does require more substructure compared to wood lumber because it doesn't have a grain pattern. Our product eliminates gram splitting.

Q. How long will my EVOLVE deck or dock last?
A. EVOLVE high density plastic lumber is still going strong after over twenty years of accelerated weather testing. We haven't seen the total life span of the product to date. We do have product installed on boat docks since 1976 with no sign of degradation.

Q. How do I take care of my plastic lumber decking?
A. Washing EVOLVE plastic lumber with a hose or a mop is about all that is needed under normal circumstances. You can use a mixture of bleach and water (1 part bleach to 10 parts water) to clean stubborn stains on the material.

Q. Will an EVOLVE deck or dock be slippery when wet?
A. EVOLVE high density plastic lumber is no more slippery than painted or sealed wood when wet. A natural film, which can't be seen or felt, is left on the surface of the material after manufacturing. Sunlight will normally "burn off" this film in a few weeks.

2


PVC-FREE
EVOLVE
AS SEEN ON HGTV!
home | contact us
Deck/Dock/Porch CONSUMER
Deck/Dock/Porch PROFESSIONAL
Custom Extrusions
Our Company
Custom Extrusions
PRODUCT FEATURES
Colors and Finishes
Machinability
Profiles
Lifetime Warranty
Trademark
FAQs
APPLICATIONS
Information Download Center
Photo Gallery
LOCATE A DEALER
Environmental Impact
Sustainable Manufacturing
EVOVLE® is 100% polyethylene recyclable plastic. Companies who use it can promote their commitment to green manufacturing and appeal to a growing consumer demand for environmentally responsible products.
EVOLVE recycled plastic lumber products generally contain over 90% recycled high density polyethylene (ReHDPE) material.
Highly sanitized, pure plastic from post-consumer and post-industrial material
No harsh chemicals to leech into the environment
100% recyclable
Because EVOLVE doesn't absorb water, it won't harbor harmful mold or bacteria. That means a healthier environment for you and the rest of the world.
Our Green Initiative
GreenScapes
N E W Plastics Corp makes efforts to reduce the footprint of human consumption. This seal represents our commitment to corporate policies and practices that protect the environment for future generations.
Click on the seal to learn more >>>
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RENEW PLASTICS

Complaint

LEGACY REPORT

NER-702
Issued March 1, 2004

ICC Evaluation Service, Inc.
www.icc-es.org

Business/Regional Office ▪ 5360 Workman Mill Road, Whittier, California 90601 ▪ (562) 699-0543
Regional Office ▪ 900 Montclair Road, Suite A, Birmingham, Alabama 35213 ▪ (205) 599-9800
Regional Office ▪ 4051 West Flossmoor Road, Country Club Hills, Illinois 60478 ▪ (708) 799-2305

Legacy report on the 2000 International Building Code®, the *2002 Accumulative Supplement to the International Codes*™, the BOCA® *National Building Code*/1999, the 1999 *Standard Building Code*®, the 1997 *Uniform Building Code*™, and the 2000 *International Residential Code*®

DIVISION 06 - WOOD AND PLASTICS
Section 06500 - Structural Plastics

RENEW PLASTICS,
A DIVISION OF N.E.W. PLASTICS CORP.
112 4TH STREET
P.O. BOX 480
LUXEMBURG, WISCONSIN 54217-0480
www.renewplastics.com
(920) 845-2326

1.0 SUBJECT

1.1 Perma-Poly™ Lumber Plastic Decking
1.2 EVOLVE® Lumber Plastic Decking

2.0 PROPERTY FOR WHICH EVALUATION IS SOUGHT

Structural

3.0 DESCRIPTION

3.1 General

RENEW Plastics' Perma-Poly™ and EVOLVE® Lumber Plastic Decking are used as a flooring or non-structural trim components for exterior balconies, porches, decks, and other exterior walking surfaces where combustible construction is permitted. Perma-Poly™ and EVOLVE® are the same product with different names for marketing purposes. Perma-Poly™ and EVOLVE® is a plastic composite material that consists of at least 90% recycled Type 2 High Density Polyethylene (HDPE) with the remainder of material being foaming agents and color with UV inhibitors. The HDPE composite material is manufactured by a continuous extrusion process in accordance with the listed quality control manual to produce comparable lumber-sized members with nominal sizes as listed in Table 1 of this report.

3.2 Structural

Table 1 lists the allowable spans of Perma-Poly™ and EVOLVE® Lumber used as decking (flat-wise bending).

4.0 INSTALLATION

The manufacturer's published installation instructions and this report shall be strictly adhered to and a copy available on the jobsite at all times during installation. The installation instructions within this report govern if there are any conflicts between the manufacturer's published installation instructions and this report.

TABLE 1
MAXIMUM ALLOWABLE SPANS[1,2,3]

LUMBER SIZE (inches)	MAXIMUM UNIFORM LOAD	
	40 psf	100 psf
	SPAN (inches)	
¾ x 5½	12	9
¾ x 6	12	9
1 x 5½	16	11
1½ x 3½	16	11
1½ x 5½	23	17

SI: 1 inch = 25.4 mm, 1 psf = 47.88 Pa

1. Spans are for members used as planking (flat-wise bending).
2. Members shall be supported by a minimum of three joist (2 spans) and shall be fastened at each joist.
3. Use of members as stair treads is outside the scope of this table.

5.0 IDENTIFICATION

Perma-Poly™ and EVOLVE® Lumber Plastic Decking planks shall be labeled with the manufacturer's name and/or trademark, the product name, the name and/or trademark of the third party inspection agency (Intertek) and this evaluation report number.

6.0 EVIDENCE SUBMITTED

6.1 Manufacturer's descriptive literature and installation instructions.

6.2 Test report on EVOLVE® Lumber in accordance with ASTM D 6662, prepared by Intertek Testing Services, Report No. 3022869, dated January 9, 2003, Revised January 17, 2003, signed by Kazamir L.. Falconbridge and Cameron Robinson.

6.3 Test report on Fire Retardancy Test of a RENEW Plastics Lumber Decking Boards, prepared by Intertek Testing Services, Report No. 3025606, dated June 10, 2002, signed by Kent Kelsey and Rick Curkeet.

6.4 Quality Control/Factory Audit Manual for EVOLVE®or Perma-Poly™ Recycled Plastic Lumber, dated November 2002, Revised December 19, 2003, signed by Lynie Vincent (RENEW Plastics) and Mike Van Geyn (Intertek Testing).

6.5 Letter on equivalency of product sizes, prepared by Intertek Testing Services, dated February 25, 2003, signed by Chris Bowness and Francis Roma.

6.6 Test report on Standard Flame Spread Test Program in accordance with ASTM E 84, prepared by Intertek Testing Services, Report No. 3031070, dated August 30, 2002, signed by Greg Philp and Michael van Geyn.

6.7 Span length calculations for 40 psf and 100 psf at 130°F, prepared by Intertek Testing Services, Project 3022869, dated July 30, 2003, signed and sealed by Cameron Robinson, P.Eng.

7.0 CONDITIONS OF USE

The ICC-ES Subcommittee for the National Evaluation Service, Inc. finds that the application of Perma-Poly™ and EVOLVE® Lumber Plastic Decking as described in this report complies with or is a suitable alternate to the materials prescribed in the 2000 International Building Code®, the *2002 Accumulative Supplement to the International Codes*™, the BOCA® *National Building Code*/1999, the 1999 *Standard Building Code*©, the 1997 *Uniform Building Code*™, and the 2000 *International Residential Code*® subject to the following conditions:

7.1 Perma-Poly™ and EVOLVE® Lumber Plastic Decking shall be limited to exterior applications where combustible construction is permitted.

7.2 Use of Perma-Poly™ and EVOLVE® Lumber Plastic Decking in applications where fire-rated construction is required is outside the scope of this report.

7.3 Perma-Poly™ and EVOLVE® Lumber shall be gapped to permit adequate drainage in accordance with the manufacturer's instructions.

7.4 Perma-Poly™ and EVOLVE® Lumber shall not be attached to any solid surface or watertight flooring system, such as sheathing, waterproof membranes, concrete, roof decks, or patios.

7.5 Use of Perma-Poly™ and EVOLVE® Lumber in applications where the code requires solid-sawn lumber to be naturally durable or preservative-treated is outside the scope of this report.

7.6 Use of Perma-Poly™ and EVOLVE® Lumber for single span applications is outside the scope of this report.

7.7 Perma-Poly™ and EVOLVE® Lumber shall be fastened directly to floor joists having adequate strength and stiffness in accordance with the applicable code.

7.8 Perma-Poly™ and EVOLVE® Lumber shall not be used in applications that will cause the temperature of the board to exceed 130°F (54°C).

7.9 This report is subject to periodic re-examination. For information on the current status of this report, consult the ICC-ES website.

Complaint

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Custom Extrusions

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- Machinability
- Profiles
- Environmental Impact
- Lifetime Warranty
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APPLICATIONS
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Applications

Strong, Recyclable Plastic

EVOLVE® is strong, impervious to most chemicals, needs minimal (if any) maintenance, and is highly cost effective. EVOLVE is composed of polyethylene and is entirely recyclable.

Material Characteristics
- Non-absorptive
- Impervious to most chemicals
- Solid color to core
- Durable, wear resistant
- Flame resistant
- Environmentally friendly
- Machinable
- Variety of colors

Application Benefits
- Trim costs
- Increase product life
- Decrease noise
- Reduce wear
- Minimize downtime



EVOLVE has been successfully utilized in many industrial, commercial and agricultural applications.

Product Application List

N.E.W. Plastics Corp. makes efforts to reduce the footprint of human consumption. This seal represents our commitment to corporate policies and practices that protect the environment for future generations.

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RENEW PLASTICS

MATERIAL COMPOSITION & TESTING DATA

EVOLVE

EVOLVE® LUMBER

EVOLVE lumber is a solid, non-hollow, foamed recycled product manufactured from recycled Type 2 High Density Polyethylene (ReHDPE), with no fillers. The composite mixture of the end product is at least 90% ReHDPE, utilizing both post-consumer and post-industrial materials. The plastic is impregnated with colorant and UVI to help protect the material from physical degradation, flaking and color fade.

EVOLVE lumber is a non-commingled "pultruded" product. This promotes a network of complete molecular linkage. EVOLVE lumber is able to sustain normal loading at temperatures ranging from -40°F to 110°F with proper installation.

EVOLVE lumber is manufactured using only heavy-metal free colorants, to be environmentally friendly, and to meet current and future federal standards.

PERMA-POLY® SHEETING

Perma-Poly sheet material is manufactured from a mixture of virgin and recycled Type 2 High Density Polyethylene (HDPE & ReHDPE). The composite mixture of the end product is at least 50% ReHDPE, utilizing both post-consumer and post-industrial materials. The plastic is impregnated with colorant and UVI to help protect the material from physical degradation, flaking and color fade.

Perma-Poly sheet is a non-commingled, extruded product. This promotes a network of complete molecular linkage. Perma-Poly sheet is able to sustain normal loadings at temperatures ranging from -40°F to 110°F with proper installation.

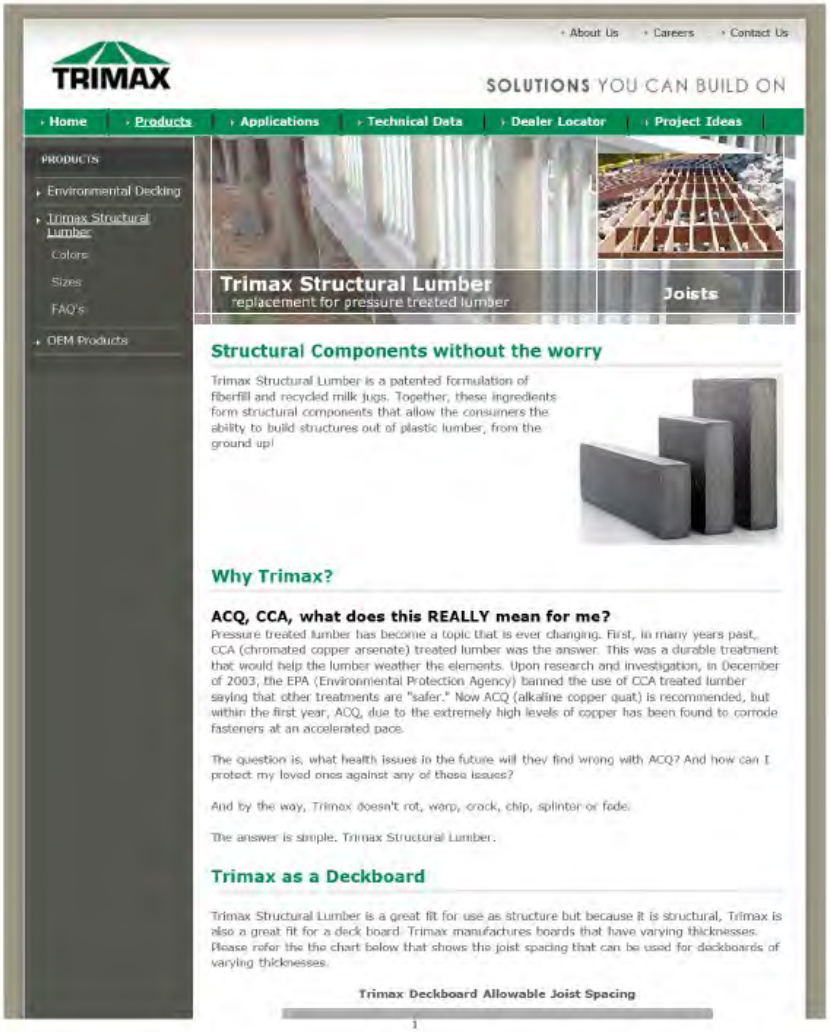
Perma-Poly sheet is manufactured using only heavy-metal free colorants, to be environmentally friendly, and to meet current and future federal standards.

112 Fourth Street • PO Box 480 • Luxemburg WI 54217-0480
Phone (920) 845-2326 or (800) 666-5207 • Fax (920) 845-2335 • www.renewplastics.com

RENEW PLASTICS

Complaint

Exhibit B



Technical Data

TRIMAX® Structural Lumber

DESCRIPTION

TRIMAX® Structural Lumber is a high-performance construction material consisting of a patented formula of recycled plastic, fiberglass, and select additives. The plastic raw material utilized in Structural Lumber is derived from post-consumer bottle waste such as milk and detergent bottles. The material is compounded into a consistent mixture of fiberglass and plastic that give it the structural properties in the table below.

Structural Lumber is a cost-effective and high-performance timber product for marine construction and commercial applications. It has exceptional resistance to marine borers, salt spray, termites, corrosive substances, oil and fuels, fungi, and other environmental stresses. It does not absorb moisture; therefore, it will not rot, splinter or crack.

Structural Lumber products are manufactured in many dimensional lumber and timber sizes, particularly in large cross sections. Deck and dock planks, sheet piling, wale timbers, camels, fenders, and piles are all available from TRIMAX® Structural Lumber. The product comes in almost any transportable length and is standard in Black. It can be special ordered in colors to complement HDPE.

Structural Lumber has excellent weathering resistance; however, as with many other polyolefins, the material will fade over the service life of the product. The product requires no waterproofing, painting, staining, or similar maintenance when used in many exterior applications.

BASIC USES

Structural Lumber products are used in a variety of commercial and marine applications and are often the product of choice for exterior applications where resistance to salt and fresh water, marine borers, and other environmentally harsh conditions is required. Due to the unique composition of TRIMAX® Structural Lumber, the product can be used for a number of structural members in commercial and shoreline timberwork. It is well suited for:

- ⇒ Dock and dock planks
- ⇒ Sheet piling
- ⇒ Pilings
- ⇒ Channel markers
- ⇒ Wale Timbers
- ⇒ Camels
- ⇒ Fenders
- ⇒ Posts, beams, and joists

Structural Properties

Mechanical Properties @ 70° F	Test Method	Average Value
Density, lbs / cu. in.	ASTM D6111-09	0.034
Water Absorption	ASTM D570-98	< 0.1
Modulus of Rupture (MOR)	ASTM D6109-05	4,134 psi
Modulus of Elasticity (MOE)	ASTM D6109-05	329,787 psi
Secant MOE @ 1% Strain	ASTM D6109-05	288,751 psi
Compression Parallel to Grain	ASTM D198-05	3,716 psi
Compression Perpendicular to Grain	ASTM D143-94	2,516 psi
Shear Strength	ASTM D143-94	1,828 psi
Tensile Strength	ASTM D198-05	3,676 psi
Durometer Hardness	ASTM D2240-05	68.2
Abrasion Resistance	ASTM D4060-10	42 mg
Chemical Resistance	ASTM D543-06	5%
Tensile Properties	ASTM D638-10	3860 psi
Coefficient of Friction (Dry)	ASTM D2047	0.95
Coefficient of Thermal Expansion	ASTM D6341-98	0.000021
Screw Withdrawal	ASTM D1761-06	938 lbf/in
Flame spread	ASTM E84	Class C

- *1 ½ x 5 ½ TRIMAX® profile used in testing data at various lengths required by the test method noted*
- *Lower density may occur in larger cross sections*
- *The above testing was performed by an independent 3rd party testing agency in January 2012*

TRIMAX
STRUCTURAL LUMBER™
112 Fourth Street * P.O. Box 480
Luxemburg, WI 54217-0480
Toll Free: 1-800-666-5207 Fax: 920-845-2335
www.trimaxbp.com

LIMITATIONS

This type of plastic lumber product has a significantly higher modulus of elasticity (MOE) than conventional forms of plastic lumber. It is important to evaluate the suitability of this product for specific uses. It is recommended that an engineering study be performed prior to use of Structural Lumber products for structural applications. Building code regulations vary by region, so all users should consult local building and safety codes prior to installation for specific requirements.

INSTALLATION

Structural Lumber can be fabricated and installed with the same tools used to work wood lumber. The product will cut and drill very cleanly, as there is no grain to split or chip, or knots to bind tools and bend fasteners. It is reinforced with glass fibers, and precautions should be taken when fabricating this product. Maintain adequate ventilation when generating fabrication dust, and personal respiratory protection such as dust masks should be employed during fabrication, as well as safety glasses or goggles.

Pilings and sheet piling products, can be driven with pile-driving equipment such as vibratory hammers, land-based or barge-mounted drop hammers, or waterjets. For sheet piling installations, backfill soils should always be analyzed to determine that the proper amount of force would be exerted on the sheet piling system. For shoreline timberwork applications, Structural Lumber is used with conventional hardware such as stainless or galvanized bolts, tie rods, nuts, washers, and anchor systems.

When using Structural Lumber for decking, joist spacing should be in accordance with the span tables. Multiple-span data at 120°F or less are presented here:

Structural Allowable Live Load (psf), Multiple Span, at 120° F or less:			
Deflection Limit	12" Span	16" Span	24" Span
Structural 2X Decking Board (I = 1.50")			
L/360	2198 PSF	927 PSF	275 PSF
L/240	3000* PSF	1391 PSF	412 PSF
L/180	3000* PSF	1618* PSF	550 PSF

*Load limited by allowable stress of 1000 psi.

Note: Table provides limiting uniform load present on three spans in pounds per square foot (psf) based on noted deflection criteria.

Recommended standard is to limit live load deflection for floors to L/360" and to limit total deflection (dead + live load) to L/240". Designers may choose less restrictive or more restrictive criteria for a given application. Except for very unusual and heavy loading, deflection criteria will control allowable plank span.

Deflection determination is based on a modulus of elasticity equal to 325,000 psi at 70° Fahrenheit.

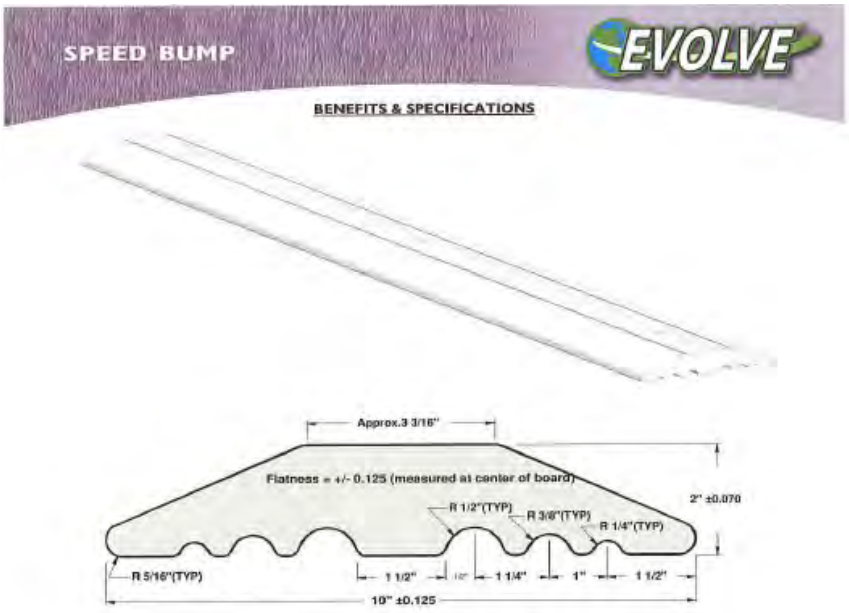
Technical Services: Technical inquiries should be directed to RENEW Plastics at 1-800-666-5207 or visit our website at http://www.trimaxbp.com

Updated 2/28/13

Complaint

Exhibit C

Exhibit D



COLORS: Standard = Safety Yellow
Special Order colors are available – contact RENEW Plastics for more details.

Slight color variations may occur from one production run to another due to variations in recycled feedstock and standard allowable tolerances of colorants used in the manufacturing process.

LENGTHS: Standard = 4', 6', 8', 9', 10', and 12'
Special Order lengths are available in virtually any desired length - contact RENEW Plastics for more details.

COMPOSITION: EVOLVE® speed bumps are solid, non-hollow, foamed recycled products manufactured from recycled Type 2 High Density Polyethylene (ReHDPE), with no fillers. The composite mixture of the end product is at least 90% ReHDPE, utilizing both post-consumer and post-industrial materials. The plastic is impregnated with colorant and UVI to help protect the material from physical degradation, flaking and color fade.

EVOLVE plastic extrusions are non-commingled "pultruded" products. This promotes a network of complete molecular linkage. EVOLVE products are able to sustain normal loadings at temperatures ranging from -40°F to 110°F with proper installation.

EVOLVE products are manufactured using only heavy-metal free colorants, to be environmentally friendly, and to meet current and future federal standards.

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RENEW PLASTICS

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Exhibit E

ICC EVALUATION SERVICE

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ICC-ES Evaluation Report

ESR-2497

Issued July 1, 2009

This report is subject to re-examination in one year.

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DIVISION: 06—WOOD AND PLASTICS
Section: 06500—Structural Plastics

REPORT HOLDER:

RENEW PLASTICS,
A DIVISION OF N.E.W. PLASTICS CORPORATION
112 4TH STREET
POST OFFICE BOX 480
LUXEMBURG, WISCONSIN 54217-0480
(920) 845-2326
www.renewplastics.com

EVALUATION SUBJECT

EVOLVE® PLASTIC LUMBER DECKING (ALSO KNOWN AS PERMA-POLY DECKING)

1.0 EVALUATION SCOPE

Compliance with the following codes:

- 2006 *International Building Code®* (IBC)
- 2006 *International Residential Code®* (IRC)

Properties evaluated

- Structural
- Durability
- Surface-burning characteristics

2.0 USES

The EVOLVE® (also known as Perma-Poly) Plastic Lumber Decking is limited to exterior use applications as deck boards for balconies, porches and decks of one- and two-family dwellings of Type V-B (IBC) construction and dwellings constructed in accordance with the IRC.

3.0 DESCRIPTION

3.1 General:

EVOLVE® or Perma-Poly Plastic Lumber Decking is made of a plastic composite material that consists of 90 percent recycled high-density polyethylene (HDPE), with the remaining 10 percent being foaming agents and color with ultraviolet inhibitors. The deck boards are manufactured by an extrusion process in the colors black, dove grey, dark green, weatherwood, cherrywood and white. The deck boards are manufactured in $^{3}/_{4}$-inch-by-$3^{1}/_{2}$-inch (19 by 89 mm), $^{3}/_{4}$-inch-by-$5^{1}/_{4}$-inch (19 by 140 mm), $^{7}/_{8}$-inch-by-6-inch (19 by 152 mm) tongue and groove, 1-inch-by-$5^{1}/_{4}$-inch (25.4 by 140 mm), 1-inch-by-6-inch (25.4 by 152 mm) tongue and groove, $1^{1}/_{2}$-inch-by-$3^{1}/_{2}$-inch (38 by 89 mm), $1^{1}/_{2}$-inch-by-$5^{1}/_{4}$-inch (38 by 140 mm) and 1-inch-by-$11^{1}/_{4}$-inch (25.4 by 286 mm) solid profiles. See Figure 1 for typical cross sections.

3.2 Durability:

When subjected to weathering, insect attack, and other decaying elements, the material used to manufacture EVOLVE® decking is equivalent in durability to preservative-treated or naturally durable lumber when used in locations described in Section 2.0 of this report. The deck boards have been evaluated for structural use when exposed to temperatures from -20°F to 125°F (-29°C to 52°C).

3.3 Surface-burning Characteristics:

When tested in accordance with ASTM E 84, the deck board products have a flame-spread index no greater than 200.

4.0 DESIGN AND INSTALLATION

4.1 General:

Installation of the deck boards must comply with this report and the manufacturer's published installation instructions. The manufacturer's published installation instructions must be available at the jobsite at all times during installation. When the manufacturer's published installation instructions differ from this report, this report governs.

4.2 Design (Structural):

When used as a deck board, EVOLVE® decking products have an allowable capacity, when installed at a maximum center-to-center spacing of supporting construction, as prescribed in Table 1.

4.3 Installation:

The end-to-end gap of the deck boards must be $^{7}/_{16}$ inch (1.6 mm) for every 20°F (11°C) of difference between the installation temperature and the hottest anticipated temperature after installation. A minimum $^{1}/_{8}$-inch (3.2 mm) gap must be provided between deck board edges. The end of each deck board must be supported by a joist. Double joists are required where decking butt-joints occur. The EVOLVE® deck boards must be attached at each joist with two No. 7 by $2^{1}/_{4}$-inch-long (57 mm) corrosion-resistant screws. Minimum fastener edge and end distances must be 1 inch (25.4 mm).

5.0 CONDITIONS OF USE

The EVOLVE® decking described in this report complies with, or is a suitable alternative to what is specified in, those codes listed in Section 1.0 of this report, subject to the following conditions:

5.1 The EVOLVE® (also known as Perma-Poly) Plastic Lumber Decking is limited to exterior use applications as deck boards for balconies, porches and decks of one- and two-family dwellings of Type V-B (IBC) construction and dwellings constructed in accordance with the IRC.

5.2 Balconies constructed on one- and two-family dwellings in accordance with the IBC and rated for 60 psf (2874 Pa) must not exceed 100 square feet (9.29 m^2) in total area.

5.3 The use of EVOLVE® deck boards as stair treads is outside the scope of this report.

5.4 Installation must comply with this report, the manufacturer's published installation instructions and the applicable code. When the manufacturer's published installation instructions differ from this report, this report governs.

5.5 The use of deck boards as a component of a fire-resistance-rated assembly is outside the scope of this report.

5.6 Only those fasteners and fastener configurations described in this report have been evaluated for installation of the EVOLVE® deck boards. The compatibility of the fasteners with the supporting construction, including chemically treated wood, is outside the scope of this report.

5.7 Adjustment factors outlined in the AF&PA National Design Standard and applicable codes do not apply to the allowable capacity and maximum spans for EVOLVE® deck boards.

5.8 The EVOLVE® decking must be fastened to supporting construction. Where required by the code official, engineering calculations and construction documents consistent with this report must be submitted for approval. The calculations must verify that the supporting construction complies with the applicable building code requirements and is adequate to resist the loads imparted upon it from the products and systems discussed in this report. The documents must contain details of the attachment to the supporting structure consistent with the requirements of this report. The documents must be prepared by a registered design professional where required by the statutes of the jurisdiction in which the project is to be constructed.

5.9 The EVOLVE® decking is manufactured in Luxemburg, Wisconsin, under a quality control program with inspections by Intertek Testing Services Inc. (AA-690).

6.0 EVIDENCE SUBMITTED

Data in accordance with the ICC-ES Acceptance Criteria for Deck Board Span Ratings and Guardrail Systems (Guards and Handrails) (AC174), dated February 2006 (editorially revised April 2009).

7.0 IDENTIFICATION

The EVOLVE® decking described in this report is identified by a stamp on each individual piece or on the packaging. The stamp includes the manufacturer's name (RENEW Plastics), the product name (EVOLVE® decking), the name of inspection agency (Intertek Testing Services) and the ICC-ES evaluation report number (ESR-2497).

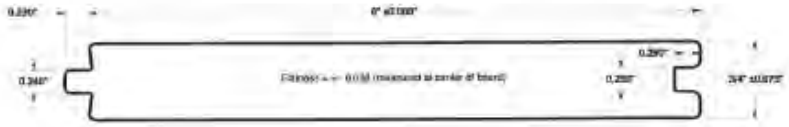
Complaint

TABLE 1—DECK BOARD SPAN RATINGS

DECK BOARD	MAXIMUM SPAN (inches)[1]	ALLOWABLE CAPACITY (lb/ft^2)[2, 3]
EVOLVE® $^3/_4$-by-3$^1/_2$	12	100
EVOLVE® $^3/_4$-by-5$^1/_2$	12	60
EVOLVE® $^3/_4$-by-6 T&G	12	60
EVOLVE® 1-by-5$^1/_2$	16	60
EVOLVE® 1$^1/_4$-by-3$^1/_2$	24	60
EVOLVE® 1$^1/_2$-by-5$^1/_2$	24	100
EVOLVE® 1-by-6 T &G	16	100
EVOLVE® 1-by- 11$^7/_4$ Bull Nose (used as deck board only)	16	100

For SI: 1 inch = 25.4 mm; 1 lb/ft^2 = 47.9 Pa.

[1] Maximum span is measured center-to-center perpendicular, of the supporting construction.
[2] Maximum allowable capacity is adjusted for durability. No further increases are permitted.
[3] Under the IBC, deck boards not rated for at least 100 lb/ft^2 are limited to 100 square feet (9.29 m^2) in total area.



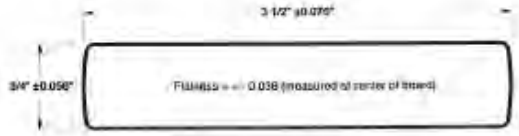
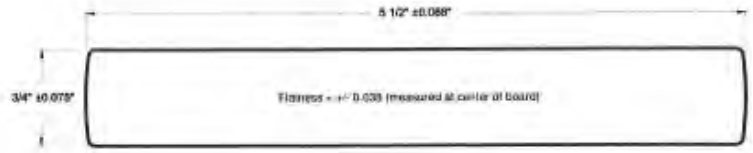
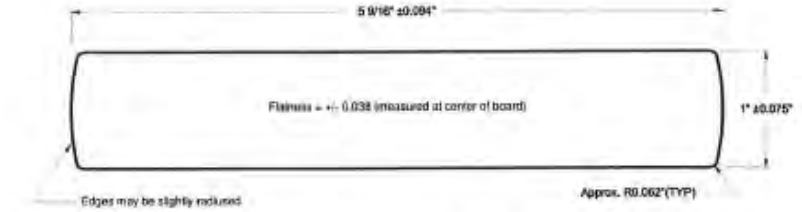


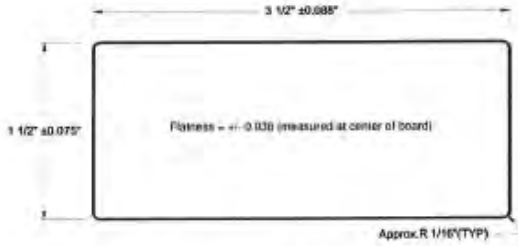
FIGURE 1—DECK BOARD PROFILES



$^{3}/_{4}$" x 5$^{1}/_{2}$" Flat
Approximate Unit Weight -1.48 Lbs./Lin. Ft.

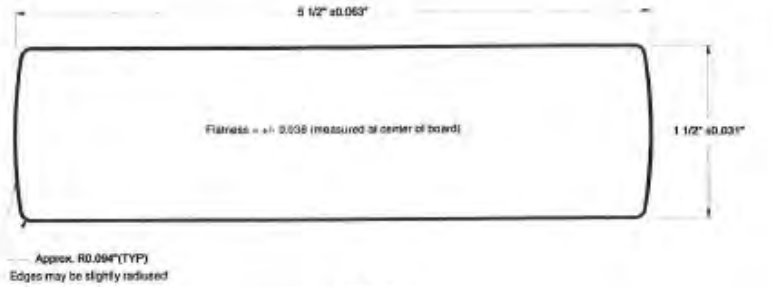


1" x 5$^{1}/_{2}$" Flat
Approximate Unit Weight – 1.76 Lbs./Lin. Ft.

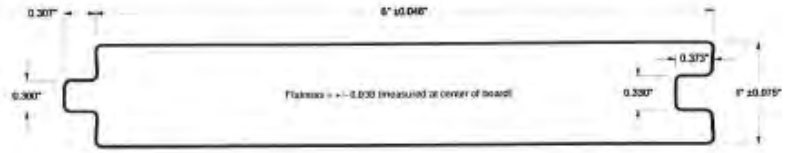


1$^{1}/_{2}$" x 3$^{1}/_{2}$"
Approximate Unit Weight – 1.69 Lbs/Lin. Ft.

FIGURE 1—DECK BOARD PRFILES (Continued)



1 1/2" x 5 1/2"
Approximate Unit Weight – 3.75 Lbs./Lin. Ft.



1" x 6" T&G
Approximate Unit Weight – 1.92 Lbs./Lin. Ft.

1" x 11 1/4" Bullnose
Approximate Unit Weight – 3.68 Lbs./Lin. Ft.

FIGURE 1—DECK BOARD PROFILES (Continued)

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"), a statement that respondent neither admits nor denies any of the allegations in the draft complaint except as specifically stated in the consent agreement, an admission by the respondent of facts necessary to establish jurisdiction for purposes of this action, 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, 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 N.E.W. Plastics Corp., also doing business as Renew Plastics, is a Wisconsin corporation with its principal office or place of business at 112 Fourth Street, Luxemburg, Wisconsin 54217.

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

ORDER

DEFINITIONS

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

A. "Clearly and prominently" means:

1. 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;

2. 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

3. 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.

B. "Close proximity" means on the same print page, web page, online service page, or other electronic page, and proximate to the triggering representation, and not accessed or displayed through hyperlinks, pop-ups, interstitials, or other means.

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

D. "Competent and reliable scientific evidence" means 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.

E. Unless otherwise specified, "respondent" means N.E.W. Plastics Corp., a corporation, and its successors and assigns.

I.

IT IS ORDERED that respondent, its officers, agents, servants, employees, and attorneys, and all other persons in active concert or participation with any of them, who receive actual notice of this order, whether acting directly or indirectly, in connection with promoting or offering for sale any product or package, shall not make any representation, in any manner, expressly or by implication, about:

A. The recycled content of any product or package;

B. The post-consumer recycled content, such as milk jugs or detergent bottles, of any product or package; or

C. The environmental benefit of any product or package;

unless such representation is true, not misleading, and, at the time it is made, respondent possesses and relies upon competent and reliable evidence that substantiates that the representation is true. If, in general, experts in the relevant scientific fields would conclude it is necessary, such evidence must be competent and reliable scientific evidence. For any representation that a product or package contains recycled content, such evidence must show that any recycled content in such product or package is composed of materials that have been recovered or otherwise diverted from the waste stream.

II.

IT IS FURTHER ORDERED that respondent, its officers, agents, servants, employees, and attorneys, and all other persons in active concert or participation with any of them, who receive actual notice of this order, whether acting directly or indirectly, in connection with promoting or offering for sale any product or package, shall not represent, in any manner, expressly or by implication, that any such product or package is recyclable, unless:

A. The entire item, excluding minor incidental components, can be collected, separated, or otherwise recovered from the waste stream through an established recycling program for reuse or use in manufacturing or assembling another item;

B. Recycling facilities that accept the item for recycling are available:

1. to a substantial majority (at least sixty (60) percent) of consumers or communities where the item is sold; or

2. to less than a substantial majority (at least sixty (60) percent) of consumers or communities where the item is sold and respondent discloses, clearly and prominently and in close proximity to the representation, the limited availability of recycling for the item and the extent to which it is limited, such as by disclosing the percentage of consumers or communities that have access to facilities that recycle such item;

and such representation is true, not misleading, and, at the time it is made, respondent possesses and relies upon competent and reliable evidence that substantiates that the representation is true. If, in general, experts in the relevant scientific fields would conclude it is necessary, such evidence must be competent and reliable scientific evidence.

Provided, if respondent, its officers, agents, servants, employees, and attorneys, and all other persons in active concert or participation with any of them, who receive actual notice of this order, whether acting directly or indirectly, in connection with promoting or offering for sale any product or package that is partially recyclable, represents that such product or package is recyclable, respondent must disclose, clearly and prominently and in close proximity to the representation, the part or portion of the product or package that is recyclable.

III.

IT IS FURTHER ORDERED that respondent, its officers, agents, servants, employees, and attorneys, and all other persons in active concert or participation with any of them, who receive actual notice of this order, whether acting directly or indirectly, in connection with promoting or offering for sale any good or service, shall not provide to others the means and instrumentalities with which to make, directly or indirectly, expressly or by implication, including through the use of endorsements or trade names, any false, unsubstantiated, or otherwise misleading representation of material fact. For the purposes of this Part, "means and instrumentalities" means any information, including, but not necessarily limited to, any

advertising, labeling, telemarketing scripts, or promotional, sales training, or purported substantiation materials, for use by trade customers in their marketing of any product or package, in or affecting commerce.

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 retailers and distributors, and all other entities to which respondent provided point-of-sale advertising for the products 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 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 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 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 must 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 shall notify the Commission at least thirty (30) days prior to any change in the corporation that may affect compliance obligations arising under this order, including but not limited to a dissolution, assignment, sale, merger, or other action that would result in the emergence of a successor corporation; the creation or dissolution of a subsidiary, parent, or affiliate that engages in any acts or practices subject to this order; the proposed filing of a bankruptcy petition; or a change in the corporate name or address. *Provided, however*, that, with respect to any proposed change in the corporation about which respondent learns less than thirty (30) days prior to the date such action is to take place, respondent shall notify the Commission as soon as is practicable after obtaining such knowledge. 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: "N.E.W. Plastics Corp., File No. 132 3126, Docket No. C-4449."

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 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. Unless otherwise directed by a representative of the Commission in writing, all reports required by this Part shall also 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: "N.E.W. Plastics Corp., File No. 132 3126, Docket No. C-4449."

IX.

This order will terminate on April 3, 2034, or twenty (20) years from the most recent date that the United States or the Federal Trade Commission files a complaint (with or without an accompanying consent decree) in federal court alleging any violation of the order, whichever comes later; *provided, however*, that the filing of such a complaint will not affect the duration of:

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

B. This order's application to any respondent that is not named as a defendant in such complaint; and

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

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

will not terminate between the date such complaint is filed and the later of the deadline for appealing such dismissal or ruling and the date such dismissal or ruling is upheld on appeal.

By the Commission.

ANALYSIS 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 N.E.W. Plastics Corp., a corporation ("Respondent").

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

This matter addresses allegedly deceptive green claims that Respondent made while promoting two brands of plastic lumber products, Evolve and Trimax, to retailers, independent distributors and end-use consumers. According to the FTC complaint, Respondent marketed (1) Evolve products as made from 90% or more recycled content; (2) Trimax products as made from mostly post-consumer recycled content; and (3) both Trimax and Evolve as recyclable. The complaint alleges first that each of these claims is false and misleading. It also alleges that Respondent did not possess or rely upon a reasonable basis to substantiate these representations. Finally, it alleges that Respondent provided its retailers and distributors with deceptive promotional materials, *i.e.*, the means and instrumentalities to deceive consumers. Thus,

the three-count complaint alleges that Respondent engaged in deceptive practices in violation of Section 5(a) of the FTC Act.

The proposed consent order contains several provisions designed to prevent Respondent from engaging in similar acts and practices in the future. Part I prohibits N.E.W. from making representations regarding the recycled content, the post-consumer recycled content, or the environmental benefit of any product or package unless they are true, not misleading, and substantiated by competent and reliable evidence. Part I further provides that if, in general, experts in the relevant scientific field would conclude it necessary, such evidence must be competent and reliable scientific evidence. Consistent with the Guides for the Use of Environmental Marketing Claims ("Green Guides"), 16 C.F.R. § 260.13(b), Part I specifically requires N.E.W. to substantiate recycled content claims by demonstrating that such recycled content is composed of materials that were recovered or otherwise diverted from the waste stream.

Part II prohibits N.E.W. from making an unqualified claim that any product or package is recyclable unless: (1) the item, excluding minor incidental components, can be recycled in an established recycling program, and (2) recycling facilities that accept the item are available to at least 60% of consumers or communities where it is sold. If recycling facilities are available to fewer than 60%, consistent with the Green Guides, 16 C.F.R. § 260.12(b), Part II requires N.E.W. to qualify its claim regarding the availability of recycling facilities. Part II requires such claims to be true, not misleading, and substantiated by competent and reliable evidence. It further provides that if, in general, experts in the relevant scientific field would conclude it necessary, such evidence must be competent and reliable scientific evidence. Finally, Part II provides that if Respondent promotes as recyclable at item that is only partially recyclable, Respondent must disclose the part or portion of the product or package that is recyclable.

Part III prohibits N.E.W. from providing others with the means and instrumentalities to make any false, unsubstantiated, or otherwise misleading representation of material fact regarding any product or package.

Part IV requires N.E.W. to deliver a letter to its distributors and retailers that instructs them to stop using Evolve and Trimax plastic lumber advertising and marketing materials provided by N.E.W. prior to December 2013. This requirement seeks to ensure that deceptive claims will be entirely removed from the market.

Parts V through IX are reporting and compliance provisions. Part V requires Respondent to keep (and make available to the Commission on request): copies of advertisements and promotional materials containing the representations covered by the order; materials relied upon in disseminating those representations; evidence that contradicts, qualifies, or calls into question the representations, or the basis relied upon for the representations. Part VI 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. It also requires Respondent to maintain and make available to the FTC all acknowledgments of receipt of the order. Part VII requires notification to the FTC of changes in corporate status. Part VIII mandates that Respondent submit an initial compliance report to the FTC and make available to the FTC subsequent reports. Part IX is a provision terminating the order after twenty (20) years, with certain exceptions.

The purpose of this analysis is to aid public comment on the proposed consent 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

COMMUNITY HEALTH SYSTEMS, INC.,
AND
HEALTH MANAGEMENT ASSOCIATES, INC.

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

Docket No. C-4427; File No. 131 0202
Complaint, January 21, 2014 – Decision, April 11, 2014

This consent order addresses the $7.6 billion acquisition by Community Health Systems, Inc. ("CHS") of certain assets of Health Management Associates, Inc. The complaint alleges that the acquisition, if consummated, would violate Section 7 of the Clayton Act and Section 5 of the Federal Trade Commission Act by removing an actual, direct, and substantial competitor from two local markets in Alabama and South Carolina for general acute care inpatient services sold to commercial health plans. The consent order requires CHS to divest the Riverview Regional Medical Center and all associated operations and businesses in and around Gadsden, Alabama, and the Carolina Pines Regional Medical Center and all associated operations and businesses in and around Hartsville, South Carolina.

Participants

For the *Commission*: *Katie Ambrogi*, *Maggie DiMoscato, Michelle Fetterman, Matthew McDonald*, and *Jennifer Schwab.*

For the *Respondents*: *Mark Kovner* and *Bilal Sayyed, Kirkland & Ellis;* and *Steven Bernstein* and *Vadim Brusser, Weil Gotshal.*

COMPLAINT

Pursuant to the Clayton Act and the Federal Trade Commission Act ("FTC Act"), and by virtue of the authority vested in it by said Acts, the Federal Trade Commission ("Commission"), having reason to believe that Respondent Community Health Systems, Inc. ("CHS"), a corporation subject to the jurisdiction of the Commission, has agreed to acquire Respondent Health Management Associates, Inc. ("HMA"), a corporation subject to the jurisdiction of the Commission, in violation of Section 7 of the Clayton Act, as amended, 15 U.S.C.

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

I. RESPONDENTS

1. Respondent CHS is a corporation organized, existing, and doing business under and by virtue of the laws of the State of Delaware, with its offices and principal place of business located at 4000 Meridian Boulevard, Franklin, Tennessee 37067-6325.

2. CHS owns or leases 135 hospitals, comprised of 131 general acute care hospitals and four stand-alone rehabilitation or psychiatric hospitals, located in 29 states. CHS is the second-largest U.S. hospital chain and one of the largest publicly-traded operators of hospitals in the United States. CHS generated approximately $13 billion in revenue in 2012. CHS is, and at all times relevant herein has been, engaged in the sale and provision of general acute care inpatient services ("GAC services").

3. Respondent HMA is a corporation organized, existing, and doing business under and by virtue of the laws of the State of Delaware, with its offices and principal place of business located at 5811 Pelican Bay Boulevard, Suite 500, Naples, Florida 34108-2710.

4. HMA operates 71 hospitals located in 15 states. In 2012, HMA generated $5.9 billion in revenue. HMA is, and at all times relevant herein has been, engaged in the sale and provision of GAC services.

II. THE PROPOSED MERGER

5. Pursuant to an Agreement and Plan of Merger dated July 29, 2013, CHS proposes to purchase all of the issued and outstanding common stock of HMA (the "Merger").

III. JURISDICTION

6. Respondents, and each of their relevant operating subsidiaries and parent entities, are, and at all times relevant herein have been, engaged in commerce, or in activities affecting commerce, within the meaning of Section 1 of the Clayton Act, 15 U.S.C. § 12, and Section 4 of the FTC Act, 15 U.S.C. § 44.

7. The Merger constitutes an acquisition under Section 7 of the Clayton Act, 15 U.S.C. § 18.

IV. THE RELEVANT PRODUCT MARKET

8. The relevant line of commerce in which to analyze the Merger is the sale and provision of GAC services to commercial health plans and commercially insured patients, respectively. GAC services consist of a broad cluster of routine inpatient services that require an overnight hospital stay.

9. GAC services do not include services related to psychiatric care, substance abuse, and rehabilitation services. Likewise, outpatient services are not included in the GAC services market because such services are characterized by different competitive conditions (e.g., different competitors, lower entry barriers) and because health plans and their members generally cannot and would not substitute those services for inpatient services in response to a small but significant and non-transitory increase in price.

V. THE RELEVANT GEOGRAPHIC MARKETS

10. One relevant geographic market in which to assess the competitive effects of the Merger is the area that approximates Etowah County and includes the City of Gadsden, Alabama, or, the "Gadsden Area."

11. In general, patients prefer to obtain GAC services close to home or work. Accordingly, most residents of the Gadsden Area receive GAC services from two locally-situated providers—CHS's Gadsden Regional Medical Center and HMA's Riverview Regional Medical Center. Gadsden Area residents are unlikely to

seek GAC services from more distant providers, even in response to a small but significant and non-transitory increase in price.

12. A second relevant geographic market in which to assess the competitive effects of the Merger is the area that approximates Darlington County and includes the City of Hartsville, South Carolina, or, the "Darlington County Area."

13. As in the Gadsden Area, patients prefer to obtain GAC services close to home or work. Accordingly, most residents of the Darlington County Area receive GAC services from three locally-situated providers—CHS's Carolinas Hospital-Florence, HMA's Carolina Pines Regional Medical Center, and third-party McLeod Regional Medical Center ("McLeod Regional"). Darlington County Area residents are unlikely to seek GAC services from more distant providers, even in response to a small but significant and non-transitory increase in price.

VI. MARKET CONCENTRATION

14. The Gadsden Area market for the provision and sale of GAC services is highly concentrated, and the Merger will substantially increase concentration in this market. The Merger would combine the only two competitively meaningful providers of GAC services to commercially insured patients. Respondents CHS and HMA each own and operate a general acute care hospital that serves this area. Respondents compete on a number of price and non-price factors, including a range of available services, quality of service, name recognition, reputation, location, and associated product offerings. Post-merger, patients in the Gadsden Area would have only CHS's hospitals as meaningful options to obtain GAC services.

15. The Darlington County Area market for the provision and sale of GAC services is highly concentrated, and the Merger will substantially increase concentration in this market. The Merger would combine two of the three competitively meaningful providers of GAC services to commercially insured patients. Respondents CHS and HMA each own and operate a general acute care hospital that serves this area. Respondents compete on a number of price and non-price factors, including a range of

available services, quality of service, name recognition, reputation, location, and associated product offerings. Post-merger, patients in the Darlington County Area would have only two meaningful options for GAC services—either a Respondent-owned hospital or third-party McLeod Regional.

VII. ENTRY CONDITIONS

16. Entry into the relevant geographic markets would not be timely, likely, or sufficient to prevent or deter the likely anticompetitive effects of the Merger. Significant entry barriers include the time and costs associated with constructing or expanding a general acute care hospital, as well as the need to satisfy regulatory and licensing requirements that govern the provision of GAC services, including Certificate of Need requirements.

VIII. EFFECTS OF THE ACQUISITION

17. The Merger, if consummated, may substantially lessen competition for the sale and provision of GAC services to commercial health plans and commercially insured patients in the relevant geographic markets, identified in Paragraphs 10 and 12, in the following ways, among others:

a. by eliminating direct and substantial competition between Respondents CHS and HMA; and

b. by increasing the likelihood that Respondent CHS will unilaterally exercise market power.

18. The ultimate effect of the Merger would be to increase the likelihood that prices of GAC services provided to commercially insured patients would rise above competitive levels, and/or that there would be a decrease in the quality or availability of GAC services, in the relevant geographic markets.

IX. VIOLATIONS CHARGED

19. The agreement described in Paragraph 5 constitutes a violation of Section 5 of the FTC Act, as amended, 15 U.S.C. §

45, and the Merger, if consummated, would violate Section 7 of the Clayton Act, as amended, 15 U.S.C. § 18, and Section 5 of the FTC Act, as amended, 15 U.S.C. § 45.

WHEREFORE, THE PREMISES CONSIDERED, the Federal Trade Commission on this twenty-first day of January, 2014, issues its Complaint against said Respondents.

By the Commission.

ORDER TO HOLD SEPARATE AND MAINTAIN ASSETS
[Public Record Version]

The Federal Trade Commission ("Commission"), having initiated an investigation of the proposed acquisition of Respondent Health Management Associates, Inc. ("HMA"), by Respondent Community Health Systems, Inc. ("CHS"), (hereinafter referred to as Respondents), and Respondents having been furnished thereafter with a copy of a draft of Complaint that the Bureau of Competition proposed to present to the Commission for its consideration and which, if issued by the Commission, would charge Respondents with violations of Section 7 of the Clayton Act, as amended, 15 U.S.C. § 18, and Section 5 of the Federal Trade Commission Act, as amended, 15 U.S.C. § 45; and

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

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

1. Respondent CHS 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 4000 Meridian Boulevard, Franklin, TN 37067.

2. Respondent HMA 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 5811 Pelican Bay Boulevard, Naples, FL 34108.

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

ORDER

I.

IT IS ORDERED that, as used in this Hold Separate Order, the following definitions, and all other definitions used in the Consent Agreement and the Decision and Order, shall apply:

A. "Date of the Merger Agreement" means the date the parties entered into the Agreement and Plan of Merger by and among CHS and HMA.

B. "Decision and Order" means the:

1. Proposed Decision and Order contained in the Consent Agreement in this matter until issuance and service of a final Decision and Order by the Commission; and

2. Final Decision and Order issued by the Commission following issuance and service of a final Decision and Order by the Commission.

C. "Hold Separate Business" means the Hospital Services and Outpatient Business of the Divestiture Assets."Hold Separate Employees" means all full-time employees, part-time employees, contract employees, and independent contractors, whose duties, at any time during the ninety (90) days preceding the date the Acquisition is completed or any time after the date the Acquisition is completed, related or relates to the Divestiture Assets, a complete list of whom has been submitted to and approved by the Hold Separate Monitor, in consultation with the Commission staff, no later than three (3) days after the date the Acquisition is completed.

D. "Hold Separate Monitor" means the Person appointed pursuant to Paragraph III. of this Hold Separate Order.

E. "Hold Separate Order" means this Order to Hold Separate and Maintain Assets.

F. "Hold Separate Period" means the period during which the Hold Separate Order is in effect, which shall begin on the date the Acquisition is completed and terminate pursuant to Paragraph XI. of this Hold Separate Order.

G. "Manager" means the Person or Persons appointed pursuant to Paragraph IV. of this Hold Separate Order.

H. "Orders" means the Decision and Order and this Hold Separate Order.

I. "Person" means any individual, partnership, firm, corporation, association, trust, unincorporated organization, or other entity or governmental body.

J. "Support Service Employees" means the persons listed on Confidential Appendix A of this Hold Separate Order; at any time during the Hold Separate Period, Respondents may, in consultation with the Hold Separate Monitor, modify the list of Support Service Employees on Confidential Appendix A.

K. "Support Services" means assistance with respect to the operation of the Hold Separate Business, including, but not limited to, (i) human resources and administrative services such as payroll processing and employee benefits; (ii) financial accounting services; (iii) reimbursement department support (i.e., Medicare cost reports); (iv) tax-related support; (v) treasury support; (vi) insurance support; (vii) clinical information systems support; (viii) information technology software and support services; (ix) participation in group purchasing arrangements; (x) online training programs; (xi) legal services; and (xii) federal and state regulatory compliance support.

II.

IT IS FURTHER ORDERED that during the Hold Separate Period:

A. Respondents shall:

1. Hold the Hold Separate Business separate, apart, and independent of Respondents' other businesses and assets as required by this Hold Separate Order

and shall vest the Hold Separate Business with all rights, powers, and authority necessary to conduct its business;

2. Not exercise direction or control over, or influence directly or indirectly, the Hold Separate Business or any of its operations, the Managers, or the Hold Separate Monitor, except to the extent that Respondents must exercise direction and control over the Hold Separate Business as is necessary to assure compliance with this Hold Separate Order, the Consent Agreement, the Decision and Order, and all applicable laws; and

3. Take all actions necessary to maintain and assure the continued viability, marketability, and competitiveness of the Hold Separate Business, and prevent the destruction, removal, wasting, deterioration, or impairment of any of the Divestiture Assets, except for ordinary wear and tear, and shall not sell, transfer, encumber, or otherwise impair any of the Divestiture Assets or the Hold Separate Business (except as required by the Decision and Order).

B. The purpose of this Hold Separate Order is to (1) maintain and preserve the Hold Separate Business as a viable, competitive, and ongoing business independent of Respondents until the divestitures required by the Decision and Order are achieved; (2) assure that no Confidential Business Information is exchanged between Respondents and the Hold Separate Business, except in accordance with the provisions of this Hold Separate Order; and (3) prevent interim harm to competition pending the divestiture and other relief.

III.

IT IS FURTHER ORDERED that:

A. The Commission appoints Curtis Lane as Hold Separate Monitor to monitor and supervise the management of the Hold Separate Business and ensure that Respondents comply with their obligations under this Hold Separate Order and the Decision and Order.

B. Respondents shall enter into an agreement with the Hold Separate Monitor that shall become effective no later than one (1) day after the date the Acquisition is completed, and that, subject to the approval of the Commission, transfers to and confers upon the Hold Separate Monitor all rights, powers, and authority necessary to permit the Hold Separate Monitor to perform his or her duties and responsibilities pursuant to this Hold Separate Order in a manner consistent with the purposes of this Hold Separate Order and the Decision and Order and in consultation with Commission staff; and shall require that the Hold Separate Monitor act in a fiduciary capacity for the benefit of the Commission:

1. The Hold Separate Monitor shall have the responsibility for monitoring the organization of the Hold Separate Business; supervising the management of the Hold Separate Business by the Managers; maintaining the independence of the Hold Separate Business; and monitoring Respondents' compliance with their obligations pursuant to this Hold Separate Order and the Decision and Order.

2. The Hold Separate Monitor shall act in a fiduciary capacity for the benefit of the Commission. Subject to all applicable laws and regulations, the Hold Separate Monitor shall have full and complete access to all personnel, books, records, documents, and facilities of the Hold Separate

Business, and to any other relevant information as the Hold Separate Monitor may reasonably request including, but not limited to, all documents and records kept by Respondents in the ordinary course of business that relate to the Hold Separate Business. Respondents shall develop such financial or other information as the Hold Separate Monitor may reasonably request.

3. The Hold Separate Monitor shall have the authority to employ, at the cost and expense of Respondents, such consultants, accountants, attorneys, and other representatives and assistants as are reasonably necessary to carry out the Hold Separate Monitor's duties and responsibilities.

4. The Commission may require the Hold Separate Monitor and each of the Hold Separate Monitor's consultants, accountants, attorneys, and other representatives and assistants to sign an appropriate confidentiality agreement relating to materials and information received from the Commission in connection with performance of the Hold Separate Monitor's duties.

5. Respondents may require the Hold Separate Monitor and each of the Hold Separate Monitor's consultants, accountants, attorneys, and other representatives and assistants to sign an appropriate confidentiality agreement; *provided, however*, that such agreement shall not restrict the Hold Separate Monitor from providing any information to the Commission.

6. The Hold Separate Monitor shall serve, without bond or other security, at the cost and expense of Respondents, on reasonable and customary terms commensurate with the person's experience and responsibilities.

7. Respondents shall indemnify the Hold Separate Monitor and hold him/her harmless against any losses, claims, damages, liabilities, or expenses arising out of, or in connection with, the performance of the Hold Separate Monitor's duties, including all reasonable fees of counsel and other expenses incurred in connection with the preparation for, or defense of, any claim, whether or not resulting in any liability, except to the extent that such losses, claims, damages, liabilities, or expenses result from the Hold Separate Monitor's malfeasance, gross negligence, willful or wanton acts, or bad faith.

8. Thirty (30) days after the date the Acquisition is completed, and every thirty (30) days thereafter until the Hold Separate Order terminates, the Hold Separate Monitor shall report in writing to the Commission concerning the efforts to accomplish the purposes of this Hold Separate Order and Respondents' compliance with their obligations under the Hold Separate Order and the Decision and Order.

C. If the Hold Separate Monitor ceases to act or fails to act diligently and consistent with the purposes of this Hold Separate Order, the Commission may appoint a substitute Hold Separate Monitor, subject to the consent of Respondents, which consent shall not be unreasonably withheld, as follows:

1. If Respondents have not opposed in writing, including the reasons for opposing, the selection of the proposed substitute Hold Separate Monitor within five (5) business days after notice by the staff of the Commission to Respondents of the identity of the proposed substitute Hold Separate Monitor, then Respondents shall be deemed to have consented to the selection of the proposed substitute Monitor.

2. Respondents shall, no later than five (5) days after the Commission appoints a substitute Hold Separate Monitor, enter into an agreement with the substitute Hold Separate Monitor that, subject to the approval of the Commission, confers on the substitute Hold Separate Monitor all the rights, powers, and authority necessary to permit the substitute Hold Separate Monitor to perform his or her duties and responsibilities on the same terms and conditions as provided in Paragraph III. of this Hold Separate Order.

D. The Hold Separate Monitor shall serve through the Hold Separate Period; *provided, however,* that the Commission may extend or modify this period as may be necessary or appropriate to accomplish the purposes of the Orders.

E. The Commission may on its own initiative or at the request of the Hold Separate Monitor issue such additional orders or directions as may be necessary or appropriate to assure compliance with the requirements of this Hold Separate Order.

IV.

IT IS FURTHER ORDERED that:

A. No later than three (3) days after the date the Acquisition is completed, Respondents shall appoint Jim Edmondson as the Manager of Riverview Regional Medical Center and Tim Browne as the Manager of Carolina Pines Regional Medical Center, to manage and maintain the operations of the Hold Separate Business in the regular and ordinary course of business and in accordance with past practice.

B. Respondents shall enter into a management agreement with each of the Managers that shall become effective no later than three (3) days after the date the Acquisition is completed, and that, subject to the

approval of the Hold Separate Monitor, in consultation with the Commission staff, transfers all rights, powers, and authority necessary to permit each Manager to perform his or her duties and responsibilities pursuant to this Hold Separate Order:

1. The Managers shall be responsible for managing the operations of the Hold Separate Business and shall report directly and exclusively to the Hold Separate Monitor and shall manage the Hold Separate Business independently of the management of Respondents and Respondents' other businesses.

2. The Managers shall make no material changes in the ongoing operations of the Hold Separate Business except with the approval of the Hold Separate Monitor, in consultation with the Commission staff.

3. The Managers, in consultation with the Hold Separate Monitor, shall have the authority to employ such Persons as are reasonably necessary to assist the Managers in managing the Hold Separate Business, including consultants, accountants, attorneys, and other representatives and assistants. Nothing contained herein shall preclude the Managers from contacting or communicating directly with the staff of the Commission either at the request of the staff of the Commission or in the discretion of the Manager.

4. Respondents shall provide the Managers with reasonable financial incentives to undertake this position. Such incentives shall include a continuation of all employee benefits, including regularly scheduled raises, bonuses, vesting of pension benefits (as permitted by law), and additional incentives as may be necessary to assure the continuation, and prevent any diminution, of the Hold Separate Business's viability,

marketability, and competitiveness, and as may otherwise be necessary to achieve the purposes of this Hold Separate Order.

5. The Managers shall serve, without bond or other security, at the cost and expense of Respondents, on reasonable and customary terms commensurate with the person's experience and responsibilities.

6. Respondents shall indemnify the Managers and hold them harmless against any losses, claims, damages, liabilities, or expenses arising out of, or in connection with, the performance of the Managers' duties, including all reasonable fees of counsel and other expenses incurred in connection with the preparation for, or defense, of any claim, whether or not resulting in any liability, except to the extent that such losses, claims, damages, liabilities, or expenses result from either Manager's malfeasance, gross negligence, willful or wanton acts, or bad faith.

C. The Managers shall have the authority, in consultation with the Hold Separate Monitor, to staff the Hold Separate Business with sufficient employees to maintain the viability and competitiveness of the Hold Separate Business, including:

1. Replacing any departing or departed employee with a person who has similar experience and expertise or determine not to replace such departing or departed employees;

2. Removing any Hold Separate Employee who ceases to act or fails to act diligently and consistent with the purposes of this Hold Separate Order, and replacing such employee with another person of similar experience or skills;

3. Ensuring that no Hold Separate Employee shall (i) be involved in any way in the operations of

Respondents' other businesses, (ii) receive or have access to, or use or continue to use, any Confidential Business Information pertaining to Respondents' other businesses, and (iii) provide or permit access to Confidential Business Information pertaining to the Hold Separate Business to Respondents' employees, except as provided in Paragraph VI. below;

4. Providing each Hold Separate Employee with reasonable financial incentives, including continuation of all employee benefits and regularly scheduled raises and bonuses, to continue in his or her position pending divestiture of the Divestiture Assets.

D. Either or both Managers may be removed for cause by the Hold Separate Monitor, in consultation with the Commission staff. If a Manager is removed, resigns, or otherwise ceases to act as Manager, Respondents shall, within three (3) days of such action, subject to the approval of the Hold Separate Monitor and in consultation with Commission staff, on the same terms and conditions as provided in this Hold Separate Order, (i) appoint a substitute Manager, and (ii) enter into an agreement with the substitute Manager.

V.

IT IS FURTHER ORDERED that:

A. Respondents shall cooperate with, and take no action to interfere with or impede the ability of: (i) the Hold Separate Monitor, (ii) the Managers, (iii) any Hold Separate Employee, or (iv) any Support Services Employee, to perform his or her duties and responsibilities consistent with the terms of this Hold Separate Order and the Decision and Order.

B. Respondents shall continue to provide, or offer to provide, Support Services and goods to the Hold

Separate Business as were being provided to the Hold Separate Business by Respondents as of the Date of the Merger Agreement;

1. For Support Services and goods that Respondents provided to the Hold Separate Business as of the Date of the Merger Agreement, Respondents may charge no more than the same price, if any, charged by Respondents for such Support Services and goods as of the Date of the Merger Agreement;

2. For any other Support Services and goods that Respondents may provide to the Hold Separate Business, Respondents may charge no more than Respondents' Direct Cost for the same or similar Support Services; and

3. Notwithstanding the above, the Hold Separate Business shall have, at the option of the Managers and in consultation with the Hold Separate Monitor, the ability to acquire Support Services from Third Parties.

C. Respondents shall not permit:

1. Any of its employees, officers, agents, or directors, other than (i) the Managers, (ii) any Hold Separate Employees, and (iii) any Support Services Employees, to be involved in the operations of the Hold Separate Business, except to the extent otherwise provided in this Hold Separate Order.

2. The Managers or any Hold Separate Employee to be involved, in any way, in the operations of Respondents' businesses other than the Hold Separate Business.

D. Respondents shall provide the Hold Separate Business with sufficient financial and other resources as are appropriate in the judgment of the Hold Separate

Monitor, consistent with his obligations and responsibilities in this Hold Separate Order, to:

1. Operate the Hold Separate Business as it was operated as of the Date of the Merger Agreement (including efforts to generate new business) consistent with the practices of the Hold Separate Business in place prior to the Date of the Merger Agreement;

2. Perform all maintenance to, and replacements or remodeling of, the assets of the Hold Separate Business in the ordinary course of business and in accordance with past practice and with current plans;

3. Carry on such capital projects, physical plant improvements, and business plans as are already under way or planned for which all necessary regulatory and legal approvals have been obtained, including, but not limited to, existing or planned renovation, remodeling, and expansion projects; and

4. Maintain the viability, competitiveness, and marketability of the Hold Separate Business.

Such financial resources to be provided to the Hold Separate Business shall include, but shall not be limited to, (i) general funds, (ii) capital, (iii) working capital, and (iv) reimbursement for any operating losses, capital losses, or other losses; *provided, however,* that, consistent with the purposes of the Decision and Order and in consultation with the Hold Separate Monitor, the Managers may reduce in scale or pace any capital or research and development project of the Hold Separate Business, or substitute any capital or research and development project of the Hold Separate Business for another of the same cost.

E. Respondents shall provide each Hold Separate Employee with reasonable financial incentives to continue in his or her position consistent with past practices and/or as may be necessary to preserve the marketability, viability, and competitiveness of the Divestiture Assets pending divestiture. Such incentives shall include a continuation of all employee benefits, including funding of regularly scheduled raises and bonuses, vesting of pension benefits (as permitted by law), and additional incentives as may be necessary to assure the continuation, and prevent any diminution, of the viability, marketability, and competitiveness of the Hold Separate Business until the Closing Date, and as may otherwise be necessary to achieve the purposes of this Hold Separate Order.

F. No later than ten (10) days after the date the Acquisition is completed, Respondents shall establish and implement procedures, subject to the approval of the Hold Separate Monitor, covering the management, maintenance, and independence of the Hold Separate Business consistent with the provisions of this Hold Separate Order.

G. No later than ten (10) days after the date the Acquisition is completed, Respondents shall circulate to Hold Separate Employees and to persons who are employed in Respondents' businesses that compete with the Hold Separate Business in the Relevant Areas, a notice of the requirements of this Hold Separate Order, the Decision and Order, and the Consent Agreement, in a form approved by the Hold Separate Monitor in consultation with Commission staff, including copies of the Hold Separate Order and the Decision and Order.

VI.

IT IS FURTHER ORDERED that:

A. After the date the Acquisition is completed, Respondents' employees, other than employees of the Hold Separate Business and Support Services Employees, shall not receive, or have access to, or use or continue to use any Confidential Business Information of the Hold Separate Business except in the course of:

1. Performing their obligations or as permitted under this Hold Separate Order or the Decision and Order;

2. Performing their obligations under the Divestiture Agreements;

3. Negotiating agreements to divest assets pursuant to the Decision and Order and engaging in related due diligence; and

4. Complying with financial reporting requirements, obtaining legal advice, defending legal claims, conducting investigations, or enforcing actions threatened or brought against the Hold Separate Business, or as required by law. Notwithstanding the above, Respondents may receive aggregate financial and operational information relating to the Hold Separate Business only to the extent necessary to allow Respondents to comply with the requirements and obligations of the laws and regulations of the United States and other countries, to prepare consolidated financial reports, tax returns, reports required by securities laws, and personnel reports, and to comply with this Hold Separate Order or in complying with or as permitted by the Decision and Order. Any such information that is obtained pursuant to this

subparagraph shall be used only for the purposes set forth in this Hold Separate Order.

For purposes of this Paragraph VI.A., Respondents' employees that provide Support Services or that staff the Hold Separate Business shall be deemed to be performing obligations under this Hold Separate Order.

B. If access to or disclosure of Confidential Business Information of the Hold Separate Business to Respondents' employees is necessary and permitted under Paragraph VI.A. of this Hold Separate Order, Respondents shall:

1. Implement and maintain a process and procedures, as approved by the Hold Separate Monitor, such approval not to be unreasonably withheld, pursuant to which Confidential Business Information of the Hold Separate Business may be disclosed or used only:

   a. to or by those employees who require such information;

   b. to the extent such Confidential Business Information is required; and

   c. after such employees have signed an appropriate agreement in writing to maintain the confidentiality of such information.

2. Enforce the terms of this Paragraph VI. as to any of Respondents' employees and take such action as is necessary to cause each such employee to comply with the terms of this Paragraph VI., including training of Respondents' employees and taking all other actions that Respondents would take to protect their own trade secrets and proprietary information.

C. Respondents shall implement, and maintain in operation, a system, as approved by the Hold Separate Monitor, of access and data controls to prevent unauthorized access to or dissemination of Confidential Business Information of the Hold Separate Business, including, but not limited to, the opportunity by the Hold Separate Monitor, on terms and conditions agreed to with Respondents, to audit Respondents' networks and systems to verify compliance with this Hold Separate Order.

D. Neither the Managers nor any Hold Separate Employee shall receive or have access to, or use or continue to use, any Confidential Business Information relating to Respondents' businesses (not subject to the Hold Separate Order), except such information as is necessary to maintain and operate the Hold Separate Business.

VII.

IT IS FURTHER ORDERED that Respondents shall:

A. No later than ten (10) days after a request from a Prospective Acquirer, provide the Prospective Acquirer with the following information for each Relevant Employee, as and to the extent permitted by law:

1. Name, job title or position, date of hire, and effective service date;

2. A specific description of the employee's responsibilities;

3. The base salary or current wages;

4. The most recent bonus paid, aggregate annual compensation for Respondents' last fiscal year, and current target or guaranteed bonus, if any;

5. Employment status (i.e., active or on leave or disability; full-time or part-time);

6. Any other material terms and conditions of employment in regard to such employee that are not otherwise generally available to similarly situated employees; and

7. At the Prospective Acquirer's option, copies of all employee benefit plans and summary plan descriptions (if any) applicable to the Relevant Employee.

B. Within a reasonable time after a request from a Prospective Acquirer, provide to the Prospective Acquirer an opportunity to meet personally and outside the presence or hearing of any employee or agent of any Respondent, with any one or more of the Relevant Employees, and to make offers of employment to any one or more of the Relevant Employees;

C. Not interfere, directly or indirectly, with the hiring or employing by the Prospective Acquirer of any Relevant Employees, not offer any incentive to such employees to decline employment with the Prospective Acquirer, and not otherwise interfere with the recruitment of any Relevant Employee by the Prospective Acquirer; *provided, however,* that Respondents may:

1. Advertise for employees in newspapers, trade publications, or other media, or engage recruiters to conduct general employee search activities, in either case not targeted specifically at Relevant Employees; or

2. Hire Relevant Employees who apply for employment with Respondents, as long as such employees were not solicited by Respondents in violation of this Paragraph; provided further, however, that this Paragraph shall not prohibit

Respondents from making offers of employment to or employing any Relevant Employee if the Prospective Acquirer has notified Respondents in writing that the Prospective Acquirer does not intend to make an offer of employment to that employee, or where such an offer has been made and the employee has declined the offer, or where the employee's employment has been terminated by the Acquirer;

D. Remove any impediments within the control of Respondents that may deter Relevant Employees from accepting employment with the Prospective Acquirer, including, but not limited to, removal of any non-compete or confidentiality provisions of employment or other contracts with Respondents that may affect the ability or incentive of those individuals to be employed by the Prospective Acquirer, and shall not make any counteroffer to a Relevant Employee who receives a written offer of employment from the Prospective Acquirer; *provided, however*, that nothing in this Order shall be construed to require Respondents to terminate the employment of any employee or prevent Respondents from continuing the employment of any employee;

E. Not, for a period of one (1) year following the Closing Date, directly or indirectly, solicit or otherwise attempt to induce any of the Relevant Employees who have accepted offers of employment with the Acquirer to terminate his or her employment with the Acquirer; *provided*, *however*, that Respondents may:

1. Advertise for employees in newspapers, trade publications, or other media, or engage recruiters to conduct general employee search activities, in either case not targeted specifically at Relevant Employees; or

2. Hire Relevant Employees who apply for employment with Respondents, as long as such

employees were not solicited by Respondents in violation of this Paragraph; *provided further, however,* that this Paragraph shall not prohibit Respondents from making offers of employment to or employing any Relevant Employee if the Acquirer has notified Respondents in writing that the Acquirer does not intend to make an offer of employment to that employee, or where such an offer has been made and the employee has declined the offer, or where the employee's employment has been terminated by the Acquirer.

VIII.

IT IS FURTHER ORDERED that, within thirty (30) days after this Hold Separate Order becomes final, and every thirty (30) days thereafter until this Hold Separate Order terminates, Respondents shall submit to the Commission a verified written report setting forth in detail the manner and form in which they intend to comply, are complying, and have complied with all provisions of this Hold Separate Order. Respondents shall include in their reports, among other things that are required from time to time, a full description of the efforts being made to comply with this Hold Separate Order.

IX.

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

A. Any proposed dissolution of such Respondent;

B. Any proposed acquisition, merger, or consolidation of such Respondent; and

C. Any other change in such Respondent including, but not limited to, assignment and the creation or dissolution of subsidiaries, if such change may affect compliance obligations arising out of this Hold Separate Order.

X.

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

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

B. The opportunity to interview officers, directors, or employees of such Respondent, who may have counsel present, related to compliance with this Hold Separate Order.

XI.

IT IS FURTHER ORDERED that this Hold Separate Order shall terminate at the earlier of:

A. Three (3) business days after the Commission withdraws its acceptance of the Consent Agreement pursuant to the provisions of Commission Rule 2.34, 16 C.F.R. § 2.34; or

B. The day after the last of the divestitures required by the Decision and Order is completed; *provided, however,* that when the Divestiture Assets that are

included within the Hold Separate Business are divested pursuant to the applicable paragraphs in the Decision and Order, those Divestiture Assets shall cease to be covered by this Hold Separate Order.

By the Commission.

Confidential Appendix A

List of Respondents' Support Service Employees

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

DECISION AND ORDER

The Federal Trade Commission ("Commission"), having initiated an investigation of the proposed acquisition of Respondent Health Management Associates, Inc. ("HMA"), by Respondent Community Health Systems, Inc. ("CHS"), and Respondents having been furnished thereafter with a copy of a draft of Complaint that the Bureau of Competition proposed to present to the Commission for its consideration and which, if issued by the Commission, would charge Respondents with violations of Section 7 of the Clayton Act, as amended, 15 U.S.C. § 18, and Section 5 of the Federal Trade Commission Act, as amended, 15 U.S.C. § 45; and

Respondents, their attorneys, and counsel for the Commission having thereafter executed an Agreement Containing Consent Orders ("Consent Agreement"), containing an admission by

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

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

1. Respondent CHS 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 4000 Meridian Boulevard, Franklin, TN 37067.

2. Respondent HMA 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 5811 Pelican Bay Boulevard, Naples, FL 34108.

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

ORDER

I.

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

A. "CHS" means Community Health Systems, Inc., its directors, officers, employees, agents, representatives, successors, and assigns; and its joint ventures, subsidiaries, divisions, groups, and affiliates controlled by CHS, and the respective directors, officers, employees, agents, representatives, successors, and assigns of each. After the date the Acquisition is completed, "CHS" includes HMA.

B. "HMA" means Health Management Associates, Inc., its directors, officers, employees, agents, representatives, successors, and assigns; and its joint ventures, subsidiaries, divisions, groups, and affiliates controlled by HMA, and the respective directors, officers, employees, agents, representatives, successors, and assigns of each.

C. "Acquirer" means each Person approved by the Commission to acquire the Divestiture Assets pursuant to this Order.

D. "Acquisition" means the acquisition described in and contemplated by the Agreement and Plan of Merger by and among CHS and HMA, dated July 29, 2013.

E. "Acute Care Hospital" means a health-care facility licensed as a hospital, other than a federally-owned facility, having a duly organized governing body with overall administrative and professional responsibility and an organized professional staff that provides 24-hour inpatient care, and that provides General Acute Care Inpatient Hospital Services.

F. "Business Records" means all information, books and records, documents, files, correspondence, manuals, computer printouts, databases, and other documents, including all hard copies and electronic records wherever stored, including without limitation, client and customer lists, patient and payor information, referral sources, research and development reports, production reports, service and warranty records, maintenance logs, equipment logs, operating guides and manuals, documents relating to policies and procedures, financial and accounting records and documents, creative materials, advertising materials, promotional materials, studies, reports, correspondence, financial statements, financial plans and forecasts, operating plans, price lists, cost information, supplier and vendor contracts, marketing analyses, customer lists, customer contracts, employee lists and contracts, salaries and benefits information, physician lists and contracts, supplier lists and contracts, and, subject to legal requirements, copies of all personnel files.

G. "Carolina Pines Assets" means all of Respondents' rights, title, and interest in all property and assets, tangible or intangible, of whatever nature and wherever located, relating to or used in connection with the Hospital Services and Outpatient Business of the Carolina Pines Regional Medical Center and all Carolina Pines Outpatient Facilities, including, without limitation, all:

1. Real property interests (including fee simple interests and real property leasehold interests, whether as lessor or lessee), wherever located, including all easements, appurtenances, licenses, and permits, together with all buildings and other structures, facilities, and improvements located thereon, owned, leased, or otherwise held;

2. Tangible Personal Property, including, without limitation, any Tangible Personal Property

removed from and not replaced at the Carolina Pines Regional Medical Center and all Carolina Pines Outpatient Facilities, if such property was used by or in connection with the Hospital Services and Outpatient Business of the Carolina Pines Regional Medical Center or any Carolina Pines Outpatient Facilities on or after July 29, 2013;

3. Rights under any and all contracts and agreements (e.g., leases, service agreements such as dietary and housekeeping services, supply agreements, procurement contracts), including, but not limited to, contracts and agreements with physicians, other health care providers, unions, third-party payors, health maintenance organizations ("HMOs"), customers, suppliers, sales representatives, distributors, agents, personal property lessors, personal property lessees, licensors, licensees, cosigners, and consignees;

4. Rights and title in and to use the name of the Carolina Pines Regional Medical Center and all Carolina Pines Outpatient Facilities on a permanent and exclusive basis (even as to Respondents);

5. Medicare and Medicaid provider numbers for the Carolina Pines Regional Medical Center and all Carolina Pines Outpatient Facilities, to the extent transferable;

6. Intellectual Property;

7. Intangible rights and property other than Intellectual Property, including, going concern value, goodwill, internet, telecopy and telephone numbers, domain names, listings, and web sites;

8. Approvals, consents, licenses, certificates, registrations, permits, waivers, or other authorizations issued, granted, given, or otherwise

made available by or under the authority of any governmental body or pursuant to any legal requirement, and all pending applications therefore or renewals thereof, to the extent assignable;

9. All consumable or disposable inventory, including, but not limited to, janitorial, office, and medical supplies, and at least thirty (30) treatment days of pharmaceuticals;

10. Accounts receivable;

11. Items of prepaid expense;

12. Rights under warranties and guarantees, express or implied; and

13. Business Records;

provided, *however*, that Respondents may retain a copy of Business Records to the extent necessary to comply with applicable law, regulations, and other legal requirements.

H. "Carolina Pines Outpatient Facilities" means:

1. Carolina Pines Regional Medical Center Sleep Center;

2. All facilities or entities providing Outpatient Services that are owned or controlled by Hartsville HMS Physician Management, LLC, including, but not limited to, The Medical Group, Pee Dee Hospitalists, Pee Dee Weight Loss Clinic, The Children's Group, and Children's Care Clinic;

3. All facilities or entities providing Outpatient Services that are owned or controlled by Hartsville Medical Group, LLC, including, but not limited to, Hartsville Cardiology Associates, Hartsville Nephrology, Hartsville Nephrology and

Endocrinology, Hartsville Orthopedics & Sports Medicine, The Children's Group, The Medical Group, The Medical Group Darlington, The Medical Group Swift Creek, and Women's Care of Hartsville; and

4. All other entities or facilities providing Outpatient Services relating to Carolina Pines Regional Medical Center.

I. "Carolina Pines Regional Medical Center" means the Acute Care Hospital located at 1304 West Bobo Newsom Highway, Hartsville, SC 29550.

J. "Closing Date" means the applicable date on which each divestiture required by this Order is completed.

K. "Commission" means the Federal Trade Commission.

L. "Confidential Business Information" means information not in the public domain that is related to or used in connection with the Hospital Services and Outpatient Business, except for any information that was or becomes generally available to the public other than as a result of disclosure by Respondents, and includes, but is not limited to, pricing information, marketing methods, market intelligence, competitor information, commercial information, management system information, business processes and practices, payor and provider communications and information, bidding practices and information, procurement practices and information, supplier qualification and approval practices and information, and training practices.

M. "Direct Cost" means cost not to exceed the cost of labor, material, travel, and other expenditures to the extent the costs are directly incurred to provide Transitional Services. "Direct Cost" to an Acquirer for its use of any of Respondents' employees' labor

shall not exceed the then-current average wage rate for such employee, including benefits.

N. "Divestiture Agreement" means each agreement between Respondents and each Acquirer (or between a Divestiture Trustee and the Acquirer, if applicable), and all amendments, exhibits, attachments, agreements, and schedules thereto, approved by the Commission, and pursuant to which the Divestiture Assets are divested as required by this Order.

O. "Divestiture Assets" means:

1. Carolina Pines Assets, and

2. Riverview Assets.

P. "General Acute Care Inpatient Hospital Services" means a broad cluster of basic medical and surgical diagnostic and treatment services, provided on a 24-hour in-patient basis, for the medical diagnosis, treatment, and care of physically injured or sick persons with short term or episodic health problems or infirmities, that include an overnight stay in the hospital by the patient. "General Acute Care Inpatient Hospital Services" excludes: (i) services at hospitals that serve solely military personnel and veterans; (ii) services at outpatient facilities that provide same-day service only; and (iii) psychiatric, substance abuse, and rehabilitation services.

Q. "Hospital Services and Outpatient Business" means the operation of, and all activities relating to, the:

1. Business of an Acute Care Hospital, which includes the provision of General Acute Care Inpatient Hospital Services; and

2. Business of providing Outpatient Services, whether provided or performed at the Acute Care Hospital or in a different location.

R. "Hold Separate Order" means the Order to Hold Separate and Maintain Assets issued by the Commission in this matter.

S. "Intellectual Property" means, without limitation, all:

1. Patents, patent applications, and inventions and discoveries that may be patentable;

2. Know-how, trade secrets, software, technical information, data, registrations, applications for governmental approvals, inventions, processes, best practices (including clinical pathways), formulae, protocols, standards, methods, techniques, designs, quality control practices and information, research and test procedures and information, and safety, environmental and health practices and information;

3. Confidential or proprietary information, commercial information, management systems, business processes and practices, customer lists, customer information, customer records and files, customer communications, procurement practices and information, supplier qualification and approval practices and information, training materials, sales and marketing materials, customer support materials, advertising and promotional materials; and

4. Rights in any jurisdiction to limit the use or disclosure of any of the foregoing, and rights to sue and recover damages or obtain injunctive relief for infringement, dilution, misappropriation, violation, or breach of any of the foregoing.

T. "Outpatient Services" means a broad cluster of basic medical and surgical diagnostic and treatment services for the medical diagnosis, treatment, and care of physically injured or sick persons with short term or episodic health problems or infirmities, that does not

include an overnight stay and/or admission as an inpatient in the hospital by the patient.

U. "Person" means any individual, partnership, firm, corporation, association, trust, unincorporated organization, or other entity or governmental body.

V. "Prospective Acquirer" means a Person with whom Respondents (or the Divestiture Trustee, if applicable) have signed a Divestiture Agreement pursuant to Paragraphs II. or III. of this Order (or Paragraph VII. of this Order, if applicable).

W. "Relevant Area" means, as defined by the U.S. Office of Management and Budget, the:

1. Gadsden, Alabama, Metropolitan Statistical Area; or

2. Florence, South Carolina, Metropolitan Statistical Area.

X. "Relevant Employees" means any and all full-time employees, part-time employees, contract employees, or independent contractors whose duties, at any time during the ninety (90) days preceding the date the Acquisition is completed or at any time after the date the Acquisition is completed, related or relate to the Divestiture Assets.

Y. "Respondents" means CHS and HMA, collectively or individually.

Z. "Riverview Assets" means all of Respondents' rights, title, and interest in all property and assets, tangible or intangible, of whatever nature and wherever located, relating to or used in connection with Hospital Services and Outpatient Business of Riverview Regional Medical Center and all Riverview Outpatient Facilities, including, without limitation, all:

1. Real property interests (including fee simple interests and real property leasehold interests, whether as lessor or lessee) wherever located, including all easements, appurtenances, licenses, and permits, together with all buildings and other structures, facilities, and improvements located thereon, owned, leased, or otherwise held;

2. Tangible Personal Property, including, without limitation, any Tangible Personal Property removed from and not replaced at the Riverview Regional Medical Center and all Riverview Outpatient Facilities, if such property was used by or in connection with the Hospital Services and Outpatient Business of the Riverview Regional Medical Center or any Riverview Outpatient Facilities on or after July 29, 2013;

3. Rights under any and all contracts and agreements (e.g., leases, service agreements such as dietary and housekeeping services, supply agreements, procurement contracts), including, but not limited to, contracts and agreements with physicians, other health care providers, unions, third-party payors, HMOs, customers, suppliers, sales representatives, distributors, agents, personal property lessors, personal property lessees, licensors, licensees, cosigners, and consignees;

4. Rights and title in and to use the name of the Riverview Regional Medical Center and all Riverview Outpatient Facilities on a permanent and exclusive basis (even as to Respondents);

5. Medicare and Medicaid provider numbers for Riverview Regional Medical Center and all Riverview Outpatient Facilities, to the extent transferable;

6. Intellectual Property;

7. Intangible rights and property other than Intellectual Property, including, going concern value, goodwill, internet, telecopy and telephone numbers, domain names, listings, and web sites;

8. Approvals, consents, licenses, certificates, registrations, permits, waivers, or other authorizations issued, granted, given, or otherwise made available by or under the authority of any governmental body or pursuant to any legal requirement, and all pending applications therefore or renewals thereof, to the extent assignable;

9. Consumable or disposable inventory, including, but not limited to, janitorial, office, and medical supplies, and at least thirty (30) treatment days of pharmaceuticals;

10. Accounts receivable;

11. Items of prepaid expense;

12. Rights under warranties and guarantees, express or implied; and

13. Business Records;

provided, *however*, that Respondents may retain a copy of Business Records to the extent necessary to comply with applicable law, regulations, and other legal requirements.

AA. "Riverview Outpatient Facilities" means:

1. Gadsden Endoscopy Center;

2. Riverview Imaging & Laboratory Center;

3. Riverview Laboratory Bay Street;

4. Riverview Medical Center Laboratory;

5. Wound Care and Hyperbaric Center;

6. All facilities or entities providing Outpatient Services that are owned or controlled by Gadsden HMA Physician Management LLC, including, but not limited to, Primary Care Associates and Specialty Care Associates; and

7. All other entities or facilities providing Outpatient Services relating to Riverview Regional Medical Center.

BB. "Riverview Regional Medical Center" means the Acute Care Hospital located at 600 South 3rd Street, Gadsden, Alabama 35901.

CC. "Tangible Personal Property" means all machinery, equipment, spare parts, tools and tooling, fixtures, vehicles, furniture, inventories, office equipment, computer hardware, supplies and materials, and all other items of tangible personal property of every kind owned or leased by Respondents, wherever located, together with any express or implied warranty by the manufacturers, sellers, or lessors of any item or component part thereof and all maintenance records and other documents relating thereto.

DD. "Third Parties" means Persons other than Respondents or the Acquirer(s).

EE. "Transitional Administrative Services" means administrative assistance with respect to the Hospital Services and Outpatient Business, including, but not limited to, assistance relating to billing, accounting, governmental regulation, human resources management, information systems, managed care contracting, and purchasing, as well as providing assistance in acquiring, obtaining access, and customizing all software used in the provision of such services.

FF. "Transitional Clinical Services" means clinical assistance and support services with respect to the Hospital Services and Outpatient Business.

GG. "Transitional Services" means Transitional Administrative Services and Transitional Clinical Services.

II.

IT IS FURTHER ORDERED that:

A. No later than six (6) months after the date this Order is issued, Respondents shall divest the Carolina Pines Assets, absolutely and in good faith and at no minimum price, as an on-going business, only to an acquirer that receives the prior approval of the Commission, and only in a manner (including a Divestiture Agreement) that receives the prior approval of the Commission.

B. Respondents shall cooperate with the Acquirer to ensure that the Carolina Pines Assets are transferred to the Acquirer as a financially and competitively viable Hospital Services and Outpatient Business, operating as an ongoing Hospital Services and Outpatient Business, including, but not limited to, providing assistance necessary to transfer to the Acquirer all governmental approvals needed to operate the Carolina Pines Assets.

C. Prior to the Closing Date, Respondents shall:

1. Secure all consents and waivers from all Third Parties that are necessary for Respondents to divest the Carolina Pines Assets and/or to grant any license(s) to the Acquirer to permit the Acquirer to operate the Carolina Pines Assets; *provided, however*, that Respondents may satisfy this requirement by certifying that such Acquirer has

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

2. Take all actions necessary to ensure that the Carolina Pines Assets meet federal, state, local, and municipal requirements necessary to allow the transfer of the Carolina Pines Assets to the Acquirer.

D. The purpose of the divestiture is to ensure the continuation of the Carolina Pines Regional Medical Center as an ongoing, viable Acute Care Hospital providing General Acute Care Inpatient Hospital Services and to remedy the lessening of competition resulting from the Acquisition as alleged in the Commission's Complaint.

III.

IT IS FURTHER ORDERED that:

A. No later than six (6) months after the date this Order is issued, Respondents shall divest the Riverview Assets, absolutely and in good faith and at no minimum price, as an on-going business, only to an acquirer that receives the prior approval of the Commission, and only in a manner (including a Divestiture Agreement) that receives the prior approval of the Commission.

B. Respondents shall cooperate with the Acquirer to ensure that the Riverview Assets are transferred to the Acquirer as a financially and competitively viable Hospital Services and Outpatient Business, operating as an ongoing Hospital Services and Outpatient Business, including, but not limited to, providing assistance necessary to transfer to the Acquirer all governmental approvals needed to operate the Riverview Assets.

C. Prior to the Closing Date, Respondents shall:

1. Secure all consents and waivers from all Third Parties that are necessary for Respondents to divest the Riverview Assets and/or to grant any license(s) to the Acquirer to permit the Acquirer to operate the Riverview Assets; *provided, however*, that Respondents may satisfy this requirement by certifying that such Acquirer has executed all such agreements directly with each of the relevant Third Parties; and

2. Take all actions necessary to ensure that the Riverview Assets meet federal, state, local, and municipal requirements necessary to allow the transfer of the Riverview Assets to the Acquirer.

D. The purpose of the divestiture is to ensure the continuation of the Riverview Regional Medical Center as an ongoing, viable Acute Care Hospital providing General Acute Care Inpatient Hospital Services and to remedy the lessening of competition resulting from the Acquisition as alleged in the Commission's Complaint.

IV.

IT IS FURTHER ORDERED that:

A. After the date the Acquisition is completed, Respondents shall not use, solicit, or access, directly or indirectly, any Confidential Business Information of the Divestiture Assets, and shall not disclose, provide, discuss, exchange, circulate, convey, or otherwise furnish such Confidential Business Information, directly or indirectly, to or with any Person other than:

1. As necessary to comply with the requirements of this Order or the Hold Separate Order;

2. Pursuant to a Divestiture Agreement;

3. To enforce the terms of a Divestiture Agreement or prosecute or defend against any dispute or legal proceeding; or

4. To comply with applicable law, regulations and other legal requirements.

B. No later than five (5) days after the date the Acquisition is completed, Respondents shall provide written notification of the restrictions, prohibitions, and requirements of this Paragraph IV. to all of Respondents' employees, agents, and representatives employed at, or with responsibilities relating to, the Divestiture Assets, or who had or have access to or possession, custody, or control of any Confidential Business Information of the Divestiture Assets:

1. Such notification shall include a plain language explanation of the requirements of this Order and a description of the consequences of failing to comply with the requirements.

2. Respondents shall provide such notification by US mail or by e-mail, with return receipt requested acknowledging receipt of the notification or similar transmission.

3. Respondents shall maintain complete records of all such notifications at Respondents' corporate headquarters and keep a file of all receipts and acknowledgments for one (1) year after the Closing Date.

4. Respondents shall provide the Acquirer (and the Hold Separate Trustee, if one is appointed) with a copy of such notification and with copies of all other certifications, notifications, and reminders sent to Respondents' personnel.

C. Not later than thirty (30) days after the date the Acquisition is completed, Respondents shall:

1. Obtain, as a condition of continued employment post-divestiture, from each of Respondents' employees, agents, and representatives employed at or with responsibilities relating to the Divestiture Assets or who had or have access to or possession, custody, or control of any Confidential Business Information of the Divestiture Assets an executed confidentiality agreement that complies with the restrictions, prohibitions and requirements of this Order and the Hold Separate Order; and

2. Institute procedures and requirements and take such actions as are necessary to ensure that Respondents' personnel comply with the restrictions, prohibitions and requirements of this Paragraph IV., including all actions that Respondents would take to protect their own trade secrets and confidential information.

V.

IT IS FURTHER ORDERED that Respondents shall:

A. No later than ten (10) days after a request from a Prospective Acquirer, provide the Prospective Acquirer with the following information for each Relevant Employee, as and to the extent permitted by law:

1. Name, job title or position, date of hire, and effective service date;

2. Specific description of the employee's responsibilities;

3. The base salary or current wages;

4. Most recent bonus paid, aggregate annual compensation for Respondents' last fiscal year, and current target or guaranteed bonus, if any;

5. Employment status (i.e., active or on leave or disability; full-time or part-time);

6. Any other material terms and conditions of employment in regard to such employee that are not otherwise generally available to similarly situated employees; and

7. At the Prospective Acquirer's option, copies of all employee benefit plans and summary plan descriptions (if any) applicable to the Relevant Employee.

B. Within a reasonable time after a request from a Prospective Acquirer, provide to the Prospective Acquirer an opportunity to meet personally and outside the presence or hearing of any employee or agent of any Respondent, with any one or more of the Relevant Employees, and to make offers of employment to any one or more of the Relevant Employees.

C. Not interfere, directly or indirectly, with the hiring or employing by the Prospective Acquirer of any Relevant Employees, not offer any incentive to such employees to decline employment with the Prospective Acquirer, and not otherwise interfere with the recruitment of any Relevant Employee by the Prospective Acquirer; *provided, however,* that Respondents may:

1. Advertise for employees in newspapers, trade publications, or other media, or engage recruiters to conduct general employee search activities, in either case not targeted specifically at Relevant Employees; or

2. Hire Relevant Employees who apply for employment with Respondents, as long as such employees were not solicited by Respondents in violation of this Paragraph; *provided further,*

however, that this Paragraph shall not prohibit Respondents from making offers of employment to or employing any Relevant Employee if the Prospective Acquirer has notified Respondents in writing that the Prospective Acquirer does not intend to make an offer of employment to that employee, or where such an offer has been made and the employee has declined the offer, or where the employee's employment has been terminated by the Acquirer.

D. Remove any impediments within the control of Respondents that may deter Relevant Employees from accepting employment with the Prospective Acquirer, including, but not limited to, removal of any non-compete or confidentiality provisions of employment or other contracts with Respondents that may affect the ability or incentive of those individuals to be employed by the Prospective Acquirer, and shall not make any counteroffer to a Relevant Employee who receives a written offer of employment from the Prospective Acquirer; *provided, however*, that nothing in this Order shall be construed to require Respondents to terminate the employment of any employee or prevent Respondents from continuing the employment of any employee.

E. Provide all Relevant Employees with reasonable financial incentives to continue in their positions until the Closing Date. Such incentives shall include, but are not limited to, a continuation, until the Closing Date, of all employee benefits, including the funding of regularly scheduled raises and bonuses, and the vesting of pension benefits (as permitted by law and for those Relevant Employees covered by a pension plan), offered by Respondents.

F. Not, for a period of one (1) year following the Closing Date, directly or indirectly, solicit or otherwise attempt to induce any of the Relevant Employees who have accepted offers of employment with the Acquirer to

terminate his or her employment with the Acquirer; *provided, however,* that Respondents may:

1. Advertise for employees in newspapers, trade publications, or other media, or engage recruiters to conduct general employee search activities, in either case not targeted specifically at Relevant Employees; or

2. Hire Relevant Employees who apply for employment with Respondents, as long as such employees were not solicited by Respondents in violation of this Paragraph V.; *provided further, however,* that this Paragraph shall not prohibit Respondents from making offers of employment to or employing any Relevant Employee if the Acquirer has notified Respondents in writing that the Acquirer does not intend to make an offer of employment to that employee, or where such an offer has been made and the employee has declined the offer, or where the employee's employment has been terminated by the Acquirer.

VI.

IT IS FURTHER ORDERED that, at the request of an Acquirer, for a period not to exceed twelve (12) months, or as otherwise approved by the Commission, and in a manner (including pursuant to an agreement) that receives the prior approval of the Commission:

A. Respondents shall provide Transitional Services to the Acquirer sufficient to enable the Acquirer to operate the Divestiture Assets, as applicable, and to provide General Acute Care Inpatient Hospital Services and Outpatient Services in substantially the same manner that Respondents have operated such facility and provided such services at the Divestiture Assets, as applicable; and

B. Respondents shall provide the Transitional Services required by this Paragraph at substantially the same level and quality as such services are provided by Respondents in connection with the General Acute Care Inpatient Hospital Services and Outpatient Services provided at the Divestiture Assets, as applicable.

Provided, however, that Respondents shall not (i) require the Acquirer to pay compensation for Transitional Services that exceeds the Direct Cost of providing such goods and services, or (ii) terminate its obligation to provide Transitional Services because of a material breach by the Acquirer of any agreement to provide such assistance unless Respondents are unable to provide such services due to such material breach.

VII.

IT IS FURTHER ORDERED that:

A. If Respondents have not fully complied with the obligations imposed by Paragraphs II. or III. of this Order, the Commission may appoint a Divestiture Trustee to divest any remaining Divestiture Assets and perform Respondents' other obligations in a manner that satisfies the requirements of this Order. In the event that the Commission or the Attorney General brings an action pursuant to Section 5(*l*) of the Federal Trade Commission Act, 15 U.S.C. § 45(*l*), or any other statute enforced by the Commission, Respondents shall consent to the appointment of a Divestiture Trustee in such action to divest the required assets. Neither the appointment of a Divestiture Trustee nor a decision not to appoint a Divestiture Trustee under this Paragraph VII.A. shall preclude the Commission or the Attorney General from seeking civil penalties or any other relief available to it, including a court-appointed Divestiture Trustee, pursuant to Section 5(*l*) of the Federal Trade Commission Act, or any other statute

enforced by the Commission, for any failure by Respondents to comply with this Order.

B. The Commission shall select the Divestiture Trustee, subject to the consent of Respondents, which consent shall not be unreasonably withheld. The Divestiture Trustee shall be a person with experience and expertise in acquisitions and divestitures. If Respondents have not opposed, in writing, and stated in writing their reasons for opposing, the selection of any proposed Divestiture Trustee within ten (10) days after notice by the staff of the Commission to Respondents of the identity of any proposed Divestiture Trustee, Respondents shall be deemed to have consented to the selection of the proposed Divestiture Trustee.

C. Not later than ten (10) days after the appointment of a Divestiture Trustee, Respondents shall execute a trust agreement that, subject to the prior approval of the Commission, transfers to the Divestiture Trustee all rights and powers necessary to permit the Divestiture Trustee to effectuate the divestitures required by, and satisfy the additional obligations imposed by, this Order.

D. If a Divestiture Trustee is appointed by the Commission or a court pursuant to this Paragraph, Respondents shall consent to the following terms and conditions regarding the Divestiture Trustee's powers, duties, authority, and responsibilities:

1. Subject to the prior approval of the Commission, the Divestiture Trustee shall have the exclusive power and authority to effectuate the divestitures required by, and satisfy the additional obligations imposed by, this Order.

2. The Divestiture Trustee shall have one (1) year after the date the Commission approves the trust agreement described herein to effectuate the required divestitures, 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 divest, or believes the divestitures can be achieved within a reasonable time, the divestiture period may be extended by the Commission, or, in the case of a court-appointed Divestiture Trustee, by the court; *provided, however,* the Commission may extend the divestiture period only two (2) times.

3. Subject to any demonstrated legally recognized privilege, the Divestiture Trustee shall have full and complete access to the personnel, books, records, and facilities related to the relevant assets that are required to be divested by this Order and to any other relevant information, as the Divestiture Trustee may request. Respondents shall develop such financial or other information as the Divestiture Trustee may request and shall cooperate with the Divestiture Trustee. Respondents shall take no action to interfere with or impede the Divestiture Trustee's accomplishment of the divestiture. Any delays caused by Respondents shall extend the time for divestiture under this Paragraph VII. for a time period equal to the delay, as determined by the Commission or, for a court-appointed Divestiture Trustee, by the court.

4. The Divestiture Trustee shall use commercially reasonable efforts to negotiate the most favorable price and terms available in each contract that is submitted to the Commission, subject to Respondents' absolute and unconditional obligation to divest expeditiously and at no minimum price. Each divestiture shall be made in the manner and to an Acquirer as required by this Order; *provided, however,* if the Divestiture Trustee receives bona fide offers from more than one acquiring Person, and if the Commission determines to approve more than one such

acquiring Person, the Divestiture Trustee shall divest to the acquiring Person selected by Respondents from among those approved by the Commission; *provided further*, *however*, that Respondents shall select such Person within five (5) days after receiving notification of the Commission's approval.

5. The Divestiture Trustee shall serve, without bond or other security, at the cost and expense of Respondents, on such reasonable and customary terms and conditions as the Commission or a court may set. The Divestiture Trustee shall have the authority to employ, at the cost and expense of Respondents, such consultants, accountants, attorneys, investment bankers, business brokers, appraisers, and other representatives and assistants as are necessary to carry out the Divestiture Trustee's duties and responsibilities. The Divestiture Trustee shall account for all monies derived from the divestiture and all expenses incurred. After approval by the Commission of the account of the Divestiture Trustee, including fees for the Divestiture Trustee's services, all remaining monies shall be paid at the direction of Respondents, and the Divestiture Trustee's power shall be terminated. The compensation of the Divestiture Trustee shall be based at least in significant part on a commission arrangement contingent on the divestiture of all of the relevant assets that are required to be divested by this Order.

6. Respondents shall indemnify the Divestiture Trustee and hold the Divestiture Trustee harmless against any losses, claims, damages, liabilities, or expenses arising out of, or in connection with, the performance of the Divestiture Trustee's duties, including all reasonable fees of counsel and other expenses incurred in connection with the preparation for, or defense of, any claim, whether

or not resulting in any liability, except to the extent that such losses, claims, damages, liabilities, or expenses result from gross negligence, 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 report in writing to Respondents and to the Commission every thirty (30) 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.

10. The Commission may, among other things, require the Divestiture Trustee and each of the Divestiture Trustee's consultants, accountants, attorneys, 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 and responsibilities.

E. If the Commission determines that the Divestiture Trustee has ceased to act or failed to act diligently, the Commission may appoint a substitute Divestiture Trustee in the same manner as provided in this Paragraph VII.

F. The Commission or, in the case of a court-appointed Divestiture Trustee, the court, may on its own initiative or at the request of the Divestiture Trustee

issue such additional orders or directions as may be necessary or appropriate to accomplish the divestitures required by this Order.

G. The Divestiture Trustee appointed pursuant to this Paragraph VII. may be the same person appointed as Hold Separate Trustee pursuant to the relevant provisions of the Hold Separate Order.

VIII.

IT IS FURTHER ORDERED that:

A. No Divestiture Agreement shall limit or contradict, or be construed to limit or contradict, the terms of this Order, it being understood that nothing in this Order shall be construed to reduce any rights or benefits of any Acquirer or to reduce any obligations of Respondents under such agreements.

B. Each Divestiture Agreement shall be incorporated by reference into this Order and made a part hereof.

C. Respondents shall comply with all terms of each Divestiture Agreement, and any breach by Respondents of any term of any Divestiture Agreement shall constitute a failure to comply with this Order. If any term of any Divestiture Agreement varies from the terms of this Order ("Order Term"), then to the extent that Respondents cannot fully comply with both terms, the Order Term shall determine Respondents' obligations under this Order.

IX.

IT IS FURTHER ORDERED that:

A. For a period of ten (10) years from the date this Order is issued, Respondents shall not, without providing advance written notification to the Commission in the manner described in this Paragraph:

1. Acquire, directly or indirectly, any stock, share capital, equity, or other interest in any Person that, at any time during the twelve (12) months immediately preceding such acquisition, was engaged in or is engaged in providing General Acute Care Inpatient Hospital Services in a Relevant Area; or

2. Enter, directly or indirectly, into any agreement or other arrangement to manage or otherwise control an Acute Care Hospital, or be managed or otherwise controlled by an Acute Care Hospital, which, during the twelve (12) months immediately preceding such agreement or arrangement, was engaged or is engaged in providing General Acute Care Inpatient Hospital Services in a Relevant Area.

B. Said notification shall be given on the Notification and Report Form set forth in the Appendix to Part 803 of Title 16 of the Code of Federal Regulations as amended (herein referred to as "the Notification"), 16 C.F.R. § 803 App., and shall be prepared and transmitted in accordance with the requirements of that Part, except that no filing fee will be required for any such notification, notification shall be filed with the Secretary of the Commission, notification need not be made to the United States Department of Justice, and notification is required only of Respondents and not of any other party to the transaction. Respondents shall provide the Notification to the Commission at least thirty (30) days prior to consummating the transaction (hereinafter referred to as the "first waiting period"). If, within the first waiting period, representatives of the Commission make a written request for additional information or documentary material (within the meaning of 16 C.F.R. § 803.20), Respondents shall not consummate the transaction until thirty (30) days after submitting such additional information or documentary material. Early termination of the waiting periods in this Paragraph may be requested

and, where appropriate, granted by letter from the Bureau of Competition. *Provided, however*, that prior notification shall not be required by this Paragraph for a transaction for which Notification is required to be made, and has been made, pursuant to Section 7A of the Clayton Act, 15 U.S.C. § 18a.

X.

IT IS FURTHER ORDERED that:

A. Within thirty (30) days after this Order is issued, and every thirty (30) days thereafter until Respondents have complied with their obligations in Paragraphs II. and III. of this Order (or Paragraph VII. of this Order, if applicable), Respondents shall submit to the Commission a verified written report setting forth in detail the manner and form in which they intend to comply, are complying, and have complied with Paragraphs II. and III. of this Order (or Paragraph VII. of this Order, if applicable). Respondents shall include in their compliance reports, among other things that are required from time to time, a full description of the efforts being made to comply with Paragraphs II. and III. of this Order (or Paragraph VII. of this Order, if applicable), including a description of all substantive contacts or negotiations for the divestitures and the identity of all parties contacted. Respondents shall include in their compliance reports copies of all written communication to and from such parties, all internal memoranda, and all reports and recommendations concerning the divestiture.

B. One (1) year after this Order is issued, annually for the next nine (9) years on the anniversary of that date, and at other times as the Commission may require, Respondents shall file verified written reports with the Commission setting forth in detail the manner and form in which they have complied and are complying with this Order.

XI.

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.

XII.

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

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

B. The opportunity to interview officers, directors, or employees of such Respondent, who may have counsel present, related to compliance with this Order.

XIII.

IT IS FURTHER ORDERED that this Order shall terminate on April 11, 2024.

By the Commission.

ANALYSIS OF CONSENT ORDERS TO AID PUBLIC COMMENT

I. INTRODUCTION AND BACKGROUND

The Federal Trade Commission ("Commission") has accepted for public comment, subject to final approval, an Agreement Containing Consent Orders ("Consent Agreement") from Community Health Systems, Inc. ("CHS") and Health Management Associates, Inc. ("HMA"). The purpose of the proposed Consent Agreement is to remedy the anticompetitive effects that otherwise would result from CHS's acquisition of HMA. The proposed Consent Agreement requires CHS to divest the Riverview Regional Medical Center ("Riverview") and all associated operations and businesses in and around Gadsden, Alabama, and the Carolina Pines Regional Medical Center ("Carolina Pines") and all associated operations and businesses in and around Hartsville, South Carolina, to a Commission-approved acquirer, and in a manner approved by the Commission, within six months after the Decision and Order is issued. Under the proposed Consent Agreement, CHS also is required to hold separate the to-be-divested assets and maintain the economic viability, marketability, and competitiveness of the divestiture assets, until the potential acquirer is approved by the Commission and the divestiture is complete. Finally, CHS is required to provide the Commission prior notice of any acquisition of a GAC services provider in the Gadsden Metropolitan Statistical Area and the Florence Metropolitan Statistical Area for ten years.

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

On July 29, 2013, CHS and HMA signed a merger agreement pursuant to which CHS agreed to acquire HMA for $7.6 billion. The Commission's complaint alleges that the proposed acquisition, if consummated, would violate Section 7 of the Clayton Act, as amended, 15 U.S.C. § 18, and Section 5 of the Federal Trade Commission Act, as amended, 15 U.S.C. § 45, by removing an actual, direct, and substantial competitor from two local markets in Alabama and South Carolina for general acute care inpatient services sold to commercial health plans. The proposed Consent Agreement would remedy the alleged violations by requiring complete divestitures in the affected markets. The divestitures will replace the competition that otherwise would be lost in the Alabama and South Carolina markets because of the proposed acquisition.

II. THE PARTIES

Headquartered in Franklin, Tennessee, CHS is a for-profit health system that owns 135 hospitals with approximately 20,000 licensed beds in 29 states. CHS is the second-largest U.S. hospital chain and one of the largest publicly-traded operators of hospitals in the United States. CHS generated approximately $13 billion in revenue in 2012.

HMA is a for-profit health system headquartered in Naples, Florida that owns 71 hospitals in 15 states, primarily in the southeastern United States. In 2012, HMA generated $5.9 billion in revenue.

III. GENERAL ACUTE CARE INPATIENT SERVICES

CHS's proposed acquisition of HMA poses substantial antitrust concerns in the relevant product market of general acute

care inpatient services ("GAC services") provided to commercially insured patients. GAC services consist of a broad cluster of routine inpatient services that require an overnight hospital stay. They are sold to commercial health plans, which sell benefit plans to commercially insured patients. GAC services do not include services related to psychiatric care, substance abuse, and rehabilitation services. Likewise, outpatient services are not included in GAC services because such services are characterized by different competitive conditions (*e.g.*, different competitors, lower entry barriers) and because health plans and their members generally cannot substitute those services for inpatient services in response to a small but significant and non-transitory increase in price.

GAC services markets are local in nature. Evidence gathered from market participants shows that patients strongly prefer to receive care as close to home as possible and to stay within the area where they live or work. Accordingly, the proposed acquisition raises serious antitrust concerns in two local markets for patients seeking GAC services: (1) the area that approximates Etowah County and includes the City of Gadsden, Alabama (the "Gadsden Area"); and (2) the area that approximates Darlington County, South Carolina (the "Darlington County Area").

The proposed acquisition would combine the only two competitively meaningful hospitals providing GAC services to Gadsden Area patients—HMA's Riverview and CHS's Gadsden Regional Medical Center ("Gadsden Regional"). The Gadsden Area market already is highly concentrated, and the proposed merger would substantially increase concentration in that market absent relief. Post-merger, commercially insured patients in the Gadsden Area would have only CHS's hospitals as meaningful options to obtain GAC services. The presumption of anticompetitive harm created by such high levels of market concentration is supported by evidence of the close competition between Riverview and Gadsden Regional that would be eliminated by the proposed merger. Consumers in the Gadsden Area have benefited from this head-to-head competition in the form of lower health care costs and higher quality of care. Absent relief, CHS would gain additional leverage and be able to demand higher reimbursement rates from commercial health plans, and

would have reduced incentives to maintain and improve its quality of care. Ultimately, these effects are felt by local patients in the form of higher premiums, co-pays, and out-of-pocket costs, as well as reduced access to high-quality care.

In South Carolina, the proposed acquisition would combine two of only three competitively meaningful hospitals providing GAC services to Darlington County Area commercially insured patients—HMA's Carolina Pines and CHS's Carolinas Hospital-Florence ("Carolinas Hospital"). Third-party McLeod Regional Medical Center ("McLeod Regional") also serves the Darlington County Area. The Darlington County Area market is highly concentrated, and the proposed merger would substantially increase concentration in that market absent relief. Post-merger, commercially insured patients in the Darlington County Area would have only two meaningful options for GAC services—either a CHS-owned hospital or third-party McLeod Regional. The presumption of anticompetitive harm is supported by evidence of the close competition between Carolina Pines and Carolinas Hospital that would be eliminated by the proposed merger. Consumers in the Darlington County Area have benefited from this head-to-head competition in the form of lower health care costs and higher quality of care. Absent relief, CHS would gain additional leverage and be able to demand higher reimbursement rates from commercial health plans, and would have reduced incentives to maintain and improve its quality of care. Ultimately, these effects are felt by local patients in the form of higher premiums, co-pays, and out-of-pocket costs, as well as reduced access to high-quality care.

New entry or expansion is unlikely to deter or counteract the anticompetitive effects of the proposed acquisition in either market. Alabama's Certificate of Need ("CON") statute poses a regulatory hurdle that must be overcome before constructing new healthcare facilities, expanding or modifying existing facilities, or altering inpatient services. South Carolina has a similar CON statute. Significant entry barriers also include the time and costs associated with constructing or expanding a general acute care hospital. There is no evidence of planned entry into either market or any evidence that there is unmet demand for GAC services in either market that might spur entry or expansion. Thus, it is

unlikely that new entry or expansion sufficient to achieve a significant market impact will occur in a timely manner in either market.

IV. THE PROPOSED CONSENT AGREEMENT

The proposed Consent Agreement remedies the anticompetitive concerns in both local markets. The proposed Consent Agreement would maintain competition in the Gadsden Area by requiring CHS to divest Riverview and its associated operations and businesses. Similarly, the proposed Consent Agreement would fully maintain competition in the Darlington County Area by requiring CHS to divest Carolina Pines and its associated operations and businesses. Any potential buyer for either hospital is subject to the prior approval of the Commission.

The proposed Consent Agreement also requires CHS to provide transitional services to the approved acquirers for one year, as needed, to assist the acquirers with operating the divested assets as viable and ongoing businesses. Until the divestitures are completed, CHS is required to hold Riverview and Carolina Pines separate, subject to the standard terms of the Order to Hold Separate and Maintain Assets. The proposed order also appoints Curtis Lane, the senior managing director of MTS Health Partners, LP, as Hold Separate Monitor to oversee CHS's compliance with the Order to Hold Separate and Maintain Assets. Finally, the proposed order contains a ten-year prior notice requirement for acquisitions of GAC services providers in the Gadsden, Alabama Metropolitan Statistical Area or in the Florence, South Carolina Metropolitan Statistical Area, as well as compliance reporting requirements.

The hospitals to be divested are each stand-alone businesses and include all of the assets and real property necessary for a Commission-approved buyer to compete immediately and effectively in each relevant market. In addition to divestiture of the actual facilities at issue, CHS has agreed to divest the rights to all intellectual property, including the facility names, and all provider and health plan contracts associated with the facilities. Although the competitive concerns relate to GAC services to commercially insured patients only, the proposed order

contemplates divestiture of all services and operations that are affiliated with the facility or facilities to be divested that are necessary to be a viable business. Specifically, CHS will divest all outpatient operations and businesses, including outpatient physician practices, associated with each hospital. This requirement is consistent with similar divestitures in prior Commission actions.

The sole purpose of this analysis is to facilitate public comment on the Consent Agreement. This analysis does not constitute an official interpretation of the Consent Agreement or modify its terms in any way.

Complaint

IN THE MATTER OF

BILL ROBERTSON & SONS, INC.
D/B/A
HONDA OF HOLLYWOOD

CONSENT ORDER, ETC. IN REGARD TO ALLEGED VIOLATIONS OF SECTION 5 OF THE FEDERAL TRADE COMMISSION ACT, THE CONSUMER LEASING ACT, AND REGULATION M

Docket No. C-4451; File No. 132 3142
Complaint, April 11, 2014 – Decision, April 11, 2014

This consent order addresses Bill Robertson & Sons, Inc. d/b/a Honda of Hollywood's advertised leasing offers and failure to clearly and conspicuously disclose the costs and terms of certain leases offered, despite the respondent's use of certain triggering terms in the advertisements. The complaint alleges that the respondent has advertised that consumers can pay "$0 down" with "0 first payment" and "0 due at signing" to lease a car, and has depicted several cars in its advertisements to which this offer applies, listing a specific monthly lease payment for each such car, however in fact, for a $0 up-front payment, consumers cannot lease the cars shown in the advertisements for the advertised monthly payment amounts, and that instead, consumers must also pay between $1,995 and $2,499 at lease signing. The consent order requires that the respondent clearly and conspicuously make all of the disclosures required by the Consumer Leasing Act and Regulation M if it states relevant triggering terms, including the monthly lease payment; and prohibits the respondent from misrepresenting any material fact about the price, sale, financing, or leasing of any vehicle.

Participants

For the *Commission*: *Mark Glassman.*

For the *Respondent*: *Aaron Jacoby* and *Melanie Joo, Arent Fox LLP.*

COMPLAINT

The Federal Trade Commission, having reason to believe that Bill Robertson & Sons, Inc. d/b/a Honda of Hollywood, a corporation ("respondent"), has violated provisions of the Federal Trade Commission Act ("FTC Act"), the Consumer Leasing Act ("CLA"), and its implementing Regulation M, and it appearing to

the Commission that this proceeding is in the public interest, alleges:

1. Respondent is a California corporation with its principal office or place of business at 6525 Santa Monica Boulevard, Los Angeles, California 90038. Respondent offers automobiles for sale or lease to consumers.

2. The acts or practices of respondent 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. Since at least March 2013, respondent has disseminated or caused to be disseminated advertisements to the public promoting the purchase, finance, and leasing of automobiles.

4. Respondent has disseminated or caused to be disseminated advertisements promoting consumer leases for automobiles, as the terms "advertisement" and "consumer lease" are defined in Section 213.2 of Regulation M, 12 C.F.R. §213.2, as amended.

5. Respondent has placed numerous such advertisements promoting consumer leases for automobiles in the *Los Angeles Times* newspaper. A copy of one such full-page advertisement that ran in the Los Angeles Times is attached as Exhibit A. The advertisement contains the statements and depictions described in this paragraph; respondent's advertisements in other editions of the *Los Angeles Times* contain substantially similar statements and depictions.

a. Respondent's advertisements prominently state: "0 FIRST PAYMENT," "0 DOWN," "0 SECURITY DEPOSIT," "0 DUE AT SIGNING," and "0.9% APR Long Term Finance Available On Approved Credit on select models." For example, the following statement is prominently featured at the top of the advertisement attached as Exhibit A:

b. Beneath this representation, photographs of several different vehicles appear, with each stating a monthly lease payment amount immediately below the photograph. For example, the advertisement in Exhibit A features a 2013 Honda Accord Sedan LX, with a monthly lease payment of $199, as follows:

c. The following statement appears in small print below the representation of the monthly lease payment amount:

> Lease for $199/month + tax for 36 months on approved above average credit. $2,399 due at lease signing. Includes down payments with no security deposit. Excludes taxes, titles and dealer fees. 12K miles/year. 15¢ per mile in excess.

d. Small print below each featured vehicle states that consumers must pay a substantial amount at lease

signing for that vehicle. For example, the amounts due at lease signing for the four vehicles featured in Exhibit A range from $1,995 to $2,499. Thus, consumers must pay substantially more than the "0 DUE AT SIGNING" that is prominently stated at the top of the advertisement.

FEDERAL TRADE COMMISSION ACT VIOLATIONS

Count I

Misrepresentation of Amount Due at Lease Inception

6. Through the means described in Paragraph 5, respondent has represented, expressly or by implication, that consumers can pay $0 at lease inception to lease the advertised vehicles for the advertised monthly payment amounts.

7. In truth and in fact, consumers cannot pay $0 at lease inception to lease the advertised vehicles for the advertised monthly payment amounts. Consumers must also pay at least $1,995 at lease signing. Therefore, the representation set forth in Paragraph 6 was, and is, false or misleading.

8. Respondent's practices 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).

VIOLATION OF THE CONSUMER LEASING ACT AND REGULATION M

9. Under Section 184 of the CLA and Section 213.7 of Regulation M, advertisements promoting consumer leases are required to make certain disclosures ("additional terms") if they state any of several terms, such as the amount of any payment ("CLA triggering terms"). 15 U.S.C. § 1667c; 12 C.F.R. § 213.7.

10. Respondent's advertisements promoting consumer leases, including but not necessarily limited to those described in Paragraph 5, are subject to the requirements of the CLA and Regulation M.

Count II

Failure to Disclose or to Disclose Clearly and Conspicuously Required Lease Information

11. Respondent's advertisements promoting consumer leases, including but not necessarily limited to those described in Paragraph 5, have included CLA triggering terms, but have failed to disclose or to disclose clearly and conspicuously additional terms required by the CLA and Regulation M, including one or more of the following:

a. That the transaction advertised is a lease.

b. The total amount due prior to or at consummation or by delivery, if delivery occurs after consummation.

c. Whether or not a security deposit is required.

d. The number, amount, and timing of scheduled payments.

e. With respect to a lease in which the liability of the consumer at the end of the lease term is based on the anticipated residual value of the property, that an extra charge may be imposed at the end of the lease term.

12. Therefore, the practices set forth in Paragraph 11 of this Complaint have violated Section 184 of the CLA, 15 U.S.C. § 1667c, and Section 213.7 of Regulation M, 12 C.F.R. § 213.7.

THEREFORE, the Federal Trade Commission, this eleventh day of April, 2014, has issued this complaint against respondent.

By the Commission.

Complaint

Exhibit A

DECISION AND ORDER

The Federal Trade Commission having initiated an investigation of certain acts and practices of respondent named in the caption hereof, and respondent having been furnished thereafter with a copy of a draft complaint which the Western Region-Los Angeles proposed to present to the Commission for its consideration and which, if issued by the Commission, would charge respondent with violation of the Federal Trade Commission Act ("FTC Act"); and

Respondent, respondent's attorney, and counsel for the Commission having thereafter executed an agreement containing a 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 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 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 received from an interested person pursuant to Commission Rule 2.34, 16 C.F.R. § 2.34, now in further conformity with the procedure prescribed in Commission Rule 2.34, the Commission hereby issues its complaint, makes the following jurisdictional findings, and enters the following order:

1. Respondent Bill Robertson & Sons, Inc., d/b/a Honda of Hollywood, is a California corporation with its principal office or place of business at 6525 Santa Monica Boulevard, Los Angeles, California 90038.

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

A. Unless otherwise specified, "respondent" shall mean Bill Robertson & Sons, Inc., and its successors and assigns.

B. "Advertisement" shall mean a commercial message in any medium that directly or indirectly promotes a consumer transaction.

C. "Clearly and conspicuously" shall mean as follows:

1. In a print advertisement, the disclosure shall be in a type size, location, and in print that contrasts with the background against which it appears, sufficient for an ordinary consumer to notice, read, and comprehend it.

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

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

4. In a radio advertisement, the disclosure shall be delivered in a volume and cadence sufficient for an ordinary consumer to hear and comprehend it.

5. In all advertisements, the disclosure shall be in understandable language and syntax. Nothing contrary to, inconsistent with, or in mitigation of the disclosure shall be used in any advertisement or promotion.

D. "Consumer credit" shall mean credit offered or extended to a consumer primarily for personal, family, or household purposes, as set forth in Section 226.2(a)(12) of Regulation Z, 12 C.F.R. § 226.2(a)(12), as amended.

E. "Consumer lease" shall mean a contract in the form of a bailment or lease for the use of personal property by a natural person primarily for personal, family, or household purposes, for a period exceeding four months and for a total contractual obligation not exceeding the applicable threshold amount, whether or not the lessee has the option to purchase or otherwise become the owner of the property at the expiration of the lease, as set forth in Section 213.2 of Regulation M, 12 C.F.R. § 213.2, as amended.

F. "Lease inception" shall mean prior to or at consummation of the lease or by delivery, if delivery occurs after consummation.

G. "Material" shall mean likely to affect a person's choice of, or conduct regarding, goods or services.

H. "Motor vehicle" or "vehicle" shall mean:

1. Any self-propelled vehicle designed for transporting persons or property on a street, highway, or other road;

2. Recreational boats and marine equipment;

3. Motorcycles;

4. Motor homes, recreational vehicle trailers, and slide-in campers; and

5. Other vehicles that are titled and sold through dealers.

I.

IT IS HEREBY ORDERED that respondent and its officers, agents, representatives, and employees, directly or indirectly, in connection with any advertisement for the purchase, financing, or leasing of motor vehicles, shall not, in any manner, expressly or by implication:

A. Misrepresent the cost of:

1. Leasing a vehicle, including but not necessarily limited to, the total amount due at lease inception, the downpayment, amount down, acquisition fee, capitalized cost reduction, any other amount required to be paid at lease inception, and the amounts of all monthly or other periodic payments; or

2. Purchasing a vehicle with financing, including but not necessarily limited to, the amount or percentage of the downpayment, the number of payments or period of repayment, the amount of any payment, and the repayment obligation over the full term of the loan, including any balloon payment; or

B. Misrepresent any other material fact about the price, sale, financing, or leasing of any vehicle.

II.

IT IS FURTHER ORDERED that respondent and its officers, agents, representatives, and employees, directly or

indirectly, in connection with any advertisement for any consumer lease, shall not, in any manner, expressly or by implication:

A. State the amount of any payment or that any or no initial payment is required at lease inception without disclosing clearly and conspicuously the following terms:

1. That the transaction advertised is a lease;

2. The total amount due at lease signing or delivery;

3. Whether or not a security deposit is required;

4. The number, amounts, and timing of scheduled payments; and

5. That an extra charge may be imposed at the end of the lease term in a lease in which the liability of the consumer at the end of the lease term is based on the anticipated residual value of the vehicle; or

B. Fail to comply in any respect with Regulation M, 12 C.F.R. Part 213, as amended, and the Consumer Leasing Act, 15 U.S.C. §§ 1667-1667f, as amended.

III.

IT IS FURTHER ORDERED that respondent 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;

C. All evidence in its possession or control that contradicts, qualifies, or calls 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. Any documents reasonably necessary to demonstrate full compliance with each provision of this order, including but not limited to all documents obtained, created, generated, or that in any way relate to the requirements, provisions, or terms of this order, and all reports submitted to the Commission pursuant to this order.

IV.

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

V.

IT IS FURTHER ORDERED that respondent shall notify the Commission at least thirty (30) days prior to any change in the corporation(s) that may affect compliance obligations arising under this order, including but not limited to a dissolution, assignment, sale, merger, or other action that would result in the emergence of a successor corporation; the creation or dissolution of a subsidiary, parent, or affiliate that engages in any acts or practices subject to this order; the proposed filing of a bankruptcy petition; or a change in the corporate name or address. *Provided, however*, that, with respect to any proposed change in the corporation about which respondent learns less than thirty (30) days prior to the date such action is to take place, respondent shall notify the Commission as soon as is practicable after obtaining

such knowledge. 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 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: FTC v. Bill Robertson & Sons, Inc.

VI.

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 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.

VII.

This order will terminate on April 11, 2034, 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;

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 ("FTC") has accepted, subject to final approval, an agreement containing a consent order from Bill Robertson & Sons, Inc. d/b/a Honda of Hollywood. 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 FTC 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 respondent is a motor vehicle dealer. According to the FTC complaint, the respondent has advertised cars for leasing. In connection with its advertised leasing offers, the complaint alleges that the respondent has advertised that consumers can pay "$0 down" with "0 first payment" and "0 due at signing" to lease a car, and has depicted several cars in its advertisements to which this offer applies, listing a specific monthly lease payment for each such car. The complaint alleges that, in fact, for a $0 up-front payment, consumers cannot lease the cars shown in the advertisements for the advertised monthly payment amounts, and that instead, consumers must also pay between $1,995 and $2,499 at lease signing. The complaint alleges that, therefore, the respondent's representations are false or misleading in violation of Section 5 of the FTC Act. In addition, the complaint alleges a violation of the Consumer Leasing Act and Regulation M for

failing to clearly and conspicuously disclose the costs and terms of certain leases offered, despite the respondent's use of certain triggering terms in the advertisements.

The proposed order is designed to prevent the respondent from engaging in similar deceptive practices and law violations in the future. Part I.A prohibits the respondent from misrepresenting the cost of: (1) leasing a vehicle, including but not limited to the total amount due at lease inception, the downpayment, amount down, acquisition fee, capitalized cost reduction, any other amount required to be paid at lease inception, and the amounts of all monthly or other periodic payments; or (2) purchasing a vehicle with financing, including but not necessarily limited to the amount or percentage of the downpayment, the number of payments or period of repayment, the amount of any payment, and the repayment obligation over the full term of the loan, including any balloon payment. Part I.B prohibits the respondent from misrepresenting any other material fact about the price, sale, financing, or leasing of any vehicle.

Part II of the proposed order addresses the CLA allegation. It requires that the respondent clearly and conspicuously make all of the disclosures required by CLA and Regulation M if it states relevant triggering terms, including the monthly lease payment. In addition, Part II prohibits any other violation of CLA and Regulation M.

Part III of the proposed order requires respondent to keep copies of relevant advertisements and materials substantiating claims made in the advertisements. Part IV requires that respondent provide copies of the order to certain of its personnel. Part V requires notification to the Commission regarding changes in corporate structure that might affect compliance obligations under the order. Part VI requires the respondent to file compliance reports with the Commission. Finally, Part VII 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 complaint or proposed order, or to modify in any way the proposed order's terms.

Complaint

IN THE MATTER OF

PARAMOUNT KIA OF HICKORY, LLC

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

Docket No. C-4450; File No. 132 3191
Complaint, April 11, 2014 – Decision, April 11, 2014

This consent order addresses Paramount Kia of Hickory, LLC's advertisements for sale of automobiles and failure to disclose clearly and conspicuously required credit information, despite the respondent's use of certain triggering terms in the advertisements. The complaint alleges that respondent advertised that consumers can pay $0 up-front and $99 per month to finance a car, however the monthly payment increases dramatically after the first three payments. The consent order requires that the respondent clearly and conspicuously make all of the disclosures required by the Truth In Lending Act and Regulation Z if it states the amount or percentage of any down payment, the number of payments or period of repayment, the amount of any payment, or the amount of any finance charge. The order also prohibits the respondent from misrepresenting any material fact about the price, sale, financing, or leasing of any vehicle.

Participants

For the *Commission*: *Mark Glassman.*

For the *Respondent*: *Shawn D. Mercer, Bass Sox Mercer.*

COMPLAINT

The Federal Trade Commission, having reason to believe that Paramount Kia of Hickory, LLC, a limited liability company ("Paramount"), has violated provisions of the Federal Trade Commission Act ("FTC Act"), the Truth in Lending Act ("TILA"), and its implementing Regulation Z, and it appearing to the Commission that this proceeding is in the public interest, alleges:

1. Respondent Paramount Kia of Hickory, LLC, is a North Carolina limited liability company with its principal office or place of business at 1205 South Center Street, Hickory, North

Carolina 28602. Paramount offers automobiles for sale or lease to consumers.

2. The acts or practices of Paramount 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. Since at least July 2012, Paramount has disseminated or caused to be disseminated advertisements to the public promoting the purchase, finance, and leasing of automobiles.

4. Paramount has disseminated or caused to be disseminated advertisements to the public promoting credit sales and other extensions of closed-end credit in consumer credit transactions, as the terms "advertisement," "closed-end credit," "credit sale," and "consumer credit" are defined in Section 226.2 of Regulation Z, 12 C.F.R. § 226.2, as amended.

5. One such advertisement has been posted on the website YouTube.com. A video copy of the advertisement is attached as Exhibit A, and a screenshot capture of one image on the video is attached as Exhibit B.

The video attached as Exhibit A depicts a new Kia Sportage, accompanied by prominent graphics stating:

ZERO $ DOWN

2013 KIA SPORTAGE

$99/MO

While this language appears on screen, a person who appears on the screen states, "Drive any vehicle like the new 2013 Kia Sportage: zero down $99 a month."

Also, while these statements appear on screen, a statement consisting of small white text that blends in against a silver and black background – the tire and hubcap of the Kia Sportage – appears on the bottom left corner of the screen, stating:

> Example 2013 Kia Sportage STK#4886. Sale Price $27,444, $0 down, graduated payment plan: payments 1-3 $99, payments 4-72 $531/mo @ 9.99% APR Plus tax, tag, title and $599 administrative fee. On approved credit. On select vehicles. See dealer for details.

Thus, instead of owing $99 per month, consumers will owe $531 per month for 69 of 72 months. Further, the advertisement fails to clearly and conspicuously disclose the repayment obligations over the full term of the loan and the "annual percentage rate," using that term.

6. Other advertisements that Paramount has disseminated or has caused to be disseminated have been posted on Paramount's website, paramountkia.com. One example is the screenshot attached as Exhibit C, which depicts a new Kia Soul, accompanied by prominent graphics representing:

Drive Any Vehicle

$99/mo

Below this statement, the following fine-print statement appears:

> Ex.Stk#6818 2012 Kia Soul Base. Sale Price $12980 $0 down graduated payment plan: payments 1-3 $99; 4-72 $251/mo. @ 9.99% APR. Plus tax, tag and $599 admin. fee. OAC. On select vehicles. See dealer for details.

Thus, instead of owing $99 per month, consumers will owe $251 per month for 69 of 72 months. Further, the advertisement fails to clearly and conspicuously disclose the repayment obligations over the full term of the loan and the "annual percentage rate," using that term.

FEDERAL TRADE COMMISSION ACT VIOLATIONS

Count I

Misrepresentation Regarding Monthly Payment Amount

7. Through the means described in Paragraphs 5 and 6, Paramount has represented, expressly or by implication, that consumers can finance the purchase of vehicles for the prominently advertised terms, including the advertised monthly payment amount.

8. In truth and in fact, consumers cannot finance the purchase of vehicles for the prominently advertised terms, including the advertised monthly payment amount. In numerous instances, consumers' monthly payments increase dramatically after the first three payments of $99. Therefore, Paramount's representation as alleged in Paragraph 7 was, and is, false and misleading.

9. Paramount's practices 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).

VIOLATIONS OF THE TRUTH IN LENDING ACT AND REGULATION Z

10. Under Section 144 of the TILA and Section 226.24(d) of Regulation Z, as amended, advertisements promoting closed-end credit in consumer credit transactions are required to make certain disclosures ("additional terms") if they state any of several terms, such as the monthly payment ("TILA triggering terms").

11. Paramount's advertisements promoting closed-end credit, including but not necessarily limited to those described in Paragraphs 5 and 6, are subject to the requirements of the TILA and Regulation Z.

Count II

Failure to Disclose or Disclose Clearly and Conspicuously Required Credit Information

12. Paramount's advertisements promoting closed-end credit, including, but not necessarily limited to those described in Paragraphs 5 and 6, have included TILA triggering terms, but have failed to disclose or disclose clearly and conspicuously, additional terms required by the TILA and Regulation Z, including one or more of the following:

a. The amount or percentage of the down payment.

b. The terms of repayment, which reflect the repayment obligations over the full term of the loan, including any balloon payment.

c. The "annual percentage rate," using that term, and, if the rate may be increased after consummation, that fact.

13. Therefore, the practices set forth in Paragraph 12 of this Complaint have violated Section 144 of the TILA, 15 U.S.C. § 1664, and Section 226.24(d) of Regulation Z, 12 C.F.R. § 226.24(d), as amended.

THEREFORE, the Federal Trade Commission, this eleventh day of April, 2014, has issued this complaint against Paramount.

By the Commission.

Exhibit A

Video Advertisement for Paramount Kia of Hickory LLC

Complaint

Exhibit B

Exhibit C

DECISION AND ORDER

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

Respondent, respondent's attorney, and counsel for the Commission having thereafter executed an agreement containing a 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 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 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 any comments received from interested persons pursuant to Commission Rule 2.34, 16 C.F.R. § 2.34, now in further conformity with the procedure prescribed in Commission Rule 2.34, the Commission hereby issues its complaint, makes the following jurisdictional findings, and enters the following order:

1. Respondent, Paramount Kia of Hickory, LLC, is a North Carolina limited liability company with its principal office or place of business at 1205 South Center Street, Hickory, North Carolina 28602.

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

A. Unless otherwise specified, "respondent" shall mean Paramount Kia of Hickory, LLC, and its successors and assigns.

B. "Advertisement" shall mean a commercial message in any medium that directly or indirectly promotes a consumer transaction.

C. "Clearly and conspicuously" shall mean as follows:

1. In a print advertisement, the disclosure shall be in a type size, location, and in print that contrasts with the background against which it appears, sufficient for an ordinary consumer to notice, read, and comprehend it.

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

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

4. In a radio advertisement, the disclosure shall be delivered in a volume and cadence sufficient for an ordinary consumer to hear and comprehend it.

5. In all advertisements, the disclosure shall be in understandable language and syntax. Nothing contrary to, inconsistent with, or in mitigation of the disclosure shall be used in any advertisement or promotion.

D. "Consumer credit" shall mean credit offered or extended to a consumer primarily for personal, family, or household purposes, as set forth in Section 226.2(a)(12) of Regulation Z, 12 C.F.R. § 226.2(a)(12), as amended.

E. "Lease inception" shall mean prior to or at consummation of the lease or by delivery, if delivery occurs after consummation.

F. "Material" shall mean likely to affect a person's choice of, or conduct regarding, goods or services.

G. "Motor vehicle" or "vehicle" shall mean:

1. Any self-propelled vehicle designed for transporting persons or property on a street, highway, or other road;

2. Recreational boats and marine equipment;

3. Motorcycles;

4. Motor homes, recreational vehicle trailers, and slide-in campers; and

5. Other vehicles that are titled and sold through dealers.

I.

IT IS HEREBY ORDERED that respondent and its officers, agents, representatives, and employees, directly or indirectly, in connection with any advertisement for the purchase, financing, or leasing of motor vehicles, shall not, in any manner, expressly or by implication:

A. Misrepresent the cost of:

1. Purchasing a vehicle with financing, including but not necessarily limited to, the amount or percentage of the down payment, the number of payments or period of repayment, the amount of any payment, and the repayment obligation over the full term of the loan, including any balloon payment; or

2. Leasing a vehicle, including but not necessarily limited to, the total amount due at lease inception, the down payment, amount down, acquisition fee, capitalized cost reduction, any other amount required to be paid at lease inception, and the amounts of all monthly or other periodic payments; or

B. Misrepresent any other material fact about the price, sale, financing, or leasing of any vehicle.

II.

IT IS FURTHER ORDERED that respondent and its officers, agents, representatives, and employees, directly or indirectly, in connection with any advertisement for any extension of consumer credit, shall not in any manner, expressly or by implication:

A. State the amount or percentage of any down payment, the number of payments or period of repayment, the amount of any payment, or the amount of any finance charge, without disclosing clearly and conspicuously all of the following terms:

1. The amount or percentage of the down payment;

2. The terms of repayment; and

3. The annual percentage rate, using the term "annual percentage rate" or the abbreviation "APR." If the annual percentage rate may be increased after consummation of the credit transaction, that fact must also be disclosed; or

B. State a rate of finance charge without stating the rate as an "annual percentage rate" or the abbreviation "APR," using that term; or

C. Fail to comply in any respect with Regulation Z, 12 C.F.R. Part 226, as amended, and the Truth in Lending Act, as amended, 15 U.S.C. §§ 1601-1667.

III.

IT IS FURTHER ORDERED that respondent 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;

C. All evidence in its possession or control that contradicts, qualifies, or calls 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. Any documents reasonably necessary to demonstrate full compliance with each provision of this order, including but not limited to all documents obtained, created, generated, or that in any way relate to the requirements, provisions, or terms of this order, and all reports submitted to the Commission pursuant to this order.

IV.

IT IS FURTHER ORDERED that respondent shall deliver a copy of this order to all current and future principals, officers, directors, and managers, and to all current and future employees, agents, and representatives having responsibilities with respect to the subject matter of this order, and shall secure from each such person a signed and dated statement acknowledging receipt of the order. Respondent shall deliver this order to current personnel

within thirty (30) days after the date of service of this order, and to future personnel within thirty (30) days after the person assumes such position or responsibilities.

V.

IT IS FURTHER ORDERED that respondent shall notify the Commission at least thirty (30) days prior to any change in the entity that may affect compliance obligations arising under this order, including but not limited to a dissolution, assignment, sale, merger, or other action that would result in the emergence of a successor 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 entity's 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 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: FTC v. Paramount Kia of Hickory, LLC.

VI.

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 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.

VII.

This order will terminate on April 11, 2034, 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;

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 ("FTC") has accepted, subject to final approval, an agreement containing a consent order from Paramount Kia of Hickory, 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 FTC 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 respondent is a motor vehicle dealer. According to the FTC complaint, respondent has advertised that consumers can pay $0 up-front and $99 per month to finance a car. The complaint alleges that, in fact, monthly payment increases dramatically after the first three payments. The complaint alleges, therefore, that the respondent's representations are false or misleading in violation of Section 5 of the FTC Act. In addition, the complaint alleges a violation of the Truth In Lending Act and Regulation Z for failing to disclose clearly and conspicuously required credit information, despite the respondent's use of certain triggering terms in the advertisements.

The proposed order is designed to prevent the respondent from engaging in similar deceptive practices in the future. Part I.A prohibits the respondent from misrepresenting the cost of: (1) purchasing a vehicle with financing, including but not necessarily limited to the amount or percentage of the downpayment, the number of payments or period of repayment, the amount of any payment, and the repayment obligation over the full term of the loan, including any balloon payment; or (2) leasing a vehicle, including but not limited to the total amount due at lease inception, the downpayment, amount down, acquisition fee, capitalized cost reduction, any other amount required to be paid at lease inception, and the amounts of all monthly or other periodic payments Part I.B prohibits the respondent from misrepresenting any other material fact about the price, sale, financing, or leasing of any vehicle.

Part II of the proposed order addresses the TILA allegation. It requires that the respondent clearly and conspicuously make all of the disclosures required by TILA and Regulation Z if it states the amount or percentage of any downpayment, the number of payments or period of repayment, the amount of any payment, or the amount of any finance charge. In addition, Part II prohibits the respondent from stating a rate of finance charge without stating the rate as an "annual percentage rate" or the abbreviation "APR," using that term. Part II also prohibits any other violation of TILA and Regulation Z.

Analysis to Aid Public Comment

Part III of the proposed order requires respondent to keep copies of relevant advertisements and materials substantiating claims made in the advertisements. Part IV requires that respondent provide copies of the order to certain of its personnel. Part V requires notification to the Commission regarding changes in corporate structure that might affect compliance obligations under the order. Part VI requires the respondent to file compliance reports with the Commission. Finally, Part VII 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 complaint or proposed order, or to modify in any way the proposed order's terms.

Complaint

IN THE MATTER OF

AMERICAN PLASTIC MANUFACTURING, INC.]

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

Docket No. C-4453; File No. 122 3291
Complaint, April 24, 2014 – Decision, April 24, 2014

This consent order addresses American Plastic Manufacturing's marketing, sale, and distribution of purportedly biodegradable plastic shopping bags to the public. The complaint alleges that respondent represented that its plastic products are completely biodegradable in a landfill, or in a stated qualified timeframe as a result of respondent's use of a plastic additive manufactured by ECM Biofilms, Inc. The complaint further alleges that, although respondent represented (expressly or implicitly) that it could substantiate its degradable claims, respondent did not in fact possess or rely upon a reasonable basis to substantiate these representations of biodegradability. The consent order prohibits respondent from making any representation that a product or package is degradable, unless the entire item will completely decompose into elements found in nature within one year after customary disposal, and the representation must be clear and prominent and in close proximity qualified by either the time to complete decomposition or the rate and extent of decomposition. The order also requires that, at the time of any such representation, respondent must possess and rely upon competent and reliable scientific evidence from a scientific technical protocol.

Participants

For the *Commission*: *Katherine Johnson.*

For the *Respondent*: *Mark Leen, Inslee Best Doezie & Ryder, P.S.*

COMPLAINT

The Federal Trade Commission, having reason to believe that American Plastic Manufacturing, Inc. ("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:

Complaint

1. Respondent American Plastic Manufacturing, Inc., is a Washington corporation with its principal office or place of business at 526 South Monroe Street, Seattle, WA 98108.

2. Respondent advertises, offers for sale, sells, and distributes plastic bags, including "APM Biodegradable Bags," to the public throughout the United States. Respondent advertises these goods on its website, www.apmbags.com. Respondent also offers for sale, sells, and distributes these goods through various distributors throughout the United States. Respondent advertises that APM Biodegradable Bags are biodegradable because of an additive from ECM Biofilms, Inc.

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

4. To induce consumers to purchase its APM Biodegradable Bags, respondent disseminates, has disseminated, or has caused to be disseminated advertisements and promotional materials, including, but not limited to, the attached Exhibits 1-2.

5. In its advertising and promotional materials, including, but not limited to, those shown in Exhibits 1-2, respondent has made the following statements and depictions:

a. Respondent's Website (Exhibit 1):

1. Homepage:

Biodegradable bags

We are now offering biodegradable bags in both high and low density plastic!

(Ex. 1, at 1).

2. **Biodegradable Bags Page**:

"Environmental issues are important to everyone. We are doing our part by offering 100% Biodegradable bags!" (*Id.*, at 3).

"Our biodegradable bags break down completely when in contact with other decomposing materials; in compost bins, landfills, or just buried in the ground. These bags can also be recycled along with regular plastic bags." (*Id.*).

"Our biodegradable bags are made using traditional resins combined with an additive from ECM Biofilms that allows the plastic to completely biodegrade within a few years." (*Id.*).

"When we make biodegradable bags, we also offer our stock 'This Bag is Biodegradable' logo. This logo helps inform consumers about how to dispose of the bag. Two versions of this logo are available for use. Choose the one that works best for you.

Option A – Tells consumers that the bag will biodegrade but does not relay information about recycling.

Option B - Tells consumers that the bag is biodegradable and is also recyclable."

(Ex. 1, at 3).

"***Biodegradable*** bags will break down completely when in contact with decomposing organic waste – even in a landfill where practically nothing degrades." (*Id.*, at 4).

3. Reusable and Biodegradable Page:

"Reusable, Recyclable, and Biodegradable bags" (*Id.*, at 5).

"Constucted [sic] of heavy-duty low density film, with soft-loop handles, our new reusable bag is also 100% recyclable and completely biodegradable." (*Id.*).

"American Plastics new reusable and biodegradable bag is made thick, so it will stand up to many trips to the store, formulated to be recyclable with other plastic bags, and if it does end up in a landfill or even as litter, it is 100% biodegradable." (*Id.*).

"**Biodegradable Bags**
American Plastic is now producing bags that are 100% biodegradable and recyclable!" (Ex. 1, at 1, 3, 5-6).

4. Going Green Page:

"Biodegradable is a popular word these days. Everyone is concerned about the environment. But it's also a word that is easily misunderstood. . . .

Simply defined, biodegradable means that an item will break down into natural organic matter." (*Id.*, at 6).

"**American Plastic Mfg.'s biodegradable bags** are made with an additive from ECM-Biofilms that allows plastic to break down when in contact with other decomposing organic matter. . . . These bags have all the properties of normal plastic bags, can be reused and recycled with other plastic bags, and if littered or landfilled, will biodegrade safely." (*Id.*).

b. Respondent's LineCard (Exhibit 2):

"American Plastic is Going Green – Biodegradable bags now available!

Environmental issues are important to everyone. We are doing our part by offering 100% Biodegradable bags; printed with our custom 'This Bag is Biodegradable' logo.

Using an additive from ECM Biofilms (ecmbiofilms.com), our biodegradable bags break down completely when in contact with other decomposing materials; in compost bins, landfills, or just buried in the ground." (Ex. 2, at 1).

BIODEGRADABLE LOGO OPTIONS
American Plastic has created a custom biodegradable logo for use on our biodegradable bags. Choose the one that works best for your clients.
The "100% Biodegradable and Recyclable" logo

provides information about how end users can dispose
of the bags.

(*Id.*).

"**Biodegradable bags** will break down completely when in contact with decomposing organic waste – even in a landfill where practically nothing degrades." (*Id.*).

6. Approximately 92 percent of total municipal solid waste in the United States is disposed of either in landfills, incinerators, or recycling facilities. These disposal methods do not present conditions that would allow APM Biodegradable Bags to completely break down and decompose into elements found in nature within a reasonably short period of time.

7. Consumers likely interpret unqualified degradable claims to mean that the entire product or package will completely decompose into elements found in nature within a reasonably short period of time after customary disposal.

8. The Ecological Assessment of ECM Plastic, American Society for Testing and Materials ("ASTM") International D5511, *Standard Test Method for Determining Anaerobic Biodegradation of Plastic Materials under High Solids Anaerobic Digestion Conditions* ("ASTM D5511"), and other scientific tests relied on by respondent do not assure complete decomposition of APM Biodegradable Bags in a reasonably short period of time or in respondent's stated timeframes, *e.g.*, nine months to five years, and do not replicate, *i.e.*, simulate, the physical conditions of either landfills, where most trash is disposed, or other disposal facilities stated in the representations.

VIOLATIONS OF SECTION 5 OF THE FTC ACT

FALSE OR MISLEADING REPRESENTATIONS

9. Through the means described in Paragraphs 2, 4, and 5, respondent has represented, expressly or by implication, that:

a. APM Biodegradable Bags are biodegradable, *i.e.*, will completely break down and decompose into elements found in nature within a reasonably short period of time after customary disposal;

b. APM Biodegradable Bags are biodegradable in a landfill;

c. APM Biodegradable Bags are biodegradable in a stated qualified timeframe; and

d. APM Biodegradable Bags are biodegradable, biodegradable in a landfill, or biodegradable in a stated qualified timeframe as a result of an additive from ECM Biofilms, Inc.

10. In truth and in fact:

a. APM Biodegradable Bags will not completely break down and decompose into elements found in nature within a reasonably short period of time after customary disposal;

b. APM Biodegradable Bags will not completely break down and decompose into elements found in nature within a reasonably short period of time after disposal in a landfill;

c. APM Biodegradable Bags will not completely break down and decompose into elements found in nature within respondent's stated qualified timeframes after customary disposal; and

d. APM Biodegradable Bags will not completely break down and decompose into elements found in nature within a reasonably short period of time after customary disposal, after disposal in a landfill, or within respondent's stated qualified timeframes as a result of respondent's use of an additive from ECM Biofilms, Inc.

11. Therefore, the representations set forth in Paragraph 9 were, and are, false or misleading.

UNSUBSTANTIATED REPRESENTATIONS

12. Through the means described in Paragraphs 2, 4, and 5, in numerous instances respondent has represented, expressly or by implication, that it possessed and relied upon a reasonable basis that substantiated the representations set forth in Paragraph 9, at the time the representations were made.

13. In truth and in fact, at the time respondent made the representations referred to in Paragraph 9, respondent did not possess and rely upon a reasonable basis that substantiated such representations. Therefore, the representation set forth in Paragraph 12 is false or misleading.

14. Respondent's practices, as alleged in this complaint, therefore, constitute deceptive acts or practices in or affecting commerce in violation of Section 5(a) of the Federal Trade Commission Act.

IN WITNESS WHEREOF, the Federal Trade Commission has issued this complaint against respondent and has caused it to be signed by its Secretary and its official seal to be hereto affixed, at Washington, D.C. this twenty-fourth day of April, 2014.

By the Commission.

Complaint

Exhibit 1

About American Plastic Manufacturing | American Plastic Manufacturing

AMERICAN PLASTIC MANUFACTURING

Maker of custom printed plastic bags

Biodegradable Contact Home Going Green

Main Menu

- Products
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  - Reusable & Biodegradable
  - Going Green
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About American Plastic Manufacturing

6 Color Printing now available!

Our new printing press is capable of printing up to six spot colors. Print six colors on one side, or 3 colors on both sides, or 5 on the front and 1 on the back. Any combination that adds up to six.

Contact us for details

American Plastic Manufacturing has been producing quality plastic bags for **Trade Shows, Retailers, Food Packaging** and many others since 1992 in our Seattle plant. Delivery is available to anywhere in the U.S. or Canada.

Fast Delivery

Our specialty is producing and delivering custom printed bags in 2 to 3 weeks from approval of artwork.

Biodegradable bags

We are now offering biodegradable bags in both high and low density plastic!

THIS BAG IS BIODEGRADABLE ™

More information.

How to order our bags

American Plastic Manufacturing sells exclusively through distributors.

To find a distributor in your area, please visit our Contact page and let us know what you are looking for.

If you are a distributor and would like to receive a competitive quote quickly, visit our Contact page for email and phone numbers.

Minimum order for custom printing is 3,000 bags.

Plastic Bag Myths

Many popular beliefs about the environmental impact of plastic bags are exaggerated or just plain wrong.

Learn the facts...

Biodegradable Bags

American Plastic is now producing bags that are 100% biodegradable and recyclable!

More info...

Reduce, Reuse, Recycle

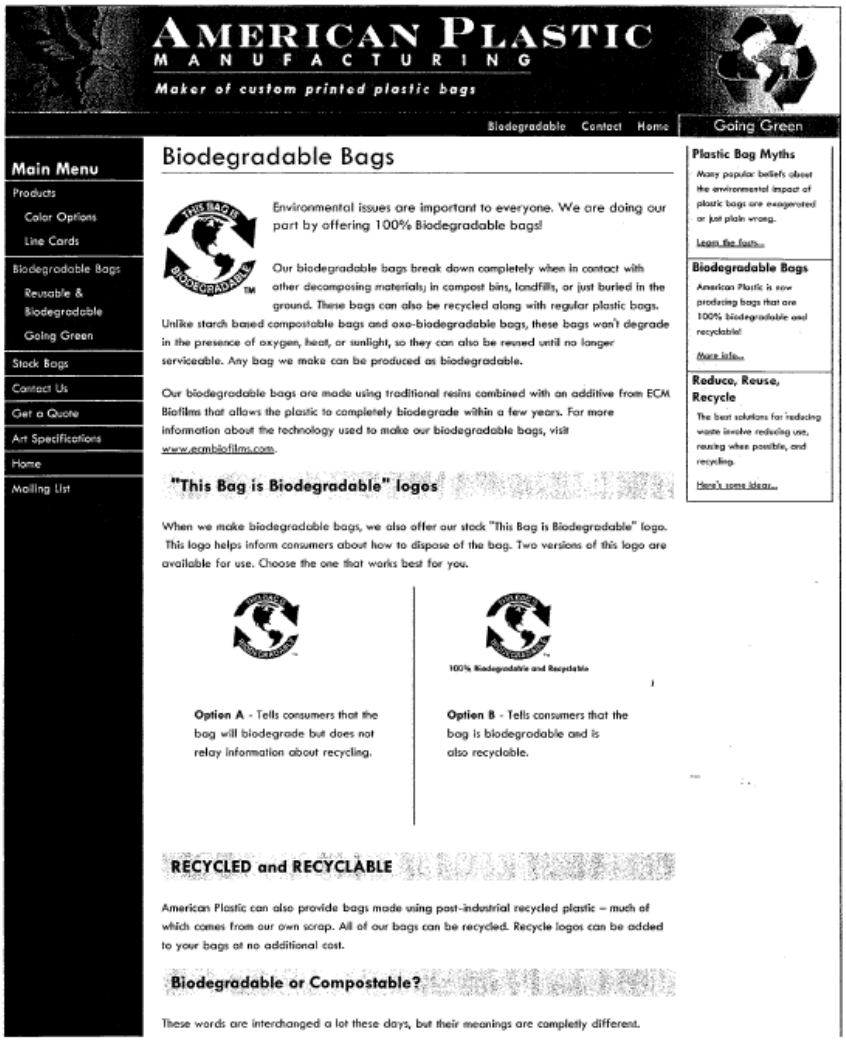
The best solutions for reducing waste involve reducing use, reusing when possible, and recycling.

Here's some ideas...

Complaint

American Plastic Manufacturing • 526 South Monroe St. • Seattle, WA 98108
1-888-763-1055 • 206-763-1055 • Fax: 206-763-3946

Biodegradable Bags | American Plastic Manufacturing



AMERICAN PLASTIC MANUFACTURING

Maker of custom printed plastic bags

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Biodegradable Bags

Environmental issues are important to everyone. We are doing our part by offering 100% Biodegradable bags!

Our biodegradable bags break down completely when in contact with other decomposing materials; in compost bins, landfills, or just buried in the ground. These bags can also be recycled along with regular plastic bags. Unlike starch based compostable bags and oxo-biodegradable bags, these bags won't degrade in the presence of oxygen, heat, or sunlight, so they can also be reused until no longer serviceable. Any bag we make can be produced as biodegradable.

Our biodegradable bags are made using traditional resins combined with an additive from ECM Biofilms that allows the plastic to completely biodegrade within a few years. For more information about the technology used to make our biodegradable bags, visit www.ecmbiofilms.com.

"This Bag is Biodegradable" logos

When we make biodegradable bags, we also offer our stock "This Bag is Biodegradable" logo. This logo helps inform consumers about how to dispose of the bag. Two versions of this logo are available for use. Choose the one that works best for you.

Option A - Tells consumers that the bag will biodegrade but does not relay information about recycling.

100% Biodegradable and Recyclable

Option B - Tells consumers that the bag is biodegradable and is also recyclable.

RECYCLED and RECYCLABLE

American Plastic can also provide bags made using post-industrial recycled plastic – much of which comes from our own scrap. All of our bags can be recycled. Recycle logos can be added to your bags at no additional cost.

Biodegradable or Compostable?

These words are interchanged a lot these days, but their meanings are completely different.

Plastic Bag Myths

Many popular beliefs about the environmental impact of plastic bags are exaggerated or just plain wrong.

Learn the facts...

Biodegradable Bags

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The best solutions for reducing waste involve reducing use, reusing when possible, and recycling.

Here's some ideas...

Complaint

Biodegradable Bags | American Plastic Manufacturing

Compostable bags are starch based Polylactic Acid (PLA) from corn and other crops. PLA decomposes in conditions found at municipal composting facilities, but not in compost bins, landfills or when littered. Compostable plastic also cannot be recycled.

Biodegradable bags will break down completely when in contact with decomposing organic waste - even in a landfill where practically nothing degrades. They can also be recycled along with other plastic bags.

What about paper bags?

When comparing plastic and paper, plastic always comes out on top.

Here are a few facts:

- Paper bags require 4-5 times more energy to produce, transport and recycle, than plastic.
- Paper bags are responsible for 70% more air pollution and 50 times more water pollution than plastic.
- Plastic bags generate 80% less solid waste than paper.
- Recycling plastic requires 91% less energy than paper.
- The manufacture of paper bags uses 40% more energy than plastic bags.

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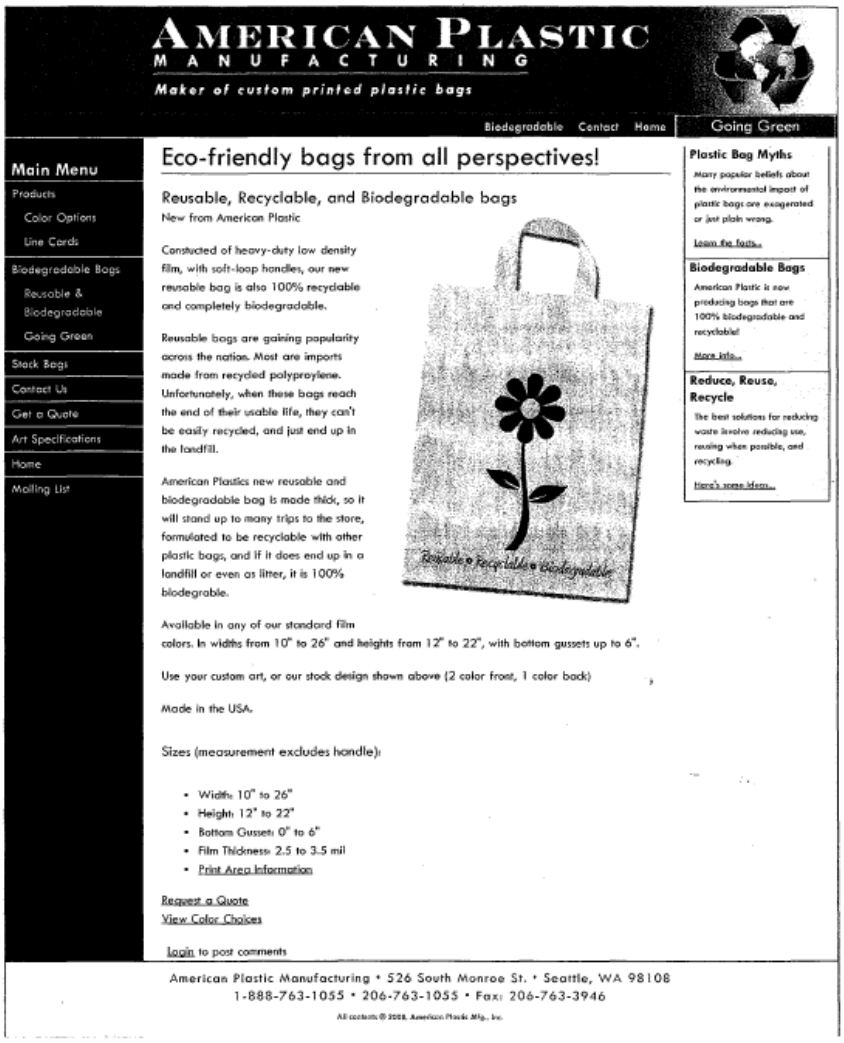
1-888-763-1055 • 206-763-1055 • Fax: 206-763-3946

Eco-friendly bags from all perspectives! | American Plastic Manufacturing



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Eco-friendly bags from all perspectives!

Reusable, Recyclable, and Biodegradable bags

New from American Plastic

Constructed of heavy-duty low density film, with soft-loop handles, our new reusable bag is also 100% recyclable and completely biodegradable.

Reusable bags are gaining popularity across the nation. Most are imports made from recycled polypropylene. Unfortunately, when these bags reach the end of their usable life, they can't be easily recycled, and just end up in the landfill.

American Plastics new reusable and biodegradable bag is made thick, so it will stand up to many trips to the store, formulated to be recyclable with other plastic bags, and if it does end up in a landfill or even as litter, it is 100% biodegrable.

Available in any of our standard film colors. In widths from 10" to 26" and heights from 12" to 22", with bottom gussets up to 6".

Use your custom art, or our stock design shown above (2 color front, 1 color back)

Made in the USA.

Sizes (measurement excludes handle):

- Width: 10" to 26"
- Height: 12" to 22"
- Bottom Gussets: 0" to 6"
- Film Thickness: 2.5 to 3.5 mil
- Print Area Information

Request a Quote
View Color Choices

Login to post comments

Plastic Bag Myths

Many popular beliefs about the environmental impact of plastic bags are exaggerated or just plain wrong.

Learn the facts...

Biodegradable Bags

American Plastic is now producing bags that are 100% biodegradable and recyclable!

More info...

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The best solutions for reducing waste involve reducing use, reusing when possible, and recycling.

Here's some ideas...

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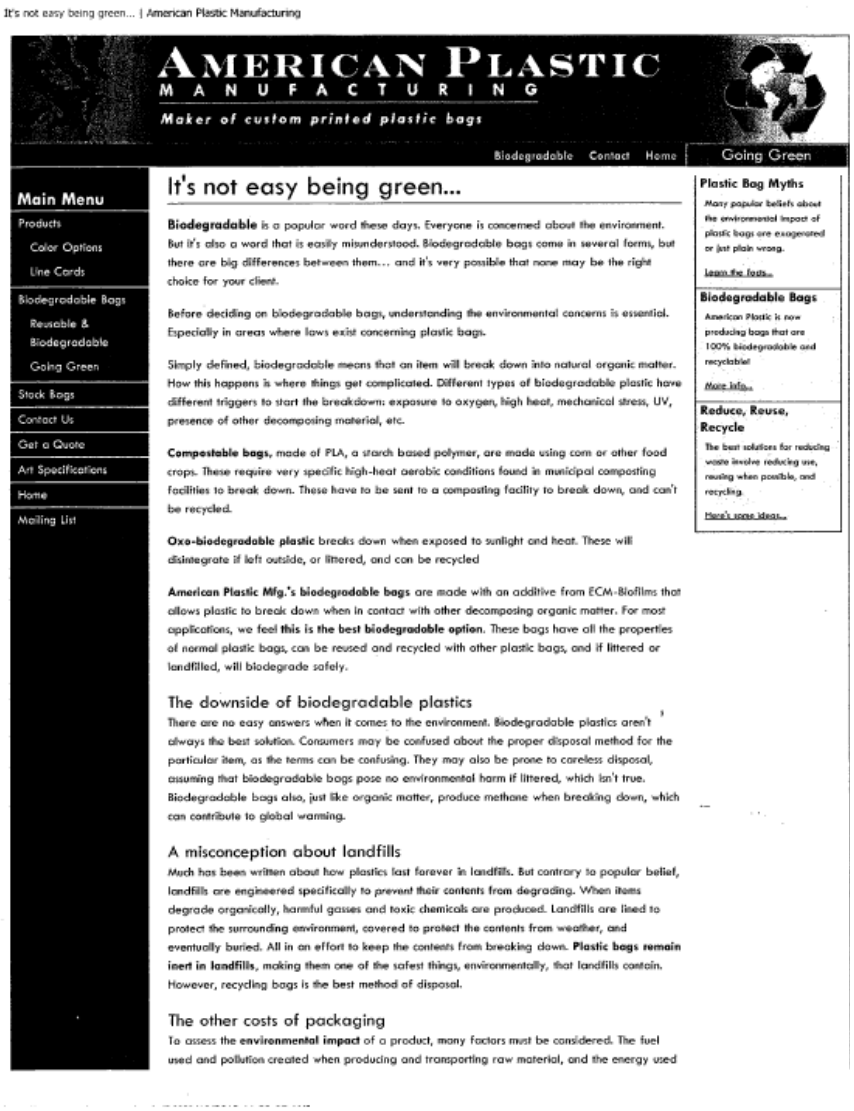
Complaint



It's not easy being green... | American Plastic Manufacturing

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It's not easy being green...

Biodegradable is a popular word these days. Everyone is concerned about the environment. But it's also a word that is easily misunderstood. Biodegradable bags come in several forms, but there are big differences between them... and it's very possible that none may be the right choice for your client.

Before deciding on biodegradable bags, understanding the environmental concerns is essential. Especially in areas where laws exist concerning plastic bags.

Simply defined, biodegradable means that an item will break down into natural organic matter. How this happens is where things get complicated. Different types of biodegradable plastic have different triggers to start the breakdown: exposure to oxygen, high heat, mechanical stress, UV, presence of other decomposing material, etc.

Compostable bags, made of PLA, a starch based polymer, are made using corn or other food crops. These require very specific high-heat aerobic conditions found in municipal composting facilities to break down. These have to be sent to a composting facility to break down, and can't be recycled.

Oxo-biodegradable plastic breaks down when exposed to sunlight and heat. These will disintegrate if left outside, or littered, and can be recycled

American Plastic Mfg.'s biodegradable bags are made with an additive from ECM-Biofilms that allows plastic to break down when in contact with other decomposing organic matter. For most applications, we feel **this is the best biodegradable option**. These bags have all the properties of normal plastic bags, can be reused and recycled with other plastic bags, and if littered or landfilled, will biodegrade safely.

The downside of biodegradable plastics

There are no easy answers when it comes to the environment. Biodegradable plastics aren't always the best solution. Consumers may be confused about the proper disposal method for the particular item, as the terms can be confusing. They may also be prone to careless disposal, assuming that biodegradable bags pose no environmental harm if littered, which isn't true. Biodegradable bags also, just like organic matter, produce methane when breaking down, which can contribute to global warming.

A misconception about landfills

Much has been written about how plastics last forever in landfills. But contrary to popular belief, landfills are engineered specifically to *prevent* their contents from degrading. When items degrade organically, harmful gasses and toxic chemicals are produced. Landfills are lined to protect the surrounding environment, covered to protect the contents from weather, and eventually buried. All in an effort to keep the contents from breaking down. **Plastic bags remain inert in landfills**, making them one of the safest things, environmentally, that landfills contain. However, recycling bags is the best method of disposal.

The other costs of packaging

To assess the **environmental impact** of a product, many factors must be considered. The fuel used and pollution created when producing and transporting raw material, and the energy used

Plastic Bag Myths

Many popular beliefs about the environmental impact of plastic bags are exaggerated or just plain wrong.

Learn the facts...

Biodegradable Bags

American Plastic is now producing bags that are 100% biodegradable and recyclable!

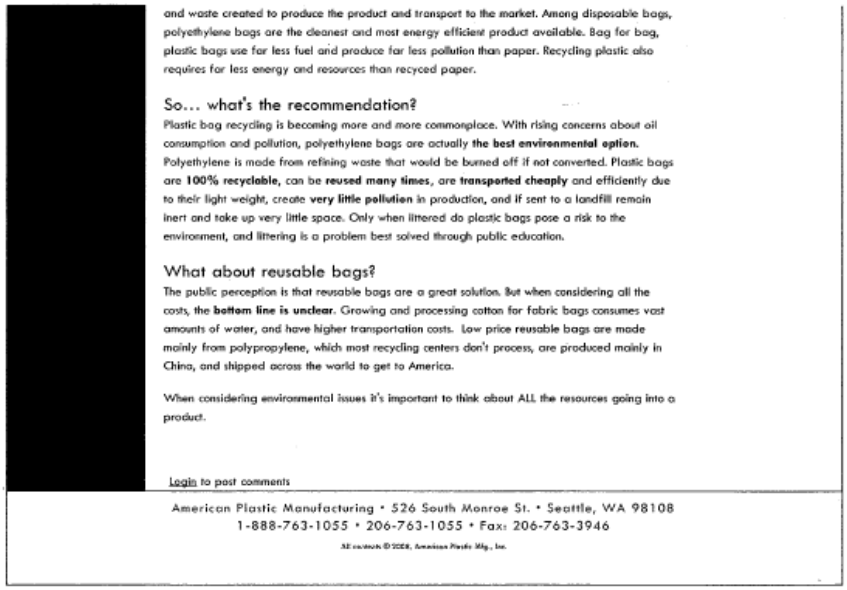
More Info...

Reduce, Reuse, Recycle

The best solutions for reducing waste involve reducing use, reusing when possible, and recycling.

Here's some ideas...

It's not easy being green... | American Plastic Manufacturing



and waste created to produce the product and transport to the market. Among disposable bags, polyethylene bags are the cleanest and most energy efficient product available. Bag for bag, plastic bags use far less fuel and produce far less pollution than paper. Recycling plastic also requires far less energy and resources than recycled paper.

So... what's the recommendation?

Plastic bag recycling is becoming more and more commonplace. With rising concerns about oil consumption and pollution, polyethylene bags are actually **the best environmental option.** Polyethylene is made from refining waste that would be burned off if not converted. Plastic bags are **100% recyclable,** can be **reused many times,** are **transported cheaply** and efficiently due to their light weight, create **very little pollution** in production, and if sent to a landfill remain inert and take up very little space. Only when littered do plastic bags pose a risk to the environment, and littering is a problem best solved through public education.

What about reusable bags?

The public perception is that reusable bags are a great solution. But when considering all the costs, the **bottom line is unclear.** Growing and processing cotton for fabric bags consumes vast amounts of water, and have higher transportation costs. Low price reusable bags are made mainly from polypropylene, which most recycling centers don't process, are produced mainly in China, and shipped across the world to get to America.

When considering environmental issues it's important to think about ALL the resources going into a product.

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1-888-763-1055 • 206-763-1055 • Fax: 206-763-3946

Complaint

Exhibit 2

AMERICAN PLASTIC MANUFACTURING

Makers of Custom Printed Plastic Bags

526 South Monroe Street | Seattle, WA 98108 | 1-888-763-1055 | 206-763-1055 | americanplasticmfg.com

American Plastic is Going Green - Biodegradable bags now available!

Environmental issues are important to everyone. We are doing our part by offering 100% Biodegradable bags, printed with our custom "This Bag is Biodegradable" logo.

Using an additive from ECM Biofilms (ecmbiofilms.com), our biodegradable bags break down completely when in contact with other decomposing materials; in compost bins, landfills, or just buried in the ground. These bags can also be **recycled** along with regular plastic bags. Unlike starch based compostable bags, these bags won't degrade in the presence of oxygen, heat, or sunlight, so they can also be **reused** until no longer serviceable. Any bag we make can be produced as biodegradable.

RECYCLED and RECYCLABLE

100% RECYCLABLE

American Plastic can also provide bags made using post-industrial recycled plastic – much of which comes from our own scrap. All of our bags can be recycled. Recycle logos can be added to your bags at no additional cost.

BIODEGRADABLE LOGO OPTIONS

American Plastic has created a custom biodegradable logo for use on our biodegradable bags. Choose the one that works best for your clients.

The "100% Biodegradable and Recyclable" logo provides information about how end users can dispose of the bags.

100% Biodegradable and Recyclable

More Information

Biodegradable or Compostable?

These words are interchanged a lot these days, but their meanings are completly different.

Compostable bags are starch based Polylactic Acid (PLA) from corn and other crops. PLA decomposes in conditions found at municipal composting facilities, but not in compost bins, landfills or when littered. Compostable plastic also cannot be recycled.

Biodegradable bags will break down completely when in contact with decomposing organic waste - even in a landfill where practically nothing degrades. They can also be recycled along with other plastic bags.

Environmental Impact

What about paper bags?

When comparing plastic and paper, plastic always wins. Here are a few facts.

- *Paper bags require 4-5 times more energy to produce, transport and recycle, than plastic.*
- *Paper bags are responsible for 70% more air pollution and 50 times more water pollution than plastic.*
- *Plastic bags generate 80% less solid waste than paper.*
- *Recycling plastic requires 91% less energy than paper.*
- *The manufacture of paper bags uses 40% more energy than plastic bags.*

All of our most popular bag styles are available in biodegradable plastic!

T-SHIRT BAGS **FOLD-OVER DIE CUT** **SOFT LOOP HANDLE** **DIE CUT HANDLE**

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"), a statement that respondent neither admits nor denies any of the allegations in the draft complaint except as specifically stated in the consent agreement, an admission by the respondent of facts necessary to establish jurisdiction for purposes of this action, and waivers and other provisions as required by the Commission's Rules;

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 American Plastic Manufacturing, Inc. is a Washington corporation with its principal office or place of business at 526 South Monroe Street, Seattle, Washington 98108.

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

ORDER

DEFINITIONS

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

A. "Clearly and Prominently" means as follows:

1. 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;

2. 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

3. 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.

B. "Close proximity" means on the same print page, web page, online service page, or other electronic page, and proximate to the triggering representation, and not accessed or displayed through hyperlinks, pop-ups, interstitials, or other means.

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

D. "Competent and reliable scientific evidence" means 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. Specifically:

1. For unqualified biodegradability claims, any scientific technical protocol (or combination of protocols) substantiating such claims must assure complete decomposition within one year and replicate, *i.e.*, simulate, the physical conditions found in landfills, where most trash is disposed.

2. For qualified biodegradability claims, any scientific technical protocol (or combination of protocols) substantiating such claims must both:

   a. assure the entire product will (1) completely decompose into elements found in nature in the stated timeframe or, if not qualified by time, within one year; or (2) decompose into

elements found in nature at the rate and to the extent stated in the representation; and

b. replicate, *i.e.*, simulate, the physical conditions found in the type of disposal facility or method stated in the representation or, if not qualified by disposal facility or method, the conditions found in landfills, where most trash is disposed.

For example, results from ASTM (American Society for Testing and Materials) International D5511-12, *Standard Test Method for Determining Anaerobic Biodegradation of Plastic Materials under High Solids Anaerobic Digestion Conditions*, or any prior version thereof, are not competent and reliable scientific evidence supporting unqualified claims, or claims of outcomes beyond the parameters and results of the actual test performed.

E. "Customary disposal" means any disposal method whereby respondent's products ultimately will be disposed of in a landfill, in an incinerator, or in a recycling facility.

F. "Degradable" includes biodegradable, oxo-biodegradable, oxo-degradable, or photodegradable, or any variation thereof.

G. "Landfill" means a municipal solid waste landfill that receives household waste. "Landfill" does not include landfills that are operated as bioreactors or those that are actively managed to enhance decomposition.

H. Unless otherwise specified, "respondent" means American Plastic Manufacturing, Inc., a corporation, and its successors and assigns.

I.

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

A. That any product or package is degradable, unless:

1. the entire item will completely decompose into elements found in nature within one year after customary disposal; or

2. the representation is clearly and prominently and in close proximity qualified by:

   a. Either (1) the time to complete decomposition into elements found in nature; or (2) the rate and extent of decomposition into elements found in nature, provided that such qualification must disclose that the stated rate and extent of decomposition does not mean that the product or package will continue to decompose; and

   b. If the product will not decompose in a customary disposal facility or by a customary method of disposal, both (1) the type of non-customary disposal facility or method and (2) the availability of such disposal facility or method to consumers where the product or package is marketed or sold

and such 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.

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

II.

IT IS FURTHER ORDERED that respondent 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 representations specified in Part I;

B. All materials that were relied upon in disseminating the representations specified in Part I;

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

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

III.

IT IS FURTHER ORDERED that 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 secure from each such person a signed and dated

statement acknowledging receipt of the order, with any electronic signatures complying with the requirements of the E-Sign Act, 15 U.S.C. § 7001 *et seq*. Respondent shall deliver this order to current personnel within thirty (30) days after the date of service of this order, and to future personnel within thirty (30) days after the person assumes such position or responsibilities.

IV.

IT IS FURTHER ORDERED that respondent 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 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 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, Mail Stop M-8102B, Washington, DC 20580. The subject line must begin: "American Plastic Manufacturing, Inc., File No. 122 3291."

V.

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

additional true and accurate written reports. Unless otherwise directed by a representative of the Commission 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, Mail Stop 8102-B, Washington, DC 20580. The subject line must begin: "American Plastic Manufacturing, Inc., File No. 122 3291."

VI.

This order will terminate on April 24, 2034, or twenty (20) years from the most recent date that the United States or the Commission files a complaint (with or without an accompanying consent decree) in federal court alleging any violation of the order, whichever comes later; *provided, however*, that the filing of such a complaint will not affect the duration of:

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

B. This order's application to any respondent that is not named as a defendant in such complaint; and

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

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

By the Commission.

ANALYSIS 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 American Plastic Manufacturing, a corporation ("respondent").

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

This matter involves respondent's marketing, sale, and distribution of purportedly biodegradable plastic shopping bags to the public. According to the FTC complaint, respondent represented that its plastic products are completely biodegradable (*i.e.*, will completely break down and decompose into elements found in nature within a reasonably short period of time after customary disposal). Respondent further represented that its plastic products are biodegradable in a landfill; are biodegradable in a stated qualified timeframe; and are biodegradable, biodegradable in a landfill, or biodegradable in a stated qualified timeframe as a result of respondent's use of a plastic additive manufactured by ECM Biofilms, Inc.

The complaint alleges that each of these degradable claims is false and misleading. In addition, the complaint alleges that, although respondent represented (expressly or implicitly) that it could substantiate its degradable claims, respondent did not in fact possess or rely upon a reasonable basis to substantiate these representations of biodegradability. Thus, the complaint alleges that respondent engaged in deceptive practices in violation of Section 5(a) of the FTC Act.

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

representation that a product or package is degradable, unless one of two conditions is met. The first condition is that the entire item will completely decompose into elements found in nature within one year after customary disposal. The second condition is that the representation will be clearly and prominently and in close proximity qualified by either the time to complete decomposition or the rate and extent of decomposition (although this qualification must disclose that the stated rate and extent of decomposition does not mean that the item will continue to decompose). In addition, if the product will not decompose in (or by) a customary disposal facility/method, the representation must be qualified regarding the type of disposal, and the availability of such disposal facility or method to consumers where the item is marketed and sold.

Part I also requires that, at the time of any such representation, respondent must possess and rely upon competent and reliable scientific evidence from a scientific technical protocol (or protocols) that does two things. First, the protocol must assure that the entire product will either completely decompose in one year or the stated timeframe, or that it will decompose at the rate and to the extent stated in the representation. Second, such protocol must replicate (*i.e.*, simulate) the physical conditions found in a landfill or the disposal facility or method stated in the representation. Part I further prohibits respondent from marketing any products, packages, or services as offering any environmental benefit, unless the representation is true, not misleading, and, at the time it is made, respondent possesses and relies upon competent and reliable evidence that substantiates the representation.

Parts II through V are reporting and compliance provisions. Part II requires respondent to keep (and make available to the Commission on request): copies of advertisements, labeling, packaging and promotional materials containing the representations identified in Part I; materials relied upon in disseminating those representations; evidence that contradicts, qualifies, or calls into question the representation, or the basis relied upon for the representation, specified in Part I; and all acknowledgments of receipt of the order. Part III requires dissemination of the order now and in the future to subsidiaries,

principals, officers, directors, and managers, and to all current and future employees, agents, and representatives having supervisory responsibilities relating to the subject matter of the order. Part IV requires notification to the FTC of changes in corporate status. Part V mandates that respondent submit an initial compliance report to the FTC and make available to the FTC subsequent reports. Part VI is a provision "sunsetting" the order after twenty (20) years, with certain exceptions.

The purpose of the analysis is to 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

SERVICE CORPORATION INTERNATIONAL
AND
STEWART ENTERPRISES, INC.

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

Docket No. C-4423; File No. 131 0163
Complaint, December 20, 2013 – Decision, April 29, 2014

This consent order addresses the $1.4 billion acquisition by Service Corporation International ("SCI") of certain assets of Stewart Enterprises, Inc. The complaint alleges that the Merger, if consummated, would violate Section 7 of the Clayton Act and Section 5 of the Federal Trade Commission Act by removing an actual, direct, and substantial competitor from 29 funeral services markets, and 30 cemetery services markets. The consent order requires SCI and Stewart to divest 53 funeral homes in 29 local funeral services markets and 38 cemeteries in 30 local cemetery markets to acquirers who receive the approval of the Commission.

Participants

For the *Commission*: *Lucas Ballet, Maggie DiMoscato, Jill M. Frumin, Jennifer Lee, Sean Pugh, Stephanie Reynolds*, and *Goldie Walker.*

For the *Respondents*: *Wayne Dale Collins* and *Jessica Delbaum, Shearman & Sterling LLP*; and *Amanda Wait, Hunton & Williams LLP*; and *Mark A. Cunningham, Jones Walker LLP.*

COMPLAINT

Pursuant to the Clayton Act and the Federal Trade Commission Act ("FTC Act"), and by virtue of the authority vested in it by said Acts, the Federal Trade Commission ("Commission"), having reason to believe that Respondent Service Corporation International ("SCI"), a corporation subject to the jurisdiction of the Commission, has agreed to acquire Respondent Stewart Enterprises, Inc. ("Stewart"), a corporation subject to the jurisdiction of the Commission, in violation of

Section 7 of the Clayton Act, as amended, 15 U.S.C. § 18, and Section 5 of the FTC Act, as amended, 15 U.S.C. § 45, and it appearing to the Commission that a proceeding in respect thereof would be in the public interest, hereby issues its Complaint, stating its charges as follows:

I. RESPONDENTS AND JURISDICTION

1. Respondent SCI is a corporation organized, existing, and doing business under and by virtue of the laws of the State of Texas, with its corporate office and principal place of business located at 1929 Allen Parkway, Houston, Texas 77019. SCI, among other things, is engaged in the sale and provision of: (a) funeral services and associated products, and (b) cemetery services and associated products and property.

2. SCI owns and operates approximately 1,449 funeral-services locations, 374 cemeteries (including 213 combined funeral services/cemetery locations), and 100 crematories in 44 states and the District of Columbia. SCI's 2012 revenue from all operations totaled approximately $2.41 billion.

3. SCI is, and at all relevant times has been, engaged in "commerce" as defined in Section 1 of the Clayton Act, 15 U.S.C. § 12, and Section 4 of the FTC Act, as amended, 15 U.S.C. § 44.

4. Respondent Stewart is a corporation organized, existing, and doing business under and by virtue of the laws of the State of Louisiana, with its corporate office and principal place of business located at 1333 South Clearview Parkway, Jefferson, Louisiana 70121. Stewart, among other things, is engaged in the sale and provision of (a) funeral services and associated products, and (b) cemetery services and associated products and property.

5. Stewart owns and operates 217 funeral homes and 141 cemeteries in 24 states and Puerto Rico. For the 12 months ending October 31, 2013, Stewart's total revenues were approximately $524.1 million.

6. Stewart is, and at all relevant times has been, engaged in "commerce" as defined in Section 1 of the Clayton Act, 15 U.S.C. § 12, and Section 4 of the FTC Act, as amended, 15 U.S.C. § 44.

II. THE ACQUISITION

7. On May 29, 2013, SCI and Stewart executed an Agreement and Plan of Merger (the "Agreement") pursuant to which SCI will acquire Stewart in a transaction valued at approximately $1.4 billion (the "Merger").

8. The Merger would combine the first and second largest funeral and cemetery services providers in North America. SCI and Stewart offer competing funeral and cemetery services in 98 metropolitan statistical areas ("MSAs") located in 16 states, including 29 funeral services markets and 30 cemetery services markets where the Merger, if consummated, likely would substantially lessen competition.

III. THE RELEVANT PRODUCT MARKETS

A. Funeral Services and Associated Products

9. The provision and sale of funeral services and associated products ("funeral services") constitutes a relevant product market in which to analyze the competitive effects of the Merger. Funeral services include all activities relating to the promotion, marketing, sale, and provision of funeral services and goods, including, but not limited to, goods and services used to remove, care for, and prepare bodies for burial; and goods and services used to arrange, supervise, or conduct the funeral ceremony. Funeral services do not include cremation services because consumers do not substitute cremation services for burial services based upon price, and the competitive conditions for cremation services are substantially different than for funeral services. Since consumers primarily choose their final disposition based on their personal or religious views, consumers generally do not view cremation services as a viable substitute for funeral services. Thus, a hypothetical monopolist of funeral services could profitably impose a small but significant and non-transitory

increase in price ("SSNIP") because most consumers would not switch to cremation services.

10. There are no products or services that are reasonably interchangeable with or viable substitutes for funeral services.

B. Cemetery Services and Associated Products and Property

11. The provision and sale of cemetery services and associated products and property ("cemetery services") constitutes a relevant product market in which to analyze the competitive effects of the Merger. Cemetery services include all activities relating to the promotion, marketing, sale, and provision of property, goods, and services to provide for the final disposition of human remains in a cemetery, whether by burial, entombment in a mausoleum or crypt, disposition in a niche, or scattering of cremated remains on the cemetery grounds.

12. There are no products or services that are reasonably interchangeable with or viable substitutes for cemetery services.

13. In some local markets, certain funeral-service and cemetery-service locations cater to specific populations by focusing on the customs and rituals associated with one or more religious, ethnic, or cultural heritage groups. In such situations, the provision of funeral or cemetery services targeted to such populations may constitute distinct and relevant product markets.

IV. THE RELEVANT GEOGRAPHIC MARKETS

14. The 29 geographic markets in which to analyze the effects of the Merger with respect to funeral services are: (1) Mobile, Alabama; (2) Auburn, California; (3) East Los Angeles County, California (Catholic); (4) Los Angeles (Long Beach), California (Catholic); (5) Los Angeles (San Fernando Valley), California (Catholic); (6) Palmdale/Lancaster, California; (7) Northern San Diego, California; (8) Southern and Eastern San Diego, California; (9) Clearwater, Florida; (10) Jacksonville, Florida; (11) Miami-Dade County (Homestead), Florida; (12) Miami-Dade County (Miami), Florida; (13) Ocala, Florida; (14) Orlando, Florida; (15) Port St. Lucie, Florida; (16) Tampa, Florida

(Hispanic); (17) Overland Park, Kansas; (18) South Kansas City, Kansas/Missouri; (19) New Orleans, Louisiana; (20) West Jackson, Mississippi; (21) North Kansas City, Missouri; (22) New Bern, North Carolina; (23) Raleigh, North Carolina; (24) Columbia, South Carolina; (25) Nashville, Tennessee; (26) Dallas, Texas; (27) Southeast Fort Worth, Texas; (28) Arlington-Alexandria, Virginia; and (29) Washington D.C./Maryland suburbs (Jewish).

15. The 30 geographic markets in which to analyze the effects of the Merger with respect to cemetery services are: (1) South San Diego, California; (2) Jacksonville, Florida; (3) Miami-Dade County, Florida; (4) Ocala, Florida; (5) West Orlando, Florida; (6) Port St. Lucie, Florida; (7) Spring Hill/Hudson, Florida; (8) St. Petersburg/Largo, Florida; (9) Tampa, Florida; (10) Atlanta (Cobb County), Georgia; (11) Atlanta (Fairburn/College Park), Georgia; (12) Atlanta (Henry County), Georgia; (13) New Orleans, Louisiana; (14) Annapolis, Maryland; (15) Baltimore, Maryland; (16) North Kansas City, Missouri; (17) South Kansas City, Kansas/Missouri; (18) High Point, North Carolina; (19) Raleigh, North Carolina; (20) Philadelphia, Pennsylvania; (21) Greenville, South Carolina; (22) Kingsport, Tennessee; (23) Knoxville, Tennessee; (24) Dallas, Texas; (25) South Dallas, Texas (African American); (26) Southeast Fort Worth, Texas; (27) Houston, Texas; (28) Northwest Richmond, Virginia; (29) South Richmond, Virginia; and (30) Kearneysville, West Virginia.

V. MARKET STRUCTURE AND MARKET CONCENTRATION

16. Under the 2010 Department of Justice and Federal Trade Commission Horizontal Merger Guidelines ("Merger Guidelines") and relevant case law, SCI's acquisition of Stewart is presumptively unlawful in the markets for funeral and cemetery services in a total of 59 geographic markets. Under the Merger Guidelines' standard measure of market concentration, the Herfindahl-Hirschman Index ("HHI"), an acquisition is presumed to create or enhance market power or facilitate its exercise if it increases the HHI by more than 200 points and results in a post-acquisition HHI that exceeds 2,500 points. The Merger creates market concentration levels well in excess of these thresholds.

A. Funeral Services

17. The Merger will significantly increase concentration in numerous local markets for funeral services and will result in SCI controlling a substantial percentage of the market in each of the affected funeral services markets.

a. Mobile, Alabama. The market for funeral services in Mobile is highly concentrated. The Respondents are close competitors and are differentiated from most other funeral homes in the market. Other competitors in the market will not constrain Respondents post-Merger.

b. Auburn, California. The market for funeral services in Auburn is highly concentrated. The Merger will reduce from three to two the number of funeral services providers in the relevant area.

c. East Los Angeles County, California. The market for Catholic funeral services is highly concentrated. The Respondents are close competitors and are differentiated from most other funeral homes by serving a significant number of Catholic consumers. The transaction will result in significant lost competition for Catholic funeral services in East Los Angeles County.

d. Los Angeles (Long Beach), California. The market for Catholic funeral services is highly concentrated. The Respondents are close competitors and are differentiated from most other funeral homes by serving a significant number of Catholic consumers. The transaction will result in significant lost competition for Catholic funeral services in Long Beach.

e. Los Angeles (San Fernando Valley), California. The market for Catholic funeral services is highly concentrated. The Respondents are close competitors and are differentiated from most other funeral homes

by serving a significant number of Catholic consumers. The transaction will result in significant lost competition for Catholic funeral services in San Fernando Valley.

f. Palmdale/Lancaster, California. The market for funeral services in Palmdale and Lancaster is highly concentrated. The Respondents are close competitors and are differentiated from most other funeral homes in the market. Post-Merger the Respondents would own three of the six funeral homes in the area. Other competitors are differentiated from Respondents' funeral homes in terms of quality.

g. Northern San Diego, California. Post-Merger, SCI will have a market share of over 60 percent for funeral services, representing an HHI increase of over 1,400, in numerous areas in and around the Pacific Beach and Clairemont, California. The Merger will reduce the number of funeral providers in the Pacific Beach and Clairemont areas from five to four.

h. Southern and Eastern San Diego, California. Post-Merger, SCI will have a market share of 57 percent for funeral services, representing a post-merger HHI increase of over 850, in numerous highly populated zip codes in southern and eastern San Diego.

i. Clearwater, Florida. Post-Merger, SCI will have a market share of 52 percent. The Respondents are close competitors and are differentiated from most other funeral homes in the market. The remaining competitors are not nearly as close substitutes for Respondents' funeral homes as Respondents' funeral homes are for each other.

j. Jacksonville, Florida. The market for funeral services in Jacksonville is highly concentrated. The Respondents are close competitors and are differentiated from most other funeral homes in the market. Respondents are close competitors while the

remaining competitors are less competitively significant.

k. Miami-Dade County (Homestead), Florida. In the Homestead area, south of Miami, the Merger will reduce the number of competitive funeral homes from two to one.

l. Miami-Dade County (Miami), Florida. Post-Merger, SCI will have a market share of 51 percent in the Miami area. The Merger will increase the HHI by 1,292 points, from 1,732 to 3,024. The Respondents are close competitors and are differentiated from most other funeral homes in the market. The remaining competitors are not nearly as close substitutes for Respondents' funeral homes as Respondents' funeral homes are for each other.

m. Ocala, Florida. Post-Merger, SCI will have a market share of 42 percent. The Merger will increase the HHI by 860 points, from 3,375 to 4,235. In addition, the Merger will reduce from four to three the number of funeral services providers in the relevant market.

n. Orlando, Florida. Post-Merger, SCI will have a market share of 67 percent. The Respondents are close competitors and are differentiated from most other funeral homes in the market.

o. Port St. Lucie, Florida. Post-Merger, SCI will have a market share of more than 72 percent. The remaining competitors are not nearly as close substitutes for Respondents' funeral homes as Respondents' funeral homes are for each other.

p. Tampa, Florida. Post-Merger, SCI will have a 76 percent share of the Hispanic-focused market. The Respondents are close competitors and are differentiated from most other funeral homes in the market.

q. Overland Park, Kansas. The market for funeral services in Overland Park is highly concentrated. The Respondents are close competitors and are differentiated from most other funeral homes in the market.

r. South Kansas City, Kansas/Missouri. The market for funeral services in South Kansas City is highly concentrated. Respondents are similarly-positioned competitors while the remaining competitors are more distant substitutes for the Respondents' facilities.

s. New Orleans, Louisiana. Post-Merger, SCI will have a market share of 90 percent. The Merger will increase the HHI by 3,961 points, from 3,965 to 7,926. In addition, the Merger will reduce from three to two the number of funeral services providers in the relevant market.

t. West Jackson, Mississippi. The Merger will reduce the number of competing providers of funeral services from three to two. The Respondents are close competitors and are differentiated from most other funeral homes in the market.

u. North Kansas City, Missouri. The market for funeral services in North Kansas City is highly concentrated. Post-Merger, SCI will have a market share of over 60 percent. The Respondents are close competitors and are differentiated from most other funeral homes in the market. The remaining competitors will not constrain Respondents post-Merger.

v. New Bern, North Carolina. Post-Merger, SCI will have a market share of 100 percent. The Merger is a merger-to-monopoly, reducing the number of funeral services providers in the relevant market from two to one. The only other funeral homes in the area do not compete closely with Respondents' homes because they cater to African-American customers.

w. Raleigh, North Carolina. Post-Merger, SCI will have a market share of 51 percent. The Merger will increase the HHI by 667 points, from 2,924 to 3,591.

x. Columbia, South Carolina. The market for funeral services in western Columbia is highly concentrated. The Respondents are close competitors and are differentiated from most other funeral homes in the market. The remaining competitors are not nearly as close substitutes for Respondents' funeral homes as Respondents' funeral homes are for each other.

y. Nashville, Tennessee. Post-Merger, SCI will have a market share of 42 percent. The Merger will increase the HHI by 499 points, from 1,785 to 2,284. The remaining local competitors are insufficient to constrain the merged firm and would not prevent competitive harm from resulting from the Merger.

z. Dallas, Texas. The market for funeral services in the Dallas area is highly concentrated. Together, Respondents own 20 funeral homes in the market including the dominant funeral home with the largest call volume. The Respondents are close competitors and are differentiated from most other funeral homes in the market including on price.

aa. Southeast Fort Worth, Texas. The market for funeral services in Southeast Fort Worth is highly concentrated. The Merger will reduce from four to three the number of funeral services providers in the relevant market. The Respondents are close competitors, offering large, well-maintained facilities serving a similar customer base, and are differentiated from most other funeral homes in the market.

bb. Arlington-Alexandria, Virginia. The market for funeral services in the Arlington-Alexandria area is highly concentrated. Post-Merger, SCI will own six of the eight funeral homes in the area. Other funeral

homes are not nearly as close substitutes for Respondents' facilities.

cc. Washington, D.C./Maryland Suburbs. Post-Merger, SCI will have a market share of 68 percent of the market for Jewish funeral services. The Merger will increase the HHI by 2,038 points, from 3,625 to 5,662. The Merger will reduce from three to two the number of current providers of Jewish funeral services in the relevant market.

B. Cemetery Services

18. The Merger will significantly increase concentration in numerous local markets for cemetery services and will result in SCI controlling a substantial percentage of the market in each of the affected cemetery services markets.

a. South San Diego, California. Post-Merger, SCI will have a market share of 70 percent. The Merger will increase the HHI by 2,381 points, from 2,832 to 5,213.

b. Jacksonville, Florida. The market for cemetery services in Jacksonville is highly concentrated. The Respondents are close competitors and are differentiated from most other cemeteries in the market. The remaining competitors are not nearly as close substitutes for Respondents' cemeteries as Respondents' cemeteries are for each other.

c. Miami-Dade County, Florida. The Merger will reduce the number of competitive providers of cemetery services in the Miami area from five to four, with SCI owning six of the ten private perpetual-care cemeteries in the area. Post-Merger, SCI will have a market share of 53 percent. Respondents are close competitors while the remaining competitors are not close substitutes for the Respondents' facilities.

d. Ocala, Florida. The market for cemetery services in Ocala is highly concentrated. Post-Merger, SCI will

own two of the three competitively significant private perpetual-care cemeteries in the market. Respondents are close competitors while the remaining competitors are not close substitutes for the Respondents' facilities.

e. West Orlando, Florida. The market for cemetery services in the West Orlando area is highly concentrated. The Respondents are close competitors and own a majority of the private cemeteries in the market. The remaining competitors are not nearly as close substitutes for Respondents' cemeteries as Respondents' cemeteries are for each other.

f. Port St. Lucie, Florida. The Merger will reduce the number of competitively-significant providers of cemetery services in the Port St. Lucie area from four to three. The Respondents are close competitors and are differentiated from most other cemeteries in the market. The remaining competitors are not nearly as close substitutes for Respondents' cemeteries as Respondents' cemeteries are for each other.

g. Spring Hill/Hudson, Florida. The market for cemetery services in the Spring Hill/Hudson area is highly concentrated. The Merger reduces the number of competitively significant cemeteries from three to two. The Respondents are close competitors and are differentiated from most other cemeteries in the market. The remaining competitors are not nearly as close substitutes for Respondents' cemeteries as Respondents' cemeteries are for each other.

h. St. Petersburg/Largo, Florida. Post-Merger, SCI will own four of the five competitive private perpetual care cemeteries in the market. The Respondents are close competitors and are differentiated from most other cemeteries in the market. There is only one other meaningful, but differentiated, competitor in the area.

i. Tampa, Florida. The market for cemetery services in the central Tampa area is highly concentrated. The

Respondents are close competitors and are differentiated from most other cemeteries in the market. The remaining competitors are not nearly as close substitutes for Respondents' cemeteries because third-party cemeteries lower quality and cater to specific ethnic groups.

j. Atlanta, Georgia. In each of the three relevant geographic markets in the Atlanta area, Cobb County, Fairburn/College Park, and Henry County, the market for cemetery services is highly concentrated. The Respondents own 20 cemeteries in the area, are close competitors, and are differentiated from most other cemeteries in each relevant geographic market. The remaining competitors are not nearly as close substitutes for Respondents' cemeteries as Respondents' cemeteries are for each other.

k. New Orleans, Louisiana. Post-Merger, SCI will have a market share of 66 percent. The Merger will increase the HHI by 1,823 points, from 2,584 to 4,407. Only one third-party firm operates a competitively significant cemetery in this market.

l. Annapolis, Maryland. Post-Merger, SCI will have a market share of 66 percent. The Merger will increase the HHI by 2,125 points, from 2,672 to 4,797. In addition, the Merger will reduce from four to three the number of cemetery services providers in the relevant market.

m. Baltimore, Maryland. Post-Merger, SCI will have a market share of 48 percent. The Merger will increase the HHI by 1,024 points, from 2,315 to 3,339. The remaining local competitors are insufficient to constrain the merged firm and would not prevent competitive harm from resulting from the Merger.

n. North Kansas City, Missouri. Post-Merger, SCI will have a market share of 68 percent. The Merger will increase the HHI by 2,145 points, from 2,687 to 4,832.

o. South Kansas City, Kansas/Missouri. The market for cemetery services in South Kansas City is highly concentrated. The Respondents are close competitors, own the dominant, most prestigious cemeteries in the market, and are differentiated from most other cemeteries in the market.

p. High Point, North Carolina. Post-Merger, SCI will have a market share of 69 percent. The Merger will increase the HHI by 2,389 points, from 2,973 to 5,362. In addition, the Merger will reduce from four to three the number of cemetery services providers in the relevant market.

q. Raleigh, North Carolina. Post-Merger, SCI will have a market share of over 70 percent. Respondents are close competitors in this market and the Merger will reduce the number of cemetery services providers in the relevant market from five to four.

r. Philadelphia, Pennsylvania. The market for cemetery services in Philadelphia is highly concentrated. The Respondents own five of the largest, most prominent cemeteries and they are close competitors. The remaining competitors include the various Catholic cemeteries that are not close substitutes for Respondents' cemeteries.

s. Greenville, South Carolina. The market for cemetery services in the relevant geographic market in the Greenville area is highly concentrated. The Merger will reduce the number of competitively significant providers of cemetery services in this relevant market from three to two.

t. Kingsport, Tennessee. Post-Merger, SCI will have a market share of 85 percent. The Merger will increase the HHI by 3,559 points, from 3,757 to 7,316. In addition, the Merger will reduce from four to three the number of cemetery services providers in the relevant market.

u. Knoxville, Tennessee. The Merger will reduce the number of competitive providers of cemetery services from four to three. The Respondents are close competitors and are differentiated from most other cemeteries in the market.

v. Dallas, Texas. The market for cemetery services in Dallas is highly concentrated. The Respondents own 13 cemeteries in the market, including the dominant cemetery with the most annual internments. The Respondents are close competitors while the remaining competitors are not as geographically close or competitively significant.

w. South Dallas, Texas. Post-Merger, SCI will have a market share above 90 percent for African-American cemetery services in South Dallas. No other cemetery in South Dallas is a close substitute for Respondents' cemeteries.

x. Southeast Fort Worth, Texas. The market for cemetery services in Southeast Fort Worth is highly concentrated. The Merger will reduce from four to three the number of cemetery services providers in the relevant market. The Respondents are close competitors serving a similar customer base and offering high-quality cemeteries.

y. Houston, Texas. The market for cemetery services in Houston is highly concentrated. The Respondents are close competitors and are differentiated from most other cemeteries in the market.

z. Northwest Richmond, Virginia. The market for cemetery services in Northwest Richmond is highly concentrated. The Respondents are close competitors and are differentiated from most other cemeteries in the market.

aa. South Richmond, Virginia. The market for cemetery services in South Richmond is highly concentrated.

The Respondents are close competitors and are differentiated from most other cemeteries in the market.

bb. Kearneysville, West Virginia. The Merger will reduce the number of competitive providers of cemetery services from three to two. The Respondents are close competitors and are differentiated from the other cemetery in the market.

VI. ANTICOMPETITIVE EFFECTS

19. The Merger may substantially lessen competition in the relevant markets by, among other things:

a. Eliminating actual, direct, and substantial competition between SCI and Stewart;

b. Increasing the likelihood that SCI will exercise market power unilaterally; and

c. Increasing the likelihood of collusion or coordinated interaction between SCI and other funeral or cemetery services providers.

VII. ENTRY CONDITIONS

20. Entry into the relevant markets would not be timely, likely, or sufficient to prevent or defeat the likely anticompetitive effects of the Merger.

21. Among other entry barriers, heritage (the consumer's tendency to use the same funeral services provider for multiple generations) and reputation pose substantial barriers to entrants attempting to establish new funeral services locations.

22. The availability of suitable land and local zoning, health, and environmental regulations impact significantly the ability of firms to enter with new cemetery services locations.

VIII. VIOLATIONS

23. The allegations of Paragraph 1 through 22 are repeated and realleged as though fully set forth here.

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

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

WHEREFORE, THE PREMISES CONSIDERED, the Federal Trade Commission on this twentieth day of December, 2013, issues its Complaint against said Respondents.

By the Commission.

ORDER TO HOLD SEPARATE AND MAINTAIN ASSETS
[Public Record Version]

The Federal Trade Commission, having initiated an investigation of the proposed acquisition by Respondent Service Corporation International ("SCI") of the outstanding voting securities of Respondent Stewart Enterprises, Inc. ("Stewart"), and Respondents having been furnished thereafter with a copy of a draft of complaint that the Bureau of Competition proposed to present to the Commission for its consideration and which, if issued by the Commission, would charge Respondents with violations of Section 7 of the Clayton Act, as amended, 15 U.S.C. § 18, and Section 5 of the Federal Trade Commission Act, as amended, 15 U.S.C. § 45; and

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

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

1. Respondent Service Corporation International is a corporation organized, existing, and doing business under, and by virtue of, the laws of the State of Texas, with its office and principal place of business located at 1929 Allen Parkway, Houston, Texas 77019.

2. Respondent Stewart Enterprises, Inc., is a corporation organized, existing, and doing business under, and by virtue of, the laws of the State of Louisiana, with its office and principal place of business located at 1333 South Clearview Parkway, Jefferson, Louisiana 70121.

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

ORDER

I.

IT IS HEREBY ORDERED that, as used in this Hold Separate Order, the following definitions, and all other definitions used in the Consent Agreement and Decision and Order, shall apply:

A. "SCI" means Service Corporation International, its directors, officers, employees, agents, representatives, successors, and assigns; and the subsidiaries, divisions, groups, and affiliates in each case controlled by Service Corporation International (including, after the Acquisition, Stewart), and the respective directors, officers, employees, agents, representatives, successors, and assigns of each.

B. "Stewart" means Stewart Enterprises, Inc., its directors, officers, employees, agents, representatives, successors, and assigns; and the subsidiaries, divisions, groups, and affiliates in each case controlled by Stewart Enterprises, Inc., and the respective directors, officers, employees, agents, representatives, successors, and assigns of each.

C. "Commission" means the Federal Trade Commission.

D. "Acquisition" means the proposed acquisition described in the Agreement and Plan of Merger among Service Corporation International, RIO Acquisition Corp. and Stewart Enterprises, Inc., dated as of May 28, 2013.

E. "Acquisition Date" means the date the Acquisition is consummated.

F. "Cemetery Services" means all activities relating to the promotion, marketing, sale, and provision of property, goods and services, to provide for the final disposition of human remains in a cemetery, whether

by burial, entombment in a mausoleum or crypt, disposition in a niche, or scattering of cremated remains on the cemetery grounds.

G. "Confidential Information" means competitively sensitive, proprietary, and all other business information of any kind, including any and all of the following information:

1. all information that is a trade secret under applicable trade secret or other law;

2. all information concerning product specifications, data, know-how, formulae, compositions, processes, designs, sketches, photographs, graphs, drawings, samples, inventions and ideas, past, current and planned research and development, current and planned manufacturing or distribution methods and processes, customer lists, current and anticipated customer requirements, price lists, market studies, business plans, software, and computer software and database technologies, systems, structures, and architectures;

3. all information concerning the relevant business (which includes historical and current financial statements, financial projections and budgets, tax returns and accountants' materials, historical, current and projected sales, capital spending budgets and plans, business plans, strategic plans, marketing and advertising plans, publications, client and customer lists and files, contracts, the names and backgrounds of key personnel and personnel training techniques and materials); and

4. all notes, analyses, compilations, studies, summaries, and other material to the extent containing or based, in whole or in part, upon any of the information described above;

Provided, however, that Confidential Information shall not include information that (i) was, is, or becomes generally available to the public other than as a result of a breach of this Order; (ii) was or is developed independently of and without reference to any Confidential Information; or (iii) was available, or becomes available, on a non-confidential basis from a third party not bound by a confidentiality agreement or any legal, fiduciary, or other obligation restricting disclosure.

H. "Decision and Order" means the:

1. Proposed Decision and Order contained in the Consent Agreement in this matter until the issuance and service of a final Decision and Order by the Commission, and

2. Final Decision and Order issued by the Commission following the issuance and service of a final Decision and Order by the Commission.

I. "Direct Cost" means the actual cost of labor, including employee benefits, materials, resources, travel expenses, services, the actual cost of any third-party charges, and other expenditures to the extent the costs are directly incurred to provide the relevant assistance or service.

J. "Divestiture Agreement" means any agreement between Respondents (or between a Divestiture Trustee) and an Acquirer to divest the Divestiture Assets, or otherwise to accomplish the requirements of the Decision and Order, and all amendments, exhibits, attachments, agreements and schedules thereto, that have been approved by the Commission to accomplish the requirements of the Decision and Order.

K. "Divestiture Assets" means the assets defined in Paragraph I.M. of the Decision and Order.

L. "Divestiture Business" means the business defined in Paragraph I.N. of the Decision and Order.

M. "Divestiture Business Employee" means any individual (i) who is or was employed by Respondents on a full-time, part-time, or contract basis as of the Acquisition Date and (ii) whose job responsibilities related primarily to the Divestiture Business at any time as of and after the date of the announcement of the Acquisition.

N. "Employee Information" means employment information relating to any Divestiture Business Employee, to the extent permitted by law, including, but not limited to, name, job title or position, date of hire, description of job responsibilities, salary or current wages, the most recent bonus paid, employment status (*i.e.*, active or on leave or disability; full-time or part-time; contract), any other material terms and conditions of employment in regard to such employee that are not otherwise generally available to similarly situated employees, and employee benefit plans.

O. "Final Report" means the report described in Paragraph III.C.(ii) of this Hold Separate Order.

P. "Funeral Services" means all activities relating to the promotion, marketing, sale, and provision of funeral services and funeral goods, including, but not limited to, goods and services used to remove, care for, and prepare bodies for burial, cremation, or other final disposition; and goods and services used to arrange, supervise, or conduct the funeral ceremony or final disposition of human remains.

Q. "Hold Separate Assets" means the Divestiture Assets relating to the operation of the Divestiture Business at the locations identified in Appendix A of this Hold Separate Order.

R. "Hold Separate Business" means (i) the Hold Separate Assets, (ii) the Hold Separate Employees, and (iii) the Divestiture Business conducted at the locations identified in Appendix A of this Hold Separate Order.

S. "Hold Separate Employees" means the Divestiture Business Employees identified on the organizational chart attached to this Hold Separate Order as Confidential Appendix B.

T. "Hold Separate Manager(s)" means the individual(s) identified in Paragraph IV.A. of this Hold Separate Order.

U. "Hold Separate Trustee" means the individual identified in Paragraph III.A. of this Hold Separate Order.

V. "Key Employee" means any (i) funeral home Divestiture Businesses Employee whose job title is funeral director, location manager, or other job title with responsibilities similar to those of funeral director or location manager, and (ii) cemetery Divestiture Businesses Employee whose job responsibilities include management of a cemetery.

W. "Person" means any individual, partnership, corporation, business trust, limited liability company, limited liability partnership, joint stock company, trust, unincorporated association, joint venture, or other entity or a governmental body.

X. "Preparation Services" means transportation of human remains, embalming, cosmetizing, and other preparation of human remains for a funeral service, burial service, or cremation as well as the cremation of human remains.

Y. "Prospective Acquirer" means a Person that Respondents (or the Divestiture Trustee) intend to submit to the Commission for its prior approval to

acquire Divestiture Assets pursuant to Paragraph II (or Paragraph IV) of the Decision and Order.

Z. "Respondents" means SCI and Stewart, individually and collectively; *provided, however,* that after the Acquisition Date, Respondents shall mean SCI.

AA. "Support Services" means Preparation Services, administrative and technical services that Respondents provide to the Divestiture Business and Divestiture Assets that are not performed by employees who are permanently located at any of the Divestiture Businesses, including, but not limited to (i) human resources and administrative services, (ii) federal and state regulatory compliance and policy development services, (iii) environmental health and safety services, (iv) financial accounting services, (v) preparation of tax returns, (vi) audit services, (vii) information technology support services, (viii) processing of accounts payable and accounts receivable, (ix) technical support, (x) procurement of supplies, (xi) maintenance and repair of facilities, (xii) legal services, or (xiii) other support services as needed to operate the Hold Separate Business in the same manner as before the Acquisition Date.

BB. "Support Services Employee" means any individual employed by Respondents who pro-vides Support Services to the Hold Separate Business pursuant to Paragraph V.C. of this Hold Separate Order.

II.

IT IS FURTHER ORDERED that from the Acquisition Date until the date that Respondents (or a Divestiture Trustee) have divested the Hold Separate Assets, Respondents shall:

A. Hold the Hold Separate Business separate, apart, and independent of Respondents' other businesses and assets as required by this Hold Separate Order and shall vest the Hold Separate Business with all rights,

powers, and authority necessary to conduct its business; and

B. Not exercise direction or control over, or influence directly or indirectly, the Hold Separate Business or any of its operations, the Hold Separate Trustee, or the Hold Separate Managers except to the extent that Respondents must exercise direction and control over the Hold Separate Business as is necessary to assure compliance with this Hold Separate Order, the Consent Agreement, the Decision and Order, and all applicable laws.

III.

IT IS FURTHER ORDERED that:

A. At any time after Respondents sign the Consent Agreement, the Commission may appoint Paul A. Houston to serve as Hold Separate Trustee.

B. Respondents shall enter into an agreement with the Hold Separate Trustee, subject to the prior approval of the Commission, that (i) shall become effective no later than one (1) day after the Acquisition Date, and (ii) transfers to and confers upon the Hold Separate Trustee all rights, powers, and authority necessary to permit the Hold Separate Trustee to perform his duties and responsibilities pursuant to this Hold Separate Order in a manner consistent with the purposes of this Hold Separate Order and the Decision and Order, and in consultation with Commission staff, including:

1. The Hold Separate Trustee shall be responsible for (i) monitoring the organization of the Hold Separate Business, (ii) supervising the management of the Hold Separate Business by the Hold Separate Managers, (iii) maintaining the independence of the Hold Separate Business and Hold Separate Managers, and (iv) monitoring Respondents' compliance with its obligations

under this Hold Separate Order and the Decision and Order, and (v) shall act in a fiduciary capacity for the benefit of the Commission;

2. Subject to all applicable laws and regulations, the Hold Separate Trustee shall have full and complete access to all personnel, books, records, documents, and facilities of the Hold Separate Business, and to any other relevant information as the Hold Separate Trustee may reasonably request including, but not limited to, all documents and records kept by Respondents in the ordinary course of business that relate to the Hold Separate Business. Respondents shall develop such financial or other information as the Hold Separate Trustee may reasonably request and shall cooperate with the Hold Separate Trustee;

3. The Hold Separate Trustee (i) shall serve at the expense of Respondents and without bond or other security, on reasonable and customary terms and conditions commensurate with the Hold Separate Trustee's experience and responsibilities, and (ii) shall have the authority to employ, at the expense of Respondents, such consultants, accountants, attorneys, and other representatives and assistants as are reasonably necessary to carry out the Hold Separate Trustee's duties and responsibilities;

4. Respondents shall indemnify the Hold Separate Trustee and hold him harmless against any losses, claims, damages, liabilities, or expenses arising out of, or in connection with, the performance of his duties, including all reasonable fees of counsel and other expenses incurred in connection with the preparation for, or defense of, any claim, whether or not resulting in any liability, except to the extent that such losses, claims, damages, liabilities, or expenses result from the Hold Separate Trustee's gross negligence or willful misconduct; and

5. Respondents may require the Hold Separate Trustee and each of the Hold Separate Trustee's consultants, accountants, attorneys, and other representatives and assistants to sign an appropriate confidentiality agreement; *provided, however,* that such agreement shall not restrict the Hold Separate Trustee from providing any information to the Commission.

C. The Hold Separate Trustee shall report in writing to the Commission (i) every thirty (30) days after the Acquisition Date, (ii) no later than ten (10) days after Respondents have completed their obligations under Paragraphs II.A. and II.F. of the Decision and Order; and (iii) at such other time as Commission staff may request, concerning Respondents' compliance with this Hold Separate Order and the Decision and Order.

D. The Hold Separate Trustee shall serve until termination of this Hold Separate Order; *provided, however,* that if the Hold Separate Trustee ceases to act or fails to act diligently and consistently with the purposes of this Hold Separate Order, the Commission may appoint a substitute Hold Separate Trustee, subject to the consent of Respondents, which consent shall not be unreasonably withheld:

1. If Respondents have not opposed, in writing, including the reasons for opposing, the selection of the substitute Hold Separate Trustee within five (5) days after notice by the staff of the Commission to Respondents of the identity of any substitute Hold Separate Trustee, then Respondents shall be deemed to have consented to the selection of the proposed substitute trustee; and

2. Respondents shall, no later than five (5) days after the Commission appoints a substitute Hold Separate Trustee, enter into an agreement with the substitute Hold Separate Trustee that, subject to the approval of the Commission, confers on the

substitute Hold Separate Trustee all the rights, powers, and authority necessary to permit the substitute Hold Separate Trustee to perform his or her duties and responsibilities pursuant to this Hold Separate Order on the terms and conditions as provided in this Paragraph III.

E. The Commission may extend or modify the duties of the Hold Separate Trustee as may be necessary or appropriate to accomplish the purposes of this Hold Separate Order or the Decision and Order.

IV.

IT IS FURTHER ORDERED that:

A. No later than one (1) day after the Acquisition Date, Respondents shall appoint one or more individuals to serve as Hold Separate Managers (collectively the "Hold Separate Managers").

B. Respondents shall enter into an agreement with the Hold Separate Managers that (i) shall become effective no later than one (1) day after the Acquisition Date, and (ii) subject to the approval of the Hold Separate Trustee, in consultation with the Commission staff, transfers all rights, powers, and authority necessary to permit the Hold Separate Managers to perform their duties on the terms set forth in this Hold Separate Order:

1. The Hold Separate Managers shall manage the Hold Separate Business (i) in the ordinary course of business consistent with past practices and pursuant to current business plans, (ii) independently of the management of Respondents and their other businesses, and (iii) under the exclusive direction of the Hold Separate Trustee, to whom the Hold Separate Managers shall report directly.

2. Respondents shall provide the Hold Separate Managers with reasonable financial incentives to undertake this position. Such incentives shall include a continuation of all employee benefits, including regularly scheduled raises, bonuses, vesting of retirement benefits (as permitted by law), and additional incentives as may be necessary;

3. The Hold Separate Managers (i) shall serve at the expense of Respondents and without bond or other security, on reasonable and customary terms commensurate with the Hold Separate Managers' experience and responsibilities; and (ii) shall have the authority to employ, in consultation with the Hold Separate Trustee, at the expense of Respondents, such consultants, accountants, attorneys, and other representatives and assistants as are reasonably necessary to assist the Hold Separate Managers in carrying out their duties and responsibilities;

4. Respondents shall indemnify the Hold Separate Managers and hold them harmless against any losses, claims, damages, liabilities, or expenses arising out of, or in connection with, the performance of their duties, including all reasonable fees of counsel and other expenses incurred in connection with the preparation for, or defense of any claim, whether or not resulting in any liability, except to the extent that such liabilities, losses, damages, claims, or expenses result from the Hold Separate Managers' gross negligence or willful misconduct; and

5. Respondents shall assure that Commission staff shall have access to, and be permitted to communicate with, contact, and be contacted by the Hold Separate Managers without prior notice to Respondents or the presence of Respondents'

employees or counsel, except as expressly required by law.

C. The Hold Separate Managers shall manage the Hold Separate Business in the ordinary course of business consistent with past practices and pursuant to current business plans. The Hold Separate Managers shall, among other requirements:

1. Use best efforts to maintain and increase sales in the ordinary course of the Hold Separate Business and at levels set forth in current plans for the Hold Separate Business;

2. Use best efforts to maintain the relations and good will with suppliers, customers, landlords, creditors, agents, and others having business relationships with the Hold Separate Business; and

3. Not make any material changes in the ongoing operations or business plans of the Hold Separate Business, except with the approval of the Hold Separate Trustee, in consultation with the Commission staff.

D. The Hold Separate Managers shall supervise the activities of the Hold Separate Employees and shall have the authority, in consultation with the Hold Separate Trustee, to staff the Hold Separate Business with sufficient employees to maintain the viability and competitiveness of the Hold Separate Business. The Hold Separate Managers shall, among other requirements:

1. Replace any departing or departed Hold Separate Employee with an individual who has similar experience and expertise or determine not to replace such departing or departed employee;

2. Remove any Hold Separate Employee who ceases to act or fails to act diligently and consistent with

the purposes of this Hold Separate Order and replace such employee with another individual of similar experience or skills;

3. Provide each Hold Separate Employee with reasonable financial incentives, if necessary, including continuation of all employee benefits and regularly scheduled raises and bonuses, to continue in his or her position pending divestiture of the Divestiture Assets;

4. Obtain from each Hold Separate Employee a signed statement that the individual will keep confidential all Confidential Information relating to the Hold Separate Business; and

5. Not permit any Hold Separate Employee to (i) be involved in any way in the operations of Respondents' other businesses (for clarification, the Hold Separate Manager may permit a Hold Separate Business to provide Preparation Services for Respondent's other businesses in the same fashion as those Preparation Services were provided by the applicable Hold Separate Business prior to the Acquisition Date) or (ii) receive or have access to, or use or continue to use, any Confidential Information relating to Respondents' other businesses.

E. The Hold Separate Managers shall allow the Acquirer or Prospective Acquirer an opportunity to identify, recruit, and hire any Divestiture Business Employee, including complying as appropriate with the obligations set forth in Paragraph V.F. of this Hold Separate Order and Paragraph II.H. of the Decision and Order.

F. The Hold Separate Managers shall serve until termination of the Hold Separate Order; *provided, however,* that the Hold Separate Managers may be removed for cause by the Hold Separate Trustee in

consultation with the Commission staff. If a Hold Separate Manager is removed, resigns, or otherwise ceases to act as Hold Separate Manager, Respondents shall, within three (3) days after such termination, (i) appoint a substitute Hold Separate Manager and (ii) enter into an agreement with the substitute Hold Separate Manager, subject to the approval of the Hold Separate Trustee and in consultation with Commission staff, on the terms and conditions as provided in Paragraph IV. of this Hold Separate Order.

V.

IT IS FURTHER ORDERED that:

A. Respondents shall not take any affirmative action, or fail to take any action within its control (other than conducting Respondents' own businesses in the ordinary course of business), as a result of which the viability, competitiveness, or marketability of the Hold Separate Business would be diminished or the divestiture of the Divestiture Assets jeopardized.

B. Respondents shall cooperate with, and take no action to interfere with the ability of, the Hold Separate Trustee, Hold Separate Managers, any Hold Separate Employee, or any Support Services Employee to perform their duties and responsibilities pursuant to this Hold Separate Order.

C. Respondents shall continue to provide, or offer to provide, Support Services and goods to the Hold Separate Business as are being provided to such business by Respondents as of the date the Consent Agreement is signed by Respondents:

1. For Support Services and goods that Respondents provided to the Hold Separate Business as of the date Respondents sign the Consent Agreement, Respondents may charge no more than the same price, if any, charged by Respondents for such

Support Services and goods as of the date the Consent Agreement is signed by Respondents;

2. For any other Support Services and goods that Respondents may provide to the Hold Separate Business, Respondents may charge no more than Respondents' Direct Cost for the same or similar Support Services and goods; and

3. Notwithstanding the above, the Hold Separate Business shall have, at the option of the Hold Separate Managers and in consultation with the Hold Separate Trustee, the ability to acquire Support Services and goods from third parties unaffiliated with Respondents.

D. Respondents shall provide the Hold Separate Business with sufficient financial and other resources as are appropriate in the judgment of the Hold Separate Trustee to:

1. Operate the Hold Separate Business at least at the current rate of operation and staffing (including efforts to generate new business) and to carry out, at least at their scheduled pace, all business plans and promotional activities in place prior to the Acquisition;

2. Perform all maintenance to, and replacements or remodeling of, the assets of the Hold Separate Business in the ordinary course of business and in accordance with past practice and current plans;

3. Carry on such capital projects, physical plant improvements, and business plans as are already underway or planned for which all necessary regulatory and legal approvals have been obtained, including but not limited to existing or planned renovation, remodeling, or expansion projects; and

4. Maintain the viability, competitiveness, and marketability of the Hold Separate Business.

Such financial resources to be provided to the Hold Separate Business shall include, but shall not be limited to, (i) general funds, (ii) capital, (iii) working capital, and (iv) re-imbursement for any operating losses, capital losses, or other losses; *provided, however*, that, consistent with the purposes of the Decision and Order and in consultation with the Hold Separate Trustee, the Hold Separate Managers may reduce in scale or pace any capital or research and development project, or substitute any capital or research and development project for another of the same cost.

E. Respondents shall not permit:

1. The Hold Separate Managers or any Hold Separate Employee to be involved, in any way, in the operations of any of Respondents' businesses other than the Hold Separate Business (for clarification, the Hold Separate Manager may permit, and a Hold Separate Employee may provide, Preparation Services for Respondents' businesses, other than the Hold Separate Businesses in the same fashion as those Preparation Services were provided by the applicable Hold Separate Business prior to the Acquisition Date); or

2. Any of its employees, officers, agents, or directors (i) to be involved in the operations of the Hold Separate Business, except to the extent otherwise provided in this Hold Separate Order, (ii) to disclose Confidential Information relating to Respondents' retained businesses to the Hold Separate Managers or any Hold Separate Employee, or (iii) receive or have access to, or use or continue to use, any Confidential Information relating to the Hold Separate Business.

F. Respondents shall allow an Acquirer or Prospective Acquirer an opportunity to recruit and employ any Divestiture Business Employee relating to the relevant Divestiture Business and Divestiture Assets under the following terms and conditions:

1. No later than ten (10) days after a request from an Acquirer or Prospective Acquirer, or Commission staff, Respondents shall (i) identify each Divestiture Business Employee, (ii) provide the Employee Information for each Divestiture Business Employee; (iii) allow the Acquirer or Prospective Acquirer an opportunity to meet personally with and interview such employee outside the presence or hearing of Respondents, and (iv) allow the Acquirer to inspect the personnel files and other documentation relating to any such employee, to the extent permissible under applicable laws;

2. Respondents shall (i) not offer any incentive to any Divestiture Business Employee to decline employment with the Acquirer or Prospective Acquirer, (ii) remove any contractual impediments with Respondents that may deter any Divestiture Business Employee from accepting employment with the Acquirer or Prospective Acquirer, including, but not limited to, any non-compete or confidentiality provisions of employment or other contracts with Respondents that would affect the ability of such employee to be employed by the Acquirer or Prospective Acquirer, and (iii) not otherwise interfere with the recruitment, hiring, or employment of any Divestiture Business Employee by the Acquirer or Prospective Acquirer;

3. Respondents shall (i) vest all current and accrued pension benefits as of the date of transition of employment with the Acquirer for any Divestiture Business Employee who accepts an offer of employment from the Acquirer or Prospective

Acquirer no later than thirty (30) days from the date Respondents divest the relevant assets and, if necessary, (ii) provide any Key Employee to whom the Acquirer or Prospective Acquirer has made an offer of employment with reasonable financial incentives to accept a position with the Acquirer or Prospective Acquirer at the time of divestiture of the corresponding businesses and assets; and

4. For a period of two (2) years commencing at the date of divestiture applicable to the relevant business within the Divestiture Businesses, Respondents shall not, directly or indirectly, solicit, induce, or attempt to solicit or induce any Divestiture Business Employee who has accepted offers of employment with the Acquirer, or who is employed by the Acquirer, to terminate their employment relationship with the Acquirer; *provided, however*, a violation of this provision will not occur if: (1) the individual's employment has been terminated by the Acquirer, (2) Respondents advertise for employees in newspapers, trade publications, or other media not targeted specifically at the employees, or (3) Respondents hire employees who apply for employment with Respondents, so long as such employees were not solicited by Respondents in violation of this paragraph.

G. No later than five (5) days after the Acquisition Date, Respondents shall:

1. Establish and implement written procedures, subject to the approval of the Hold Separate Trustee, covering the management, maintenance, and independence of the Hold Separate Business consistent with the provisions of this Hold Separate Order; and

2. Circulate to each Hold Separate Employee and to individuals who are employed in Respondents'

businesses that compete with the Hold Separate Business, a notice of this Hold Separate Order and the Consent Agreement, in a form approved by the Hold Separate Trustee and in consultation with Commission staff.

VI.

IT IS FURTHER ORDERED that:

A. Respondents shall (i) keep confidential (including as to Respondents' employees) and (ii) not use for any reason or purpose, any Confidential Information received or maintained by Respondents relating to the Divestiture Business or Divestiture Assets; *provided, however,* that Respondents may disclose or use such Confidential Information in the course of:

1. Performing their obligations or as permitted under this Order, the Hold Separate Order, or any Divestiture Agreement (Hold Separate Employees and Support Services Employees shall be deemed to be performing obligations under this Hold Separate Order); or

2. Complying with financial reporting requirements, obtaining legal advice, de-fending legal claims, investigations, or enforcing actions threatened or brought against the Divestiture Business or Divestiture Assets, or as required by law.

B. If disclosure or use of any Confidential Information is permitted to Respondents' employees or to any other Person under Paragraph VI.A. of this Hold Separate Order, Respondents shall limit such disclosure or use (i) only to the extent such information is required, (ii) only to those employees or Persons who require such information for the purposes permitted under Paragraph VI.A., and (iii) only after such employees or Persons have signed an agreement to maintain the confidentiality of such information.

C. Respondents shall enforce the terms of this Paragraph VI. as to its employees or any other Person, and take such action as is necessary to cause each of its employees and any other Person to comply with the terms of this Paragraph VI., including implementation of access and data controls, training of its employees, and all other actions that Respondents would take to protect its own trade secrets and proprietary information.

VII.

IT IS FURTHER ORDERED that:

A. The Commission may require that the Hold Separate Trustee and the Hold Separate Managers, as well as each of their consultants, accountants, attorneys, and other representatives and assistants, to sign an appropriate agreement to maintain the confidentiality of any information and materials obtained from (i) the Commission or (ii) the Hold Separate Business in connection with performance of such individuals' duties.

B. Upon the request of the Hold Separate Trustee or Commission staff, Respondents shall obtain an agreement in writing, from any employee other than those identified in Paragraph VI.B.(iii) of this Order, to maintain the confidentiality of any Confidential Information pertaining to the Hold Separate Business.

VIII.

IT IS FURTHER ORDERED that the Commission may, on its own initiative or at the request of the Hold Separate Trustee, issue such additional orders or directions as may be neces-sary or appropriate to assure compliance with the requirements of this Hold Separate Order.

IX.

IT IS FURTHER ORDERED that from the date this Hold Separate Order is issued until the Acquisition Date, Respondents shall take all actions necessary to maintain the full economic viability, marketability, and competitiveness of the Divestiture Assets and Divestiture Business, and to prevent the destruction, removal, wasting, deterioration, or impairment of the Divestiture Assets and Divestiture Business (except for ordinary wear and tear).

X.

IT IS FURTHER ORDERED that the purpose of this Hold Separate Order is to (i) preserve the assets and businesses within the Hold Separate Business as a viable, competitive, and ongoing businesses independent of Respondents until the divestitures required by the Decision and Order is achieved; (ii) assure that no Confidential Information is exchanged between Respondents and the Hold Separate Business, except in accordance with the provisions of this Hold Separate Order; (iii) prevent interim harm to competition pending the divestitures and other relief, and (iv) maintain the full economic viability, marketability, and competitiveness of the Divestiture Business and Divestiture Assets, and prevent the destruction, removal, wasting, deterioration, or impairment of any of the Divestiture Assets, except for ordinary wear and tear.

XI.

IT IS FURTHER ORDERED that:

A. Respondents shall file a verified written report with the Commission setting forth in detail the manner and form in which they intend to comply, are complying, and have complied with this Order to Hold Separate and the Decision and Order no later than thirty (30) days from the date this Hold Separate Order is issued and every thirty (30) days thereafter until Respondents have fully complied with Paragraphs II.A. and II.F. of the Decision and Order.

B. With respect to any divestiture required by Paragraph II.A. of the Decision and Order, Respondents shall include in their compliance reports (i) the status of the divestiture and transfer of the Divestiture Assets; (ii) a description of all Transitional Services provided to each Acquirer; (iii) a description of all substantive contacts with each Acquirer; and (iv) any other actions taken by Respondents relating to compliance with the terms of this Order and/or any Divestiture Agreement, and (v) as applicable, a statement that any divestiture approved by the Commission has been accomplished, including a description of the manner in which Respondents completed such divestiture and the date the divestiture was accomplished.

XII.

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

A. Any proposed dissolution of Respondents;

B. Any proposed acquisition, merger, or consolidation of Respondents; or

C. Any other change in the Respondents, including, but not limited to, assignment and the creation or dissolution of subsidiaries, if such change might affect compliance obligations arising out of the Order.

XIII.

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

A. Access, during business office hours of the Respondents and in the presence of counsel, to all

facilities and access to inspect and copy all books, ledgers, accounts, correspondence, memoranda, and other records and documents in the possession or under the control of Respondents related to compliance with this Hold Separate Order, which copying services shall be provided by Respondents at their expense; and

B. To interview officers, directors, or employees of Respondents, who may have counsel present, regarding such matters.

XIV.

IT IS FURTHER ORDERED that this Hold Separate Order shall terminate at the earlier of:

A. Three (3) business days after the Commission withdraws its acceptance of the Consent Agreement pursuant to the provisions of Commission Rule 2.34, 16 C.F.R. § 2.34; or

B. The later of the day after (i) the Hold Separate Trustee completes his Final Report relating to the completion of Respondents' obligations under Paragraphs II.A. and II.F. of the Decision and Order or (ii) the Commission otherwise directs that this Hold Separate Order is terminated.

By the Commission.

Appendix A

SCI Properties To Be Held Separate

State	Area	Owner	FH/ CEM	Property Name & Address
Alabama	Mobile	SCI	FH	Mobile Memorial Gardens Funeral Home 6040 Three Notch Road Mobile, Alabama 36619
California	Los Angeles (Long Beach)	SCI	FH	Lubyen Family Dilday-Motell Mortuary 5161 Arbor Road Long Beach, California 90808
California	Los Angeles (San Fernando Valley)	SCI	FH	Funeraria Del Angel JT Oswald 1001 North Maclay San Fernando, California 91340
California	Los Angeles (East Los Angeles County)	SCI	FH	Custer Christiansen Mortuary 124 S. Citrus Avenue Covina, California 91723
California	San Diego (Northern)	SCI	FH	Clairemont Mortuary 4266 Mt. Abernathy Avenue San Diego, California 92117
California	San Diego (Southern and Eastern)	SCI	FH/ CEM	Greenwood Memorial Park & Mortuary **(c)** 4300 Imperial Avenue San Diego, California 92113
Florida	Clearwater	SCI	FH	Moss Feaster Funeral Home – Dunedin 1320 Main Street Dunedin, Florida 34698
Florida	Clearwater	SCI	FH	Moss Feaster Funeral Home – Belcher Road 693 South Belcher Road Clearwater, Florida 33764
Florida	Miami-Dade (Miami)	SCI	FH	Funeraria Memorial Plan – San Jose 250 East 4th Avenue Hialeah, Florida 33010
Florida	Miami-Dade (Miami)	SCI	FH	Funeraria Memorial Plan – Westchester 9800 SW 24th Street Miami, Florida 33165
Florida	Miami (Homestead)	SCI	FH	Branam Funeral Home 809 North Krome Avenue Homestead, Florida 33030

Order to Hold Separate

State	Area	Owner	FH/ CEM	Property Name & Address
Florida	Miami-Dade	SCI	CEM	Memorial Plan Flagler Memorial Park 5301 West Flagler Street Miami, Florida 33134
Florida	Miami-Dade	SCI	CEM	Memorial Plan Miami Memorial Park 6200 SW 77th Avenue Miami, Florida 33143
Florida	Orlando	SCI	FH	Carey-Hand Cox Parker Funeral Home 1350 West Fairbanks Avenue Winter Park, Florida 32789
Florida	Orlando	SCI	FH	Colonial Chapel/Carey Hand 2811 East Curry Ford Road Orlando, Florida 32806
Florida	Orlando	SCI	FH	Collison Carey Hand Funeral Home 1148 East Plant Street Winter Garden, Florida 34787
Florida	Orlando (West)	SCI	CEM	Orlando Memorial Gardens 5264 Ingram Road Apopka, Florida 32703
Florida	Springhill/ Hudson	SCI	CEM	Grace Memorial Gardens & Funeral Home **(c)** 17007 US Highway 19 North Hudson, Florida 34667
Florida	Tampa	SCI	CEM	Sunset Funeral Home & Memory Gardens **(c)** 11005 N US Highway 301 Thonotosassa, Florida 33592
Louisiana	New Orleans	SCI	FH	Schoen Funeral Home 3827 Canal Street New Orleans, Louisiana 70119
Louisiana	New Orleans	SCI	FH	Tharp-Sontheimer-Tharp Funeral Home 1600 North Causeway Boulevard Metairie, Louisiana 70001
Louisiana	New Orleans	SCI	FH/ CEM	Garden of Memories Funeral Home & Cemetery **(c)** 4900 Airline Drive Metairie, Louisiana 70001
Maryland	Washington, DC/Maryland Suburbs	SCI	FH	Edward Sagel Funeral Direction Inc. 1091 Rockville Pike Rockville, Maryland 20852

State	Area	Owner	FH/ CEM	Property Name & Address
Mississippi	West Jackson	SCI	FH	Wright & Ferguson Funeral Home 106 Cynthia Street Clinton, Mississippi 39056
Mississippi	West Jackson	SCI	FH	Wright & Ferguson Funeral Home 201 Hinds Boulevard Raymond, Mississippi 39154
Missouri	North Kansas City	SCI	FH/ CEM	Mount Moriah Terrace Park Funeral Home & Cemetery **(c)** 801 Northwest 108th Street Kansas City, Missouri 64155
South Carolina	Columbia	SCI	FH	Caughman-Harman St. Andrew's Chapel/Bush River Memorial Gardens **(c)** 5400 Bush River Road Columbia, South Carolina 29212
Tennessee	Knoxville	SCI	CEM	New Gray Cemetery 2724 Western Avenue Knoxville, Tennessee 37921
Tennessee	Knoxville	SCI	CEM	Greenwood Cemetery 3500 Tazewell Pike Knoxville, Tennessee 37918
Texas	Dallas (South)	SCI	CEM	Lincoln Funeral Home & Cemetery **(c)** 8100 Fireside Drive Dallas, Texas 75217
Texas	Dallas (South)	SCI	CEM	Lincoln Memorial Park Cemetery 1311 Murdock Road Dallas, Texas 75217
Virginia	Richmond (South)	SCI	CEM	Sunset Memorial Park 2901 West Hundred Road Chester, Virginia 23831

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Stewart Properties To Be Held Separate

State	Area	Owner	FH/ CEM	Property Name & Address
California	Auburn	Stewart	FH	Lasilla Funeral Chapel – Auburn 551 Grass Valley Highway Auburn, California 95603
California	Palmdale/ Lancaster	Stewart	FH	Halley-Olsen-Murphy Funerals & Cremations 44831 N. Cedar Avenue Lancaster, California 93534
California	Palmdale/ Lancaster	Stewart	FH	Antelope Valley Cremation Service 619 West Milling Lancaster, California 93534
Florida	St. Petersburg/ Largo	Stewart	CEM	Memorial Park Funeral Home & Cemetery **(c)** 5750 49th Street North St. Petersburg, Florida 33709
Florida	St. Petersburg/ Largo	Stewart	CEM	Woodlawn Memory Gardens 101 58th Street South St. Petersburg, Florida 33707
Florida	Jacksonville	Stewart	FH/CEM	Arlington Park Cemetery/Funeral Home **(c)** 6920 Lone Star Road Jacksonville, Florida 32211
Florida	Ocala	Stewart	FH	Roberts Funeral Home 606 Southwest 2nd Avenue Ocala, Florida 34471
Florida	Ocala	Stewart	FH	Roberts Funeral Home – Bruce Chapel East 2739 SSE Maricamp Road Ocala, Florida 34471
Florida	Ocala	Stewart	FH	Roberts Funeral Home – Bruce Chapel West 6241 Southwest State Road 200 Ocala, Florida 34476
Florida	Ocala	Stewart	CEM	Good Shepherd Memorial Gardens 5050 SW 20th Street Ocala, Florida 32111
Florida	Orlando (West)	Stewart	CEM	Highland Memory Gardens 3329 East Semoran Boulevard Apopka, Florida 32703

State	Area	Owner	FH/ CEM	Property Name & Address
Florida	Port St. Lucie	Stewart	FH/ CEM	Forest Hills Palm City Chapel & Forest Hills Memorial Park **(c)** 2001 S.W. Murphy Road Palm City, FL 34990
Florida	Tampa	Stewart	FH	Boza & Roel Funeral Home 4730 North Armenia Avenue Tampa, Florida 33603
Georgia	Atlanta	Stewart	CEM	Cheatham Hill Memorial Park/Southern Cremations & Funerals **(c)** 1860 Dallas Highway SW Marietta, Georgia 30064
Georgia	Atlanta	Stewart	CEM	Holly Hill Memorial Park 359 West Broad Street Fairburn, Georgia 30213
Georgia	Atlanta	Stewart	CEM	Eastlawn Memorial Park 640 McGarity Road McDonough, Georgia 30252
Louisiana	New Orleans	Stewart	FH	Greenwood Funeral Home 5200 Canal Boulevard New Orleans, Louisiana 70124
Maryland	Annapolis	Stewart	CEM	Hillcrest Memorial Gardens 1911 Forest Drive Annapolis, Maryland 21401
Maryland	Baltimore	Stewart	CEM	Parkwood Cemetery 3310 Taylor Avenue Baltimore, Maryland 21234
Missouri	Overland Park, KS	Stewart	FH	Overland Park Chapel 8201 Metcalf Avenue Overland Park, Kansas 66204
Missouri	South Kansas City, KS/ Missouri	Stewart	FH/ CEM	Johnson County Funeral Chapel & Memorial Gardens **(c)** 11200 Metcalf Avenue Overland Park, Kansas 66210
North Carolina	New Bern	Stewart	FH	Pollack-Best Funerals & Cremations 2015 Neuse Boulevard New Bern, North Carolina 28560
North Carolina	High Point	Stewart	CEM	Floral Garden Memorial Park 1730 W. English Road High Point, North Carolina 27262

Order to Hold Separate

State	Area	Owner	FH/ CEM	Property Name & Address
North Carolina	Raleigh	Stewart	FH/ CEM	Montlawn Memorial Pk, Funerals & Cremations**(c)** 2911 South Wilmington Street Raleigh, North Carolina 27603
Pennsylvania	Philadelphia	Stewart	CEM	George Washington Memorial Park/Kirk & Nice Funeral Home, Inc. **(c)** 80 Stenton Avenue Plymouth Meeting, Pennsylvania 19462
Pennsylvania	Philadelphia	Stewart	CEM	Sunset Memorial Park/Kirk & Nice Suburban Chapel, Inc. **(c)** 333 County Line Road Feasterville, Pennsylvania 19053
South Carolina	Greenville	Stewart	FH/CEM	Cannon Memorial Pk, Funerals and Cremations **(c)** 1150 North Main Street Fountain Inn, South Carolina 29644
South Carolina	Greenville	Stewart	FH	Cannon Memorial Park, Funerals and Cremations – Jones Chapel 603 West Curtis Street Simpsonville, South Carolina 29681
Tennessee	Kingsport	Stewart	CEM	Oak Hill Memorial Park, Funerals and Cremations **(c)** 800 Truxton Drive Kingsport, Tennessee 37660
Tennessee	Nashville	Stewart	FH	Cole & Garrett Funeral Home 127 North Main Street Goodlettsville, Tennessee 37072
Texas	Dallas	Stewart	FH/ CEM	Restland Funeral Home & Cemetery **(c)** 13005 Greenville Avenue Dallas, Texas 75243
Texas	Southeast Fort Worth	Stewart	FH/ CEM	Emerald Hills Funeral Home & Cemetery **(c)** 500 Sublett Road Kennedale, Texas 76060
Texas	Houston	Stewart	CEM	South Park Funeral Home & Cemetery **(c)** 1310 North Main Street Pearland, Texas 77518
Texas	Houston	Stewart	CEM	San Jacinto Memorial Park & Funeral Home **(c)** 14659 East Freeway Houston, Texas 77015

State	Area	Owner	FH/ CEM	Property Name & Address
Virginia	Arlington-Alexandria	Stewart	FH	Everly Wheatley Funeral Home – Alexandria 1500 West Braddock Road Alexandria, Virginia 22302
Virginia	Arlington-Alexandria	Stewart	FH	Everly Community Funeral Care 6161 Leesburg Pike Falls Church, Virginia 22044
Virginia	Richmond (Northwest)	Stewart	CEM	Greenwood Memorial Gardens 12609 Patterson Avenue Richmond, Virginia 23238
West Virginia	Kearneysville	Stewart	CEM	Pleasant View Memory Gardens 2938 Charles Town Road Kearneysville, West Virginia 25430

Confidential Appendix B – Held Separate Employees

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

DECISION AND ORDER

The Federal Trade Commission, having initiated an investigation of the proposed acquisition by Respondent Service Corporation International ("SCI") of the outstanding voting securities of Respondent Stewart Enterprises, Inc. ("Stewart"), and Respondents having been furnished thereafter with a copy of a draft of complaint that the Bureau of Competition proposed to present to the Commission for its consideration and which, if issued by the Commission, would charge Respondents with violations of Section 7 of the Clayton Act, as amended, 15 U.S.C. § 18, and Section 5 of the Federal Trade Commission Act, as amended, 15 U.S.C. § 45; and

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

The Commission having thereafter considered the matter and having determined that it had reason to believe that Respondents have violated the said Acts, and that a complaint should issue stating its charges in that respect, and having thereupon issued its complaint and its Order to Hold Separate and Maintain Assets ("Hold Separate Order") 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 any comments received from 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 enters the following Decision and Order ("Order"):

1. Respondent Service Corporation International is a corporation organized, existing, and doing business under, and by virtue of, the laws of the State of Texas, with its corporate office and principal place of business located at 1929 Allen Parkway, Houston, Texas 77019.

2. Respondent Stewart Enterprises, Inc., is a corporation organized, existing, and doing business under, and by virtue of, the laws of the State of Louisiana, with its corporate office and principal place of business located at 1333 South Clearview Parkway, Jefferson, Louisiana 70121.

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

ORDER

I.

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

A. "SCI" means Service Corporation International, its directors, officers, employees, agents, representatives, successors, and assigns; and the subsidiaries, divisions, groups, and affiliates in each case controlled by Service Corporation International (including, after the Acquisition, Stewart) and the respective directors, officers, employees, agents, representatives, successors, and assigns of each.

B. "Stewart" means Stewart Enterprises, Inc., its directors, officers, employees, agents, representatives, successors, and assigns; and the subsidiaries, divisions, groups, and affiliates in each case controlled by Stewart Enterprises, Inc., and the respective directors,

officers, employees, agents, representatives, successors, and assigns of each.

C. "Commission" means the Federal Trade Commission.

D. "Acquirer" means any Person that receives the prior approval of the Commission to acquire any of the Divestiture Assets pursuant to this Order.

E. "Acquisition" means the proposed acquisition described in the Agreement and Plan of Merger among Service Corporation International, RIO Acquisition Corp. and Stewart Enterprises, Inc., dated as of May 28, 2013.

F. "Acquisition Date" means the date the Acquisition is consummated.

G. "Cemetery Services" means all activities relating to the promotion, marketing, sale, and provision of property, goods, and services, to provide for the final disposition of human remains in a cemetery, whether by burial, entombment in a mausoleum or crypt, disposition in a niche, or scattering of cremated remains on the cemetery grounds.

H. "Confidential Information" means competitively sensitive, proprietary, and all other business information of any kind, including any and all of the following information:

1. all information that is a trade secret under applicable trade secret or other law;

2. all information concerning product specifications, data, know-how, formulae, compositions, processes, designs, sketches, photographs, graphs, drawings, samples, inventions and ideas, past, current and planned research and development, current and planned manufacturing or distribution methods and processes, customer lists, current and

anticipated customer requirements, price lists, market studies, business plans, software and computer software and database technologies, systems, structures, and architectures;

3. all information concerning the relevant business (which includes historical and current financial statements, financial projections and budgets, tax returns and accountants' materials, historical, current and projected sales, capital spending budgets and plans, business plans, strategic plans, marketing and advertising plans, publications, client and customer lists and files, contracts, the names and backgrounds of key personnel and personnel training techniques and materials); and

4. all notes, analyses, compilations, studies, summaries and other material to the extent containing or based, in whole or in part, upon any of the information described above;

Provided, however, that Confidential Information shall not include information that (i) was, is, or becomes generally available to the public other than as a result of a breach of this Order; (ii) was or is developed independently of and without reference to any Confidential Information; or (iii) was available, or becomes available, on a non-confidential basis from a third party not bound by a confidentiality agreement or any legal, fiduciary or other obligation restricting disclosure.

I. "Contract" means any agreement, contract, lease, consensual obligation, promise or undertaking (whether written or oral and whether express or implied), whether or not legally binding; including, but not limited to, Pre-Need Contracts.

J. "Corporate Trade Names" means the following commercial names, trade names, "doing business as (d/b/a) names, registered and unregistered trademarks

and service marks: "Service Corporation International," "SCI," "Dignity" (including "Dignidad," "Dignite," and other translations of Dignity into languages other than English), "Dignity Memorial," "Alderwoods," "Keystone," "Key Memories," "Stewart," "Stewart Enterprises," "STEI," "SE," and "Simplicity Plan."

K. "Direct Cost" means the actual cost of labor, including employee benefits, materials, resources, travel expenses, services, the actual cost of any third-party charges, and other expenditures to the extent the costs are directly incurred to provide the relevant assistance or service.

L. "Divestiture Agreement" means any agreement between Respondents (or between a Divestiture Trustee) and an Acquirer to divest the Divestiture Assets, or otherwise to accomplish the requirements of this Order, and all amendments, exhibits, attachments, agreements, and schedules thereto, that have been approved by the Commission to accomplish the requirements of this Order.

M. "Divestiture Assets" means all of Respondents' right, title, and interest in and to all property and assets, real, personal or mixed, tangible and intangible, of every kind and description, wherever located, and any improvements or additions thereto, relating to operation of the Divestiture Business, including, but not limited to:

1. all real property interests (including fee simple interests and real property leasehold interests), including all easements, and appurtenances, together with all buildings and other structures, facilities, and improvements located thereon, owned, leased, or otherwise held;

2. all Tangible Personal Property, including any Tangible Personal Property removed from any

location of the Divestiture Business since the date of the announcement of the Acquisition, and not replaced, if such property is necessary to operate a Divestiture Business as a going concern, unless such Tangible Personal Property was removed in the ordinary course of business and has a replacement cost of less than $5,000;

3. all inventories;

4. all (i) trade accounts receivable and other rights to payment from customers and the full benefit of all security for such accounts or rights to payment, including all trade accounts receivable representing amounts receivable in respect of goods shipped or products sold or services rendered to customers, (ii) all other accounts or notes receivable and the full benefit of all security for such accounts or notes and (iii) any claim, remedy or other right related to any of the foregoing;

5. all Contracts and all outstanding offers or solicitations to enter into any Contract, and all rights thereunder and related thereto;

6. all consents, licenses, registrations, or permits issued, granted, given, or otherwise made available by or under the authority of any governmental body or pursuant to any legal requirement, and all pending applications therefor or renewals thereof, to the extent assignable;

7. all data and Records, including client and customer lists and Records, referral sources, research and development reports and Records, production reports and Records, service and warranty Records, equipment logs, operating guides and manuals, financial and accounting Records, creative materials, advertising materials, promotional materials, studies, reports, correspondence and other similar documents and Records, and copies

of all personnel Records (to the extent permitted by law);

8. all intangible rights and property, including Intellectual Property owned or licensed (as licensor or licensee) by Respondents, going concern value, goodwill, and telephone and telecopy listings;

9. all insurance benefits, including rights and proceeds; and

10. all rights relating to deposits and prepaid expenses, claims for refunds and rights to offset in respect thereof;

Provided, however, that the Divestiture Assets need not include any:

(i) Retained Assets;

(i) Retained Intellectual Property; and

(iii) Assets not needed by Acquirer and the Commission approves the divestiture required by Paragraph II.A. of this Order without such assets.

N. "Divestiture Business" means the provision of Funeral Services, Cemetery Services, or both, by Respondents prior to the Acquisition at the locations identified in Appendix A to this Order.

O. "Divestiture Business Employee" means any individual (i) who is or was employed by Respondents on a full-time, part-time, or contract basis as of the Acquisition Date and (ii) whose job responsibilities related primarily to the Divestiture Business at any time as of and after the date of the announcement of the Acquisition.

P. "Divestiture Date" means the date on which Respondents (or the Divestiture Trustee) close on any

transaction to divest any of the Divestiture Assets to an Acquirer.

Q. "Employee Information" means employment information relating to any Divestiture Business Employee, to the extent permitted by law, including, but not limited to, name, job title or position, date of hire, description of job responsibilities, salary or current wages, the most recent bonus paid, employment status (*i.e.*, active or on leave or disability; full-time or part-time; contract), any other material terms and conditions of employment in regard to such employee that are not otherwise generally available to similarly situated employees, and employee benefit plans.

R. "Funeral Services" means all activities relating to the promotion, marketing, sale, and provision of funeral services and funeral goods, including, but not limited to, goods and services used to remove, care for, and prepare bodies for burial, cremation, or other final disposition; and goods and services used to arrange, supervise, or conduct the funeral ceremony or final disposition of human remains.

S. "Hold Separate Business" means the business, assets, and employees identified in the Hold Separate Order that Respondents shall hold separate pursuant to the Hold Separate Order.

T. "Hold Separate Employees" means the Divestiture Business Employees identified in Paragraph I.S. of the Hold Separate Order.

U. "Intellectual Property" means all intellectual property, including (i) commercial names, all assumed fictional business names, trade names, "doing business as" (d/b/a names), registered and unregistered trademarks, service marks and applications; (ii) all patents, patent applications and inventions and discoveries that may be patentable; (iii) all registered and unregistered

copyrights in both published works and unpublished works; (iv) all rights in mask works; (v) all know-how, trade secrets, confidential or proprietary information, customer lists, software, technical information, data, process technology, plans, drawings, and blue prints; (vi) and all rights in internet web sites and internet domain names presently used.

V. "Key Employee" means (i) funeral home Divestiture Business Employees whose job title is funeral director, location manager, or other job title with responsibilities similar to those of funeral director or location manager and (ii) cemetery Divestiture Business Employees whose job responsibilities include management of a cemetery.

W. "License" means (i) a worldwide, royalty-free, paid-up, perpetual, irrevocable, transferrable, and sublicensable license; and (ii) such tangible embodiments of the licensed rights (including, but not limited to, physical and electronic copies) as may be necessary or appropriate to enable an Acquirer to use the rights.

X. "National" in reference to an asset, license, program, or activity means that such an asset, license, program, or activity is used by Respondents in the operation of both (i) one or more Divestiture Businesses and (ii) at least ten (10) of Respondents' other businesses that provide Funeral Services or Cemetery Services.

Y. "Optional Divestiture Assets" means the Divestiture Assets relating to the operation of the Divestiture Business located at: (i) Woodlawn Memory Gardens 101 58th Street South, St. Petersburg, Florida 33707; (ii) Orlando Memorial Gardens, 5264 Ingram Road, Apopka, Florida 32703; and (iii) Cannon Memorial Park, Funerals and Cremations – Jones Chapel, 603 West Curtis Street, Simpsonville, South Carolina 29681.

Z. "Person" means any individual, partnership, corporation, business trust, limited liability company, limited liability partnership, joint stock company, trust, unincorporated association, joint venture or other entity or a governmental body.

AA. "Pre-Need Contract" means any type of contract or other agreement entered into by a person for the purchase of Funeral Services or Cemetery Services at a future time, regardless of whether such agreement is revocable or how payment for such services is arranged.

BB. "Preparation Services" means transportation of human remains, embalming, cosmetizing, and other preparation of human remains for a funeral service, burial service, or cremation as well as the cremation of human remains.

CC. "Prospective Acquirer" means a Person that Respondents (or the Divestiture Trustee) intend to submit to the Commission for its prior approval to acquire Divestiture Assets pursuant to Paragraph II (or Paragraph IV) of this Order.

DD. "Record" means information that is inscribed on a tangible medium or that is stored in an electronic or other medium and is retrievable in perceivable form.

EE. "Respondents" means SCI and Stewart, individually and collectively; *provided, however,* that after the Acquisition Date, Respondents shall mean SCI.

FF. "Retained Assets" means:

1. Respondents' corporate headquarters;

2. Corporate Trade Names and portions of website content, domain names, or e-mail addresses that contain Corporate Trade Names;

3. The trade names "Baldwin-Fairchild," "D.W. Newcomer's Sons," "Davis," "Funeraria Del Angel," "Caughman-Harman," and "Mount Moriah" (but only those rights as they relate to Mount Moriah Cemetery South and Mount Moriah & Freeman Funeral Home);

4. Website names and content at www.baldwinfairchild.com, www.davisfunerals andcremations.com, and www.funerariasdelangel .com;

5. National information systems;

6. National licenses, unless such licenses are not generally available to the public;

7. National supply or service agreements, and National proprietary or licensed advertising programs;

8. Leases of Tangible Personal Property that pertain to generally available property relating to office furniture, office equipment, or computers;

9. Assets at locations other than a Divestiture Business if such assets are not exclusively or primarily used in the operation of such Divestiture Business;

10. Subject to the requirements of Paragraph III. of this Order, a copy of any data or Records that contain information concerning both (a) one or more Divestiture Businesses and (b) one or more other businesses that Respondents are not required to divest, and

11. Licenses to non-proprietary software generally available to the public.

GG. "Retained Intellectual Property" means any owned or licensed (as licensor or licensee) Intellectual Property (not included in the Retained Assets) relating to both to the operation of any Divestiture Business and any other business owned by SCI prior to the Acquisition or acquired by SCI in the Acquisition, unless such Intellectual Property relates primarily to the Divestiture Business.

HH. "Specified State" means California, Florida, Maryland, Missouri, North Carolina, Pennsylvania, Tennessee, or Texas.

II. "Support Services" means Preparation Services and administrative and technical services that Respondents provide to the Divestiture Business and Divestiture Assets that are not performed by employees who are permanently located at any of the Divestiture Businesses, including, but not limited to (i) human resources and administrative services, (ii) federal and state regulatory compliance and policy development services, (iii) environmental health and safety services, (iv) financial accounting services, (v) preparation of tax returns, (vi) audit services, (vii) information technology support services, (viii) processing of accounts payable and accounts receivable, (ix) technical support, (x) procurement of supplies, (xi) maintenance and repair of facilities, (xii) legal services, or (xiii) other support services as needed to operate the Hold Separate Business in the same manner as before the Acquisition Date.

JJ. "Support Services Employee" means any individual employed by Respondents who pro-vides Support Services to the Hold Separate Business pursuant to Paragraph V.C. of the Hold Separate Order.

KK. "Tangible Personal Property" means all machinery, equipment, tools, furniture, office equipment, computer hardware, supplies, materials, vehicles, and other items of tangible personal property (other than

inventories) of every kind owned or leased, together with any express or implied warranty by the manufacturers or sellers or lessors of any item or component part thereof and all maintenance records and other documents relating thereto.

LL. "Transitional Assistance" means assistance with respect to providing Funeral Services or Cemetery Services on a transitional basis, including assistance relating to administrative and support services.

II.

IT IS FURTHER ORDERED that:

A. Respondents shall:

1. No later than 180 days from the date this Order is issued, divest the Divestiture Assets absolutely and in good faith, at no minimum price, as on-going businesses, to an Acquirer or Acquirers that receive(s) the prior approval of the Commission and in a manner (including execution of a Divestiture Agreement with each Acquirer) that receives the prior approval of the Commission; and

2. No later than the Divestiture Date, grant a License to all Retained Intellectual Property to each Acquirer (in a manner that receives the prior approval of the Commission) that will permit the Acquirer to operate the relevant Divestiture Business in substantially the same manner as Respondents prior to the Acquisition, including the freedom to extend existing services and products and develop new services and products;

Provided however that Respondents need not divest the Optional Divestiture Assets if the relevant Acquirer does not want to acquire such assets and the Commission approves the divestiture without them; *provided further* that Respondents may receive

Preparation Services from an Acquirer, if needed, on a transitional basis (subject to the prior approval of the Commission).

B. Respondents shall divest each of the following groupings of funeral homes and/or cemeteries to no more than one Acquirer:

1. **Lancaster, California:** (i) Halley-Olsen-Murphy Funerals and Cremations, 44831 N. Cedar Avenue, Lancaster, California 93534 and (ii) Antelope Valley Cremation Service, 619 West Milling, Lancaster, California 93534.

2. **Los Angeles, California:** (i) Lubyen Family Dilday-Motell Mortuary, 5161 Arbor Road, Long Beach, California 90808; (ii) Funeraria Del Angel JT Oswald, 1001 North Maclay, San Fernando, California 91340; and (iii) Custer Christiansen Mortuary – Covina, 124 S. Citrus Avenue, Covina, California 91723.

3. **San Diego, California:** (i) Clairemont Mortuary, 4266 Mt. Abernathy Avenue, San Diego, California 92117 and (ii) Greenwood Memorial Park and Mortuary, 4300 Imperial Avenue, San Diego, California 92113.

4. **Clearwater/St. Petersburg, Florida:** (i) Moss Feaster Funeral Home, 1320 Main Street, Dunedin, Florida 34698, (ii) Moss Feaster Funeral Home, 693 South Belcher Road, Clearwater, Florida 33764, (iii) Woodlawn Memory Gardens, 101 58th Street South, St. Petersburg, Florida 33707, and (iv) Memorial Park Funeral Home & Cemetery, 5750 49th Street North, St. Petersburg, Florida 33709.

5. **Miami, Florida:** (i) Funeraria Memorial Plan – San Jose, 220 East 4th Avenue, Hialeah, Florida 33010; (ii) Funeraria Memorial Plan –

Westchester, 9800 SW 24th Street, Miami, Florida 33165; (iii) Branam Funeral Home, 809 North Drome Avenue, Homestead, Florida 33030; (iv) Memorial Plan Flagler Memorial Park, 5301 West Flagler Street, Miami, Florida 33134; and (v) Memorial Plan Miami Memorial Park, 6200 SW 77th Avenue, Miami, Florida 33143.

6. **Ocala, Florida:** (i) Roberts Funeral Home, 606 Southwest 2nd Avenue, Ocala, Florida 34471; (ii) Roberts Funeral Home – Bruce Chapel East, 2739 SE Maricamp Road, Ocala, Florida 34471; (iii) Roberts Funeral Home – Bruce Chapel West, 6241 SW State Road 200, Ocala, Florida 34476; and (iv) Good Shepherd Memorial Gardens, 5050 SW 20th Street, Ocala, Florida 32111.

7. **Orlando, Florida:** (i) Carey-Hand Cox Parker Funeral Home, 1350 West Fairbanks Avenue, Winter Park, Florida 32789; (ii) Colonial Chapel/Carey Hand, 2811 East Curry Ford Road, Orlando, Florida 32806; (iii) Collison Carey Hand Funeral Home, 1148 East Plant Street, Winter Garden, FL 34787; (iv) Orlando Memory Gardens, 5264 Ingram Road, Apopka, Florida 32703; and (v) Highland Memory Gardens, 3329 East Semoran Boulevard, Apopka, Florida 32703.

8. **Atlanta, Georgia:** (i) Holly Hill Memorial Park, 359 West Broad Street, Fairburn, Georgia 30213; and (ii) Eastlawn Memorial Park, 640 McGarity Road, McDonough, Georgia 30252.

9. **New Orleans, Louisiana:** (i) Schoen Funeral Home, 3827 Canal Street, New Orleans, Louisiana 70119; (ii) Garden of Memories Funeral Home and Cemetery, 4900 Airline Drive, Metairie, Louisiana 70001; and (iii) Greenwood Funeral Home, 5200 Canal Boulevard, New Orleans, Louisiana 70124.

10. **Jackson, Mississippi:** (i) Wright & Ferguson Funeral Home – Clinton, 106 Cynthia Street, Clinton, Mississippi 39056 and (ii) Wright & Ferguson Funeral Home – Raymond, 201 Hinds Boulevard, Raymond, Mississippi 39154.

11. **Kansas City, Missouri:** (i) Mount Moriah Terrace Park Funeral Home and Cemetery, 801 Northwest 108th Street, Kansas City, Missouri 64155; (ii) Overland Park Chapel, 8201 Metcalf Avenue, Overland Park, Kansas 66204; and (iii) Johnson County Funeral Chapel and Memorial Gardens, 11200 Metcalf Avenue, Overland Park, Kansas 66210.

12. **Philadelphia, Pennsylvania:** (i) George Washington Memorial Park/Kirk & Nice Funeral Home, 80 Stenton Avenue, Plymouth Meeting, Pennsylvania 19462 and (ii) Sunset Memorial Park/Kirk & Nice Suburban Chapel, 333 County Line Road, Feasterville, Pennsylvania 19053.

13. **Greenville, South Carolina:** (i) Cannon Memorial Park, Funerals and Cremations – Fountain Inn, 1150 North Main Street, Fountain Inn, South Carolina 29644 and (ii) Cannon Memorial Park, Funerals and Cremations – Jones Chapel, 603 West Curtis Street, Simpsonville, South Carolina 29681.

14. **Knoxville, Tennessee:** (i) New Gray Cemetery, 2724 Western Avenue, Knoxville, Tennessee 37921 and (ii) Greenwood Cemetery, 3500 Tazewell Pike, Knoxville, Tennessee 37918.

15. **Houston, Texas:** (i) South Park Funeral Home and Cemetery, 1310 North Main Street, Pearland, Texas 77518 and (ii) San Jacinto Memorial Park and Funeral Home, 14659 East Freeway, Houston, Texas 77015.

16. **Northern Virginia, Virginia:** (i) Everly Wheatley Funeral Home – Alexandria, 1500 West Braddock Road, Alexandria, Virginia 22302 and (ii) Everly Community Funeral Care, 6161 Leesburg Pike, Falls Church, Virginia 22044.

17. **Richmond, Virginia:** (i) Greenwood Memorial Gardens, 12609 Patterson Avenue, Richmond, Virginia 23238 and (ii) Sunset Memorial Park, 2901 West Hundred Road, Chester, Virginia 23831.

C. Notwithstanding any other provision of this Order:

1. Respondents may use any trade names included in the Divestiture Assets in connection with operation of the relevant funeral homes and cemeteries to be retained by Respondents ("Retained Properties") for a period of up to twelve (12) months from the relevant Divestiture Date, including, but not limited to:

   a. **"Lasilla"** for the funeral home located at 406 H Street, Lincoln, California 95648;

   b. **"Halley-Olsen-Murphy"** for the funeral home located at 3150 East Palmdale Boulevard, Palmdale, California 93550;

   c. **"Moss Feaster"** for the funeral homes located at 13401 Indian Rocks Road, Largo, Florida 33774 and 2550 Highlands Boulevard North, Palm Harbor, Florida 34684;

   d. **"Forest Hills"** for the funeral homes located at 1170 Southwest Bayshore Boulevard, Port St. Lucie, Florida 34983 and 6801 Southeast Federal Highway, Stuart, Florida 34997;

   e. **"Funeraria Memorial Plan"** for the funeral homes located at 1717 SW 37th Avenue,

Miami, Florida 33145 and 7355 SW 117th Avenue, Miami, Florida 33183;

f. **"Memorial Plan"** for the cemeteries located at 14200 SW 117th Avenue, Miami, Florida 33186, 1301 NW Opa Locka Boulevard, Miami, Florida 33167, and 15000 West Dixie Highway, North Miami, Florida 33181;

g. **"Wright & Ferguson"** for the funeral homes located at 350 High Street, Jackson, Mississippi 39202 and 1161 Highland Colony Parkway, Ridgeland, Mississippi 39157;

h. **"Cannon"** for the funeral home located at 603 West Curtis Street, Simpsonville, South Carolina 29681 (if applicable);

i. **"Cole & Garrett"** for the funeral home located at 212 Highway 76, Whitehouse, Tennessee 37188, and 182 West Main Street, Hendersonville, Tennessee 37075;

j. **"Restland"** for the funeral home located at 400 South Freeport Parkway, Coppell, Texas 75019; and

k. **"Everly"** for the funeral home located at 10565 Main Street, Fairfax 22030, Virginia; and

The new trade names under which Respondents seek to conduct business for each of the Retained Properties shall not include any of the trade names, words, or other designations that are assets of the relevant businesses within the Divestiture Businesses; and

2. Respondents shall grant an Acquirer a license to use any trade names (excluding any Corporate Trade Names) used in the operation of the relevant

Divestiture Business that Respondents are not required to divest pursuant to this Order, in connection with operation of the relevant funeral homes and cemeteries to be divested, for a period of up to twelve (12) months from the relevant Divestiture Date, including, but not limited to:

a. **"Funeraria Del Angel"** for the funeral home located at 1001 North Maclay, San Fernando, California 91340;

b. **"Caughman-Harman St. Andrews"** for the funeral home located at 5400 Bush River Road, Columbia, South Carolina 29212; and

c. **"Baldwin-Fairchild"** for the cemetery located at 3329 East Semoran Boulevard, Apopka, Florida 32703;

d. **"D.W. Newcomer's Sons"** for the funeral homes and cemeteries located at 8201 Metcalf Avenue, Overland Park, Kansas 66204 and 11200 Metcalf Avenue, Overland Park, Kansas 66210;

e. **"Davis"** at the cemetery located at 1730 W. English Road, High Point, North Carolina 27262; and

The trade names under which an Acquirer seeks to conduct business for properties divested by Respondents shall not include any of the trade names, words, or other designations that are assets of the businesses being retained by Respondents.

D. No later than the Divestiture Date, Respondents shall:

1. Secure all consents, assignments, and waivers from all Persons that are necessary for the divestiture of any Divestiture Assets; *provided, however*, that Respondents may satisfy this requirement by

certifying that an Acquirer has executed appropriate agreements directly with each of the relevant Persons; and

2. Take all actions necessary to ensure that divestiture of any Divestiture Assets meets federal, state, local, and municipal requirements necessary to transfer such assets to an Acquirer.

E. Respondents shall not enforce any agreement against any Person or Acquirer to the extent that such agreement may limit or otherwise impair the ability of an Acquirer to acquire, operate, or use the relevant Divestiture Assets.

F. At the request of an Acquirer and in a manner that receives the prior approval of the Commission, Respondents shall provide Transitional Assistance to such Acquirer for a period not to exceed six (6) months (or such other period as the Commission may approve) after Respondents divest the relevant Divestiture Assets:

1. Such assistance shall be sufficient to enable the Acquirer to operate the relevant Divestiture Assets and Divestiture Business in substantially the same manner and at the same quality achieved by Respondents prior to the divestiture; and

2. Respondents shall not (i) require the Acquirer to pay compensation for Transitional Assistance that exceeds the Direct Cost of providing such goods and services; (ii) terminate their obligation to provide Transitional Assistance because of a material breach by the Acquirer of the agreement to provide such assistance, in the absence of a final order of a court of competent jurisdiction; or (iii) seek to limit the damages (such as indirect, special, and consequential damages) which the Acquirer would be entitled to receive in the event of

Respondents' breach of any agreement to provide Transitional Assistance.

G. At the request of an Acquirer, Respondents shall use their best efforts to assist the Acquirer in the fulfillment of any Pre-need Contract included in the Divestiture Assets relating to the sale of a branded funeral package, including, but not limited to (i) Dignity Memorial Funeral Plan or (ii) Key Memories Plan, entered into by Respondents prior to the Divestiture Date; *provided, however*, that this Paragraph requires Respondents to assist only with such goods and services that the Acquirer cannot reasonably provide on its own.

H. Respondents shall allow an Acquirer or Prospective Acquirer an opportunity to recruit and employ any Divestiture Business Employee relating to the relevant Divestiture Business and Divestiture Assets under the following terms and conditions:

1. No later than ten (10) days after a request from an Acquirer or Prospective Acquirer, or Commission staff, Respondents shall (i) identify each Divestiture Business Employee, (ii) provide the Employee Information for each Divestiture Business Employee; (iii) allow the Acquirer or Prospective Acquirer an opportunity to meet personally with and interview such employee outside the presence or hearing of Respondents, and (iv) allow the Acquirer to inspect the personnel files and other documentation relating to any such employee, to the extent permissible under applicable laws;

2. Respondents shall (i) not offer any incentive to any Divestiture Business Employee to decline employment with the Acquirer or Prospective Acquirer, (ii) remove any contractual impediments with Respondents that may deter any Divestiture Business Employee from accepting employment

with the Acquirer or Prospective Acquirer, including, but not limited to, any non-compete or confidentiality provisions of employment or other contracts with Respondents that would affect the ability of such employee to be employed by the Acquirer or Prospective Acquirer, and (iii) not otherwise interfere with the recruitment, hiring, or employment of any Divestiture Business Employee by the Acquirer or Prospective Acquirer;

3. Respondents shall (i) vest all current and accrued pension benefits as of the date of transition of employment with the Acquirer for any Divestiture Business Employee who accepts an offer of employment from the Acquirer or Prospective Acquirer no later than thirty (30) days from the relevant Divestiture Date, (ii) provide any Key Employee to whom the Acquirer or Prospective Acquirer has made an offer of employment with reasonable financial incentives to accept a position with the Acquirer or Prospective Acquirer at the time of divestiture of the relevant Divestiture Assets; and

4. For a period of two (2) years commencing on the Divestiture Date applicable to the relevant business within the Divestiture Businesses, Respondents shall not, directly or indirectly, solicit, induce, or attempt to solicit or induce any Divestiture Business Employee who has accepted offers of employment with the Acquirer, or who is employed by the Acquirer, to terminate their employment relationship with the Acquirer; *provided, however*, a violation of this provision will not occur if: (1) the individual's employment has been terminated by the Acquirer, (2) Respondents advertise for employees in newspapers, trade publications, or other media not targeted specifically at the employees, or (3) Respondents hire employees who apply for employment with Respondents, so long as such

employees were not solicited by Respondents in violation of this paragraph.

I. Respondents shall not, directly or indirectly, solicit, induce, or attempt to solicit or induce a consumer who has a Pre-Need Contract (included in the Divestiture Assets) to terminate such contract and enter into a Pre-Need Contract with Respondents; *provided, however,* a violation of this provision will not occur if: (1) a consumer initiates communications with Respondents regarding a Pre-Need Contract; or (2) Respondents advertise in newspapers, trade publications, or other media in a manner not targeted specifically at customers of an Acquirer.

J. The Commission may order Respondents to divest additional assets relating to Preparation Services not included in the Divestiture Assets, or effect other appropriate arrangements, as the Commission determines are necessary to ensure the divestiture of the Divestiture Assets as ongoing viable enterprises.

K. If related to a geographic area located within a Specified State, Respondents shall provide a copy of each:

1. Notification described in Paragraph V.B.1. of this Order to the relevant Specified State at the same time that such notification is transmitted to the Commission; and

2. Application (including supporting materials) submitted to the Commission for its prior approval to acquire the Divestiture Assets pursuant to Paragraph II.A. of this Order to the relevant Specified State at the same time that such application is transmitted to the Commission.

L. The purpose of the divestiture of the Divestiture Assets is to ensure the continued use of the assets in the same businesses in which such assets were engaged at the

time of the announcement of the Acquisition by Respondents and to remedy the lessening of competition resulting from the Acquisition as alleged in the Commission's Complaint.

III.

IT IS FURTHER ORDERED that:

A. Respondents shall (i) keep confidential (including as to Respondents' employees) and (ii) not use for any reason or purpose, any Confidential Information received or maintained by Respondents relating to the Divestiture Business or Divestiture Assets; *provided, however,* that Respondents may disclose or use such Confidential Information in the course of:

1. Performing their obligations or as permitted under this Order, the Hold Separate Order, or any Divestiture Agreement (Hold Separate Employees and Support Services Employees shall be deemed to be performing obligations under the Hold Separate Order); or

2. Complying with financial reporting requirements, obtaining legal advice, prosecuting or defending legal claims, investigations, or enforcing actions threatened or brought against the Divestiture Business or Divestiture Assets, or as required by law.

B. If disclosure or use of any Confidential Information is permitted to Respondents' employ-ees or to any other Person under Paragraph III.A. of this Order, Respondents shall limit such disclosure or use (i) only to the extent such information is required, (ii) only to those employees or Persons who require such information for the purposes permitted under Paragraph III.A., and (iii) only after such employees or Persons have signed an agreement to maintain the confidentiality of such information.

C. Respondents shall enforce the terms of this Paragraph III. as to its employees or any other Person, and take such action as is necessary to cause each of its employees and any other Person to comply with the terms of this Paragraph III., including implementation of access and data controls, training of its employees, and all other actions that Respondents would take to protect their own trade secrets and proprietary information.

IV.

IT IS FURTHER ORDERED that:

A. If Respondents have not fully complied with the divestiture and other obligations as required by Paragraph II. of this Order, the Commission may appoint a Divestiture Trustee to divest the Divestiture Assets and perform Respondents' other obligations in a manner that satisfies the requirements of this Order. The Divestiture Trustee appointed pursuant to this Paragraph may be the same Person appointed as Hold Separate Trustee pursuant to the Hold Separate Order.

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

C. The Commission shall select the Divestiture Trustee, subject to the consent of Respondents, which consent shall not be unreasonably withheld. The Divestiture Trustee shall be a person with experience and expertise in acquisitions and divestitures. If Respondents have not opposed, in writing, including the reasons for opposing, the selection of any proposed Divestiture Trustee within ten (10) days after notice by the staff of the Commission to Respondents of the identity of any proposed Divestiture Trustee, Respondents shall be deemed to have consented to the selection of the proposed Divestiture Trustee.

D. Within ten (10) days after appointment of a Divestiture Trustee, Respondents shall execute a trust agreement that, subject to the prior approval of the Commission, transfers to the Divestiture Trustee all rights and powers necessary to permit the Divestiture Trustee to effect the relevant divestiture or other action required by the Order.

E. If a Divestiture Trustee is appointed by the Commission or a court pursuant to this Order, Respondents shall consent to the following terms and conditions regarding the Divestiture Trustee's powers, duties, authority, and responsibilities:

1. Subject to the prior approval of the Commission, the Divestiture Trustee shall have the exclusive power and authority to assign, grant, license, divest, transfer, deliver, or otherwise convey the relevant assets that are required by this Order to be assigned, granted, licensed, divested, transferred, delivered, or otherwise conveyed, and to take such other action as may be required to divest the Divestiture Assets.

2. The Divestiture 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 Divestiture Trustee has submitted a plan of divestiture or believes that the divestiture can be achieved within a reasonable time, the divestiture period may be extended by the Commission, or in the case of a court-appointed Divestiture Trustee, by the court.

3. Subject to any demonstrated legally recognized privilege, the Divestiture Trustee shall have full and complete access to the personnel, books, records, and facilities related to the relevant assets that are required to be assigned, granted, licensed, divested, delivered, or otherwise conveyed by this Order and to any other relevant information, as the Divestiture Trustee may request. Respondents shall develop such financial or other information as the Divestiture Trustee may request and shall cooperate with the Divestiture Trustee. Respondents shall take no action to interfere with or impede the Divestiture Trustee's accomplishment of the divestiture. Any delays in divestiture caused by Respondents shall extend the time for divestiture under this Paragraph IV in an amount equal to the delay, as determined by the Commission or, for a court-appointed Divestiture Trustee, by the court.

4. The Divestiture Trustee shall use commercially reasonable best efforts to negotiate the most favorable price and terms available in each contract that is submitted to the Commission, subject to Respondents' absolute and unconditional obligation to divest expeditiously and at no minimum price. The divestiture shall be made in the manner and to an Acquirer as required by this Order; *provided, however*, if the Divestiture Trustee receives bona fide offers from more than one acquiring entity, and if the Commission determines to approve more than one such

acquiring entity, the Divestiture Trustee shall divest to the acquiring entity selected by Respondents from among those approved by the Commission; *provided further*, *however*, that Respondents shall select such entity within five (5) days of receiving notification of the Commission's approval.

5. The Divestiture Trustee shall serve, without bond or other security, at the cost and expense of Respondents, on such reasonable and customary terms and conditions as the Commission or a court may set. The Divestiture Trustee shall have the authority to employ, at the cost and expense of Respondents, such consultants, accountants, attorneys, investment bankers, business brokers, appraisers, and other representatives and assistants as are necessary to carry out the Divestiture Trustee's duties and responsibilities. The Divestiture Trustee shall account for all monies derived from the divestiture and all expenses incurred. After approval by the Commission and, in the case of a court-appointed Divestiture Trustee, by the court, of the account of the Divestiture Trustee, including fees for the Divestiture Trustee's services, all remaining monies shall be paid at the direction of the Respondents, and the Divestiture Trustee's power shall be terminated. The compensation of the Divestiture Trustee shall be based at least in significant part on a commission arrangement contingent on the divestiture of all of the relevant assets that are required to be divested by this Order.

6. Respondents shall indemnify the Divestiture Trustee and hold the Divestiture Trustee harmless against any losses, claims, damages, liabilities, or expenses arising out of, or in connection with, the performance of the Divestiture Trustee's duties, including all reasonable fees of counsel and other

expenses incurred in connection with the preparation for, or defense of, any claim, whether or not resulting in any liability, except to the extent that such losses, claims, damages, liabilities, or expenses result from gross negligence or willful misconduct by the Divestiture Trustee. For purposes of this Paragraph IV.E.6., the term "Divestiture Trustee" shall include all Persons retained by the Divestiture Trustee pursuant to Paragraph IV.E.5. of this Order.

7. The Divestiture Trustee shall have no obligation or authority to operate or maintain the relevant assets required to be divested by this Order.

8. The Divestiture Trustee shall report in writing to Respondents and to the Commission every sixty (60) days concerning the Divestiture Trustee's efforts to accomplish the divestiture.

9. Respondents may require the Divestiture Trustee and each of the Divestiture Trustee's consultants, accountants, attorneys, and other representatives and assistants to sign a customary confidentiality agreement; *provided, however,* such agreement shall not restrict the Divestiture Trustee from providing any information to the Commission.

F. The Commission may require the Divestiture Trustee and each of the Divestiture Trustee's consultants, accountants, attorneys, and other representatives and assistants to sign a confidentiality agreement related to Commission materials and information received in connection with the performance of the Divestiture Trustee's duties.

G. If the Commission determines that a Divestiture Trustee has ceased to act or failed to act diligently, the Commission may appoint a substitute Divestiture Trustee in the same manner as provided in this Paragraph IV.

H. The Commission or, in the case of a court-appointed Divestiture Trustee, the court, may on its own initiative or at the request of the Divestiture Trustee issue such additional orders or directions as may be necessary or appropriate to accomplish the divestitures and other obligations or action required by this Order.

V.

IT IS FURTHER ORDERED that:

A. For a period of ten (10) years from the date this Order is issued, Respondents shall not, without providing advance written notification to the Commission, with respect to any of the geographic areas identified in Appendix B of this Order, acquire, directly or indirectly, through subsidiaries or otherwise, any leasehold, ownership interest, or any other interest, in whole or in part, in any concern, corporate or non-corporate, or in any assets engaged in Funeral Services or Cemetery Services, as specified in the relevant section of Appendix B of this Order.

B. With respect to the notification:

1. The prior notification required by this Paragraph V shall be given on the Notification and Report Form set forth in the Appendix to Part 803 of Title 16 of the Code of Federal Regulations as amended (hereinafter referred to as "the Notification"), and shall be prepared and transmitted in accordance with the requirements of that part, except that no filing fee will be required for any such notification, notification shall be filed with the Secretary of the Commission, notification need not be made to the United States Department of Justice, and notification is required only of the Respondents and not of any other party to the transaction.

2. Respondents shall provide the Notification to the Commission at least thirty (30) days prior to

consummating the transaction (hereinafter referred to as the "first waiting period"). If, within the first waiting period, representatives of the Commission make a written request for additional information or documentary material (within the meaning of 16 C.F.R. § 803.20), Respondents shall not consummate the transaction until thirty (30) days after submitting such additional information or documentary material.

3. Early termination of the waiting periods in this Paragraph V 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.

VI.

IT IS FURTHER ORDERED that:

A. All Divestiture Agreements shall be incorporated by reference into this Order and made a part hereof. Respondents shall comply with all terms of any Divestiture Agreement, and any breach by Respondents of any term of a Divestiture Agreement shall constitute a failure to comply with this Order. If any term of a Divestiture Agreement varies from the terms of this Order ("Order Term"), then to the extent that Respondents cannot fully comply with both terms, the Order Term shall determine Respondents' obligations under this Order.

B. Respondents shall not modify, replace, or extend the terms of any Divestiture Agreement without the prior approval of the Commission. Notwithstanding any paragraph, section, or other provision of a Divestiture Agreement, any modification of such agreement without the prior approval of the Commission shall

constitute a failure to comply with this Order, 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).

VII.

IT IS FURTHER ORDERED that:

A. Respondents shall file a verified written report with the Commission setting forth in detail the manner and form in which they intend to comply, are complying, and have complied with this Order:

1. No later than thirty (30) days from the date this Order is issued and every thirty (30) days thereafter until Respondents have fully complied with the provisions of Paragraphs II.A. and II.F. of this Order; and

2. No later than one (1) year after the date this Order is issued and annually thereafter until this Order terminates, and at such other times as the Commission staff may request.

B. With respect to any divestiture required by Paragraph II.A. of this Order, Respondents shall include in their compliance reports (i) the status of the divestiture and transfer of the Divestiture Assets; (ii) a description of all Transitional Services provided to each Acquirer; (iii) a description of all substantive contacts with each Acquirer; and (iv) any other actions taken by Respondents relating to compliance with the terms of this Order and/or any Divestiture Agreement, and (v) as applicable, a statement that any divestiture approved by the Commission has been accomplished, including a description of the manner in which Respondents completed such divestiture and the date the divestiture was accomplished.

VIII.

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

A. Any proposed dissolution of Respondents;

B. Any proposed acquisition, merger, or consolidation of Respondents; or

C. Any other change in the Respondents, including, but not limited to, assignment and the creation or dissolution of subsidiaries, if such change might affect compliance obligations arising out of the Order.

IX.

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

A. Access, during business office hours of the Respondents and in the presence of counsel, to all facilities and access to inspect and copy all books, ledgers, accounts, correspondence, memoranda and all other records and documents in the possession, or under the control, of the Respondents related to compliance with this Order, which copying services shall be provided by the Respondents at their expense; and

B. To interview officers, directors, or employees of the Respondents, who may have counsel present, regarding such matters.

X.

IT IS FURTHER ORDERED that this Order shall terminate on April 29, 2024.

By the Commission, Commissioner McSweeny not participating.

Appendix A

Properties To Be Divested

State	Area	Owner	FH/ CEM	Property Name & Address
Alabama	Mobile	SCI	FH	Mobile Memorial Gardens Funeral Home 6040 Three Notch Road Mobile, Alabama 36619
California	Auburn	Stewart	FH	Lasilla Funeral Chapel – Auburn 551 Grass Valley Highway Auburn, California 95603
California	Palmdale/ Lancaster	Stewart	FH	Halley-Olsen-Murphy Funerals & Cremations 44831 N. Cedar Avenue Lancaster, California 93534
California	Palmdale/ Lancaster	Stewart	FH	Antelope Valley Cremation Service 619 West Milling Lancaster, California 93534

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State	Area	Owner	FH/ CEM	Property Name & Address
California	Los Angeles (Long Beach)	SCI	FH	Lubyen Family Dilday-Motell Mortuary 5161 Arbor Road Long Beach, California 90808
California	Los Angeles (San Fernando Valley)	SCI	FH	Funeraria Del Angel JT Oswald 1001 North Maclay San Fernando, California 91340
California	Los Angeles (East Lost Angeles County)	SCI	FH	Custer Christiansen Mortuary 124 S. Citrus Avenue Covina, California 91723
California	San Diego (Northern)	SCI	FH	Clairemont Mortuary 4266 Mt. Abernathy Avenue San Diego, California 92117
California	San Diego (Southern and Eastern)	SCI	FH/ CEM	Greenwood Memorial Park & Mortuary **(c)** 4300 Imperial Avenue San Diego, California 92113
Florida	Clearwater	SCI	FH	Moss Feaster Funeral Home – Dunedin 1320 Main Street Dunedin, Florida 34698
Florida	Clearwater	SCI	FH	Moss Feaster Funeral Home – Belcher Road 693 South Belcher Road Clearwater, Florida 33764
Florida	St. Petersburg/ Largo	Stewart	CEM	Memorial Park Funeral Home & Cemetery **(c)** 5750 49th Street North St. Petersburg, Florida 33709

State	Area	Owner	FH/ CEM	Property Name & Address
Florida	St. Petersburg/ Largo	Stewart	CEM	Woodlawn Memory Gardens 101 58th Street South St. Petersburg, Florida 33707
Florida	Jacksonville	Stewart	FH/ CEM	Arlington Park Cemetery/Funeral Home **(c)** 6920 Lone Star Road Jacksonville, Florida 32211
Florida	Miami-Dade (Miami)	SCI	FH	Funeraria Memorial Plan – San Jose 250 East 4th Avenue Hialeah, Florida 33010
Florida	Miami-Dade (Miami)	SCI	FH	Funeraria Memorial Plan – Westchester 9800 SW 24th Street Miami, Florida 33165
Florida	Miami-Dade (Homestead)	SCI	FH	Branam Funeral Home 809 North Krome Avenue Homestead, Florida 33030
Florida	Miami-Dade	SCI	CEM	Memorial Plan Flagler Memorial Park 5301 West Flagler Street Miami, Florida 33134
Florida	Miami-Dade	SCI	CEM	Memorial Plan Miami Memorial Park 6200 SW 77th Avenue Miami, Florida 33143
Florida	Ocala	Stewart	FH	Roberts Funeral Home 606 Southwest 2nd Avenue Ocala, Florida 34471
Florida	Ocala	Stewart	FH	Roberts Funeral Home – Bruce Chapel East 2739 SSE Maricamp Road Ocala, Florida 34471

Decision and Order

State	Area	Owner	FH/ CEM	Property Name & Address
Florida	Ocala	Stewart	FH	Roberts Funeral Home – Bruce Chapel West 6241 Southwest State Road 200 Ocala, Florida 34476
Florida	Ocala	Stewart	CEM	Good Shepherd Memorial Gardens 5050 SW 20th Street Ocala, Florida 32111
Florida	Orlando	SCI	FH	Carey-Hand Cox Parker Funeral Home 1350 West Fairbanks Avenue Winter Park, Florida 32789
Florida	Orlando	SCI	FH	Colonial Chapel/Carey Hand 2811 East Curry Ford Road Orlando, Florida 32806
Florida	Orlando	SCI	FH	Collison Carey Hand Funeral Home 1148 East Plant Street Winter Garden, Florida 34787
Florida	Orlando (West)	Stewart	CEM	Highland Memory Gardens 3329 East Semoran Boulevard Apopka, Florida 32703
Florida	Orlando (West)	SCI	CEM	Orlando Memorial Gardens 5264 Ingram Road Apopka, Florida 32703

State	Area	Owner	FH/ CEM	Property Name & Address
Florida	Port St. Lucie	Stewart	FH/ CEM	Forest Hills Palm City Chapel & Forest Hills Memorial Park **(c)** 2001 S.W. Murphy Road Palm City, FL 34990
Florida	Springhill/ Hudson	SCI	CEM	Grace Memorial Gardens & Funeral Home **(c)** 17007 US Highway 19 North Hudson, Florida 34667
Florida	Tampa	Stewart	FH	Boza & Roel Funeral Home 4730 North Armenia Avenue Tampa, Florida 33603
Florida	Tampa	SCI	CEM	Sunset Funeral Home & Memory Gardens **(c)** 11005 N US Highway 301 Thonotosassa, Florida 33592
Georgia	Atlanta	Stewart	CEM	Cheatham Hill Memorial Park/Southern Cremations & Funerals **(c)** 1860 Dallas Highway SW Marietta, Georgia 30064
Georgia	Atlanta	Stewart	CEM	Holly Hill Memorial Park 359 West Broad Street Fairburn, Georgia 30213
Georgia	Atlanta	Stewart	CEM	Eastlawn Memorial Park 640 McGarity Road McDonough, Georgia 30252

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State	Area	Owner	FH/ CEM	Property Name & Address
Louisiana	New Orleans	SCI	FH	Schoen Funeral Home 3827 Canal Street New Orleans, Louisiana 70119
Louisiana	New Orleans	SCI	FH	Tharp-Sontheimer-Tharp Funeral Home 1600 North Causeway Boulevard Metairie, Louisiana 70001
Louisiana	New Orleans	SCI	FH/ CEM	Garden of Memories FH & Cemetery **(c)** 4900 Airline Drive Metairie, Louisiana 70001
Louisiana	New Orleans	Stewart	FH	Greenwood Funeral Home 5200 Canal Boulevard New Orleans, Louisiana 70124
Maryland	Annapolis	Stewart	CEM	Hillcrest Memorial Gardens 1911 Forest Drive Annapolis, Maryland 21401
Maryland	Baltimore	Stewart	CEM	Parkwood Cemetery 3310 Taylor Avenue Baltimore, Maryland 21234
Maryland	Washington, DC/Maryland Suburbs	SCI	FH	Edward Sagel Funeral Direction Inc. 1091 Rockville Pike Rockville, Maryland 20852
Mississippi	West Jackson	SCI	FH	Wright & Ferguson Funeral Home 106 Cynthia Street Clinton, Mississippi 39056
Mississippi	West Jackson	SCI	FH	Wright & Ferguson Funeral Home 201 Hinds Boulevard Raymond, Mississippi 39154

State	Area	Owner	FH/ CEM	Property Name & Address
Missouri	North Kansas City	SCI	FH/ CEM	Mount Moriah Terrace Park Funeral Home & Cemetery **(c)** 801 Northwest 108th Street Kansas City, Missouri 64155
Missouri	Overland Park, KS	Stewart	FH	Overland Park Chapel 8201 Metcalf Avenue Overland Park, Kansas 66204
Missouri	South Kansas City, KS/Missouri	Stewart	FH/ CEM	Johnson County Funeral Chapel & Memorial Gardens **(c)** 11200 Metcalf Avenue Overland Park, Kansas 66210
North Carolina	New Bern	Stewart	FH	Pollack-Best Funerals & Cremations 2015 Neuse Boulevard New Bern, North Carolina 28560
North Carolina	High Point	Stewart	CEM	Floral Garden Memorial Park 1730 W. English Road High Point, North Carolina 27262
North Carolina	Raleigh	Stewart	FH/ CEM	Montlawn Memorial Park, Funerals & Cremations **(c)** 2911 South Wilmington Street Raleigh, North Carolina 27603
Pennsylvania	Philadelphia	Stewart	CEM	George Washington Memorial Park/Kirk & Nice Funeral Home, Inc. **(c)** 80 Stenton Avenue Plymouth Meeting, Pennsylvania 19462

Decision and Order

State	Area	Owner	FH/ CEM	Property Name & Address
Pennsylvania	Philadelphia	Stewart	CEM	Sunset Memorial Park/Kirk & Nice Suburban Chapel, Inc. **(c)** 333 County Line Road Feasterville, Pennsylvania 19053
South Carolina	Columbia	SCI	FH	Caughman-Harman St. Andrew's Chapel/Bush River Memorial Gardens **(c)** 5400 Bush River Road Columbia, South Carolina 29212
South Carolina	Greenville	Stewart	FH/ CEM	Cannon Memorial Park, Funerals and Cremations **(c)** 1150 North Main Street Fountain Inn, South Carolina 29644
South Carolina	Greenville	Stewart	FH	Cannon Memorial Park, Funerals and Cremations – Jones Chapel 603 West Curtis Street Simpsonville, South Carolina 29681
Tennessee	Kingsport	Stewart	CEM	Oak Hill Memorial Park, Funerals and Cremations **(c)** 800 Truxton Drive Kingsport, Tennessee 37660
Tennessee	Knoxville	SCI	CEM	New Gray Cemetery 2724 Western Avenue Knoxville, Tennessee 37921
Tennessee	Knoxville	SCI	CEM	Greenwood Cemetery 3500 Tazewell Pike Knoxville, Tennessee 37918

State	Area	Owner	FH/ CEM	Property Name & Address
Tennessee	Nashville	Stewart	FH	Cole & Garrett Funeral Home 127 North Main Street Goodlettsville, Tennessee 37072
Texas	Dallas	Stewart	FH/ CEM	Restland Funeral Home & Cemetery **(c)** 13005 Greenville Avenue Dallas, Texas 75243
Texas	Dallas (South)	SCI	CEM	Lincoln Funeral Home & Cemetery **(c)** 8100 Fireside Drive Dallas, Texas 75217
Texas	Dallas (South)	SCI	CEM	Lincoln Memorial Park Cemetery 1311 Murdock Road Dallas, Texas 75217
Texas	Southeast Fort Worth	Stewart	FH/ CEM	Emerald Hills Funeral Home & Cemetery **(c)** 500 Sublett Road Kennedale, Texas 76060
Texas	Houston	Stewart	CEM	South Park Funeral Home & Cemetery **(c)** 1310 North Main Street Pearland, Texas 77518
Texas	Houston	Stewart	CEM	San Jacinto Memorial Park & Funeral Home **(c)** 14659 East Freeway Houston, Texas 77015
Virginia	Arlington-Alexandria	Stewart	FH	Everly Wheatley Funeral Home – Alexandria 1500 West Braddock Road Alexandria, Virginia 22302

State	Area	Owner	FH/ CEM	Property Name & Address
Virginia	Arlington-Alexandria	Stewart	FH	Everly Community Funeral Care 6161 Leesburg Pike Falls Church, Virginia 22044
Virginia	Richmond (Northwest)	Stewart	CEM	Greenwood Memorial Gardens 12609 Patterson Avenue Richmond, Virginia 23238
Virginia	Richmond (South)	SCI	CEM	Sunset Memorial Park 2901 West Hundred Road Chester, Virginia 23831
West Virginia	Kearneysville	Stewart	CEM	Pleasant View Memory Gardens 2938 Charles Town Road Kearneysville, West Virginia 25430

Appendix B

Prior Notice – Funeral Homes

State	Area	Area Definition
Alabama	Birmingham	Within a 15 mile radius of Southern Heritage Funeral Home, 475 Cahaba Valley Road, Pelham, Alabama 35124
Alabama	Mobile	Within a 15 mile radius of Radney FH-Mobile, 3155 Dauphin Street, Mobile, Alabama 36606

State	Area	Area Definition
California	Auburn	Within a 15 mile radius of Chapel of the Hills, 1331 Lincoln Way, Auburn, California 95603
California	Encinitas	Within a 15 mile radius of El Camino Memorial – Encinitas, 340 Melrose Avenue, Encinitas, California 92024
California	Palmdale/ Lancaster	Within a 15 mile radius of Halley-Olsen-Chapel – Palmdale, 3150 East Palmdale Boulevard, Palmdale, California 93550
California	Los Angeles (Long Beach)	Within a 15 mile radius of All Souls Mortuary, 4400 Cherry Avenue, Long Beach, California 90807, except that the prior notice requirement shall include only those facilities that primarily serve the Catholic community
California	Los Angeles (San Fernando Valley)	Within a 15 mile radius of Mission Hills Catholic Mortuary, 11160 Stranwood Avenue, Mission Hills, California 91345, except that the prior notice requirement shall include only those facilities that primarily serve the Catholic community
California	Los Angeles (East Los Angeles County)	Within a 15 mile radius of Queen of Heaven Mortuary, 2161 S. Fullerton Road, Rowland Heights, California 91748, except that the prior notice requirement shall include only those facilities that primarily serve the Catholic community
California	San Diego (North)	Within a 15 mile radius of El Camino Memorial – Pacific Beach, 4710 Cass Street, San Diego, California 92109
California	San Diego (Southern and Eastern)	Within a 15 mile radius of El Camino Memorial – Imperial Avenue, 3953 Imperial Avenue, San Diego, California 92113
California	Stockton	Within a 15 mile radius of Frisbie Warren & Carroll Mortuary, 809 North California Street, Stockton, California 95202
Florida	Clearwater	Within a 15 mile radius of Sylvan Abbey Funeral Home, 2853 Sunset Point Road, Clearwater, Florida 33759
Florida	Jacksonville	Within a 15 mile radius of Greenlawn Cemetery, 4300 Beach Blvd, Jacksonville, Florida 32219

Decision and Order

State	Area	Area Definition
Florida	Miami-Dade	Within a 15 mile radius of Cabellero Rivero Woodlawn Westchester Funeral Home, 8200 Bird Road, Miami, Florida 33155
Florida	Ocala	Within a 15 mile radius of Forest Lawn Funeral Home, 5740 South Pine Avenue, Ocala, Florida 34480
Florida	Orlando	Within a 15 mile radius of Baldwin-Fairchild Funeral Home - Ivanhoe Chapel, 301 Northeast Ivanhoe Boulevard, Orlando, Florida 32804
Florida	Port St. Lucie	Within a 15 mile radius of Byrd, Young, & Prill Funeral Home, 1170 S.W. Bayshore Blvd., Port St. Lucie, Florida 34983
Florida	Tampa	Within a 15 mile radius of Gonzalez Funeral Home, 7209 North Dale Mabry Highway, Tampa, Florida 33614, except that the prior notice requirement shall include only those facilities that primarily serve the Hispanic community
Florida	West Palm Beach	Within a 15 mile radius of Mizell-Faville-Zern Funeral Home, 6411 Parker Ave, West Palm Beach, Florida 33405
Louisiana	New Orleans	Within a 15 mile radius of Lake Lawn Metairie Funeral Home, 5100 Pontchartrain Boulevard, New Orleans, Louisiana 70124
Maryland	Washington, DC/ Maryland Suburbs	Within 15 miles radius of Danzansky-Goldberg Memorial Chapels, Inc., 1170 Rockville Pike, Rockville, Maryland 20852, except that the prior notice requirement shall include only those facilities that primarily serve the Jewish community
Mississippi	West Jackson	Within a 15 mile radius of Wright & Ferguson Funeral Home, 350 High Street, Jackson, Mississippi 39202
Missouri	Kansas City (North)	Within a 15 mile radius of White Chapel Funeral Home and Cemetery, 6600 Northeast Antioch Road, Gladstone, Missouri 64119
Missouri	South Kansas City, KS/ Missouri	Within a 15 mile radius of McGilley & Hoge Johnson County Memorial, 8024 Santa Fe Drive, Overland Park, Kansas 66204

State	Area	Area Definition
North Carolina	Hickory	Within a 15 mile radius Hickory Funeral Home, 1031 11th Avenue Blvd SE, Hickory, North Carolina 28602
North Carolina	New Bern	Within a 15 mile radius of Cotten Funeral Home, 2201 Neuse Boulevard, New Bern, North Carolina 28560
North Carolina	Raleigh	Within a 15 mile radius of Brown-Wynne Funeral Home, 300 Saint Mary's Street, Raleigh, North Carolina 27605
South Carolina	Columbia	Within a 15 mile radius of Dunbar Funeral Home, Dutch Fork Chapel, 7600 Woodrow Street, Irmo, South Carolina 29063
South Carolina	Greenville	Within a 15 mile radius of Woodlawn Funeral Home, 1 Pine Knoll Drive, Greenville, South Carolina 29609
Tennessee	Nashville	Within a 15 mile radius of Forest Lawn Funeral Home, 1150 South Dickerson Road, Goodlettsville, Tennessee 37072
Texas	Dallas	Within a 15 mile radius of Sparkman/Hillcrest Funeral Home, 7405 West Northwest Highway, Dallas, Texas 75225
Texas	Southeast Fort Worth	Within a 15 mile radius of Moore Funeral Home, 1219 North Davis Drive, Fort Worth, Texas 76012
Virginia	Charlottesville	Within a 15 mile radius of Teague Funeral Home, 2260 Ivy Road, Charlottesville, Virginia 22903
Virginia	Arlington-Alexandria	Within a 15 mile radius of Arlington Funeral Home, 4510 Wilson Boulevard, Arlington, Virginia 22203

Decision and Order

Prior Notice – Cemeteries

State	Area	Area Definition
California	San Diego (South)	Within a 20 mile radius of Cypress View Mausoleum & Mortuary, 3953 Imperial Avenue at 40th Street, San Diego, California 92113
Florida	Clearwater	Within a 20 mile radius of Sylvan Abbey Memorial Park, 2853 Sunset Point Road, Clearwater, Florida 33759
Florida	Jacksonville	Within a 20 mile radius of Greenlawn Cemetery, 4300 Beach Boulevard, Jacksonville, Florida 32219
Florida	St. Petersburg/ Largo	Within a 20 mile radius of Serenity Gardens Memorial Park, 13401 Indian Rocks Road, Largo, Florida 33774
Florida	Miami-Dade	Within a 20 mile radius of Woodlawn Park Cemetery North, 3260 S.W. 8th Street, Miami, Florida 33135
Florida	Ocala	Within a 20 mile radius of Forest Lawn Memory Gardens, 5740 South Pine Ave, Ocala, Florida 34480
Florida	Orlando (West)	Within a 20 mile radius of Glen Haven Memorial Park, 2300 Temple Drive, Winter Park, Florida 32789
Florida	Port St. Lucie	Within a 20 mile radius of Fernhill Memorial Gardens, 1501 South Kanner Highway, Stuart, Florida 34994
Florida	Spring Hill/ Hudson	Within a 20 mile radius of Florida Hills Memorial Gardens, 14354 Spring Hill Drive, Spring Hill, Florida 34609
Florida	Tampa	Within a 20 mile radius of Garden of Memories, 4207 East Lake Avenue, Tampa, Florida 33610
Georgia	Atlanta	Within a 20 mile radius of Fairview Memorial Gardens, 164 Fairview Road, Stockbridge, Georgia 30281 OR Georgia Memorial Park, 2000 Cobb Parkway SE, Marietta, Georgia 30060 OR Rose Haven Cemetery, 8640 Rose Ave., Douglasville,

State	Area	Area Definition
		Georgia 30134
Georgia	North Augusta	Within a 20 mile radius of Hillcrest Memorial Park, 2700 Deans Bridge Road, Augusta, Georgia 30906
Louisiana	New Orleans	Within a 20 mile radius of Lake Lawn Park, 5454 Pontchartrain Boulevard, Louisiana 70124
Maryland	Annapolis	Within a 20 mile radius of Lakemont Memory Gardens, 900 West Central Ave, Davidsonville, Maryland 21035
Maryland	Baltimore	Within a 20 mile radius of Gardens of Faith Memorial Gardens, 5598 Trumps Mill Road, Baltimore, Maryland 21206
Missouri	Kansas City (North)	Within a 20 mile radius of White Chapel Funeral Home and Cemetery, 6600 Northeast Antioch Road, Gladstone, Missouri 64119
Missouri	South Kansas City, KS/ Missouri	Within a 20 mile radius of Mount Moriah Cemetery South, 10507 Holmes Road, Kansas City, Missouri 64131
North Carolina	High Point	Within a 20 mile radius of Guilford Memorial Park, 6000 High Point Road, Greensboro, North Carolina 27407
North Carolina	Raleigh	Within a 20 mile radius of Raleigh Memorial Park & Mitchell Funeral, 7501 Glenwood Avenue, Raleigh, North Carolina 27612
Pennsylvania	Philadelphia	Within a 20 mile radius of Whitemarsh Memorial Park, 1169 Limekiln Pike, Ambler, Pennsylania 19002
South Carolina	Greenville	Within a 20 mile radius of Greenville Memorial Gardens, 7784 Augusta Road, Piedmont, South Carolina 29673
Tennessee	Kingsport	Within a 20 mile radius of East Lawn Memorial Park, 4997 Memorial Boulevard, Kingsport, Tennessee 37664
Tennessee	Knoxville	Within a 20 mile radius of Highland Memorial Park, 5315 Kingston Pike, Knoxville, Tennessee 37919

Decision and Order

State	Area	Area Definition
Texas	Dallas (South)	Within a 20 mile radius of Laurel Land Funeral Home & Cemetery, 6000 South R.L. Thornton Freeway, Dallas, Texas 75232, except that the prior notice requirement shall include only those facilities that primarily serve the African American community
Texas	Dallas	Within a 20 mile radius of Hillcrest Mausoleum & Memorial Park, 7405 West Northwest Highway, Dallas, Texas 75225
Texas	Southeast Fort Worth	Within a 20 mile radius of Moore Memorial Gardens, 1219 North Davis Drive, Arlington, Texas 76012
Texas	Houston	Within a 20 mile radius of Forest Park Lawndale, 6900 Lawndale Street, Houston, Texas 77023
Virginia	Richmond (Northwest)	Within a 20 mile radius of Westhampton Memorial & Cremation Park, 10000 Patterson Avenue, Richmond, Virginia 23238
Virginia	Richmond (South)	Within a 20 mile radius of Bermuda Memorial Park, 1901 Bermuda Hundred Road, Chester, Virginia 23831
West Virginia	Kearneysville	Within a 20 mile radius of Rosedale Cemetery, 917 Cemetery Road, Martinsburg, West Virginia 25404

ANALYSIS OF CONSENT ORDER TO AID PUBLIC COMMENT

I. INTRODUCTION

The Federal Trade Commission ("Commission") has accepted for public comment, subject to final approval, an Agreement Containing Consent Orders ("Consent Agreement") from Service Corporation International ("SCI") and Stewart Enterprises, Inc. ("Stewart"). The purpose of the proposed Consent Agreement is to remedy the anticompetitive effects that would otherwise result from SCI's acquisition of Stewart. Under the terms of the proposed Consent Agreement, SCI and Stewart are required to divest 53 funeral homes in 29 local funeral services markets and 38 cemeteries in 30 local cemetery markets to acquirers who receive the approval of the Commission. The proposed Consent Agreement also requires SCI and Stewart to divest all related assets and real property necessary to ensure that the buyer(s) of the divested facilities will be able to quickly and fully replicate the competition that would have been eliminated by the merger. Finally, the Commission, SCI, and Stewart have agreed to an Order to Hold Separate and Maintain Assets ("Hold Separate Order") that requires SCI and Stewart to maintain and hold separate certain facilities to be divested pending their final divestiture pursuant to the Consent Agreement.

The proposed Consent Agreement has been placed on the public record for thirty days ("Public Comment Period"). During this period, interested persons can review the proposed Consent Agreement and file comments with respect to the competitive effects of the Merger and the proposed remedy. At the end of the Public Comment Period, the Commission will review and afford appropriate consideration to all comments filed. The Commission may then determine whether to modify the proposed Consent Agreement, issue the Consent Agreement as final without modifications, or withdraw the Consent Agreement in its entirety.

On May 29, 2013, SCI and Stewart executed a definitive merger agreement pursuant to which SCI agreed to acquire Stewart in an all-cash transaction valued at approximately $1.4

billion (the "Merger"). The Commission's complaint alleges that the proposed Merger, 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, removing an actual, direct, and substantial competitor from 29 funeral services markets, and 30 cemetery services markets. The proposed Consent Agreement would remedy the alleged violations by requiring divestitures to replace the competition that otherwise would be lost in these markets as a result of the Merger.

II. THE PARTIES

SCI is the largest funeral and cemetery services provider in North America. SCI owns and operates more than 1,449 funeral-services locations and 374 cemeteries (including 213 combined funeral-services/cemetery locations), and 100 crematories in 44 states and the District of Columbia. SCI's 2012 revenue from all operations totaled approximately $2.41 billion.

Stewart is the second largest funeral and cemetery services provider in the United States. Stewart owns and operates 217 funeral homes and 141 cemeteries in 24 states and Puerto Rico. For the 12 months ending October 31, 2013, Stewart's total revenues were approximately $524.1 million.

III. FUNERAL AND CEMETERY SERVICES

SCI's proposed acquisition of Stewart presents substantial antitrust concerns in two relevant product markets: (1) funeral services; and (2) cemetery services. Funeral services include all activities relating to the promotion, marketing, sale, and provision of funeral services and goods, including, but not limited to, goods and services used to remove, care for, and prepare bodies for burial. Funeral services do not include cremation services because consumers generally do not substitute cremation services for burial services based upon price. Since many consumers primarily choose their final disposition based on their personal or religious views, these consumers do not view cremation services as a viable substitute for funeral services. Thus, a hypothetical monopolist of funeral services could

profitably impose a small but significant and non-transitory increase in price ("SSNIP") because most consumers would not switch to cremation services. Further, the competitive conditions for cremation services are substantially different than for funeral services.

Cemetery services include all activities relating to the promotion, marketing, sale, and provision of property, goods, and services to provide for the disposition of human remains in a cemetery, whether by burial, entombment in a mausoleum or crypt, disposition in a niche, or scattering cremated remains on cemetery grounds.

In some local markets, certain funeral-service and cemetery-service locations cater to specific populations by focusing on the customs and rituals associated with one or more religious, ethnic, or cultural heritage groups. In such situations, the provision of funeral or cemetery services targeted to such populations may constitute distinct and relevant product markets. Thus, in Los Angeles, California, for example, the provision of funeral services to Catholic consumers constitutes a relevant product market in which to analyze the competitive effects of the Merger. Likewise, in South Dallas, Texas, the provision of cemetery services to the African-American community constitutes a relevant product market in which to analyze the competitive effects of the Merger.

The 29 funeral services markets and 30 cemetery services markets at issue in this transaction are relatively local in nature. Indeed, data analysis and evidence gathered from market participants indicate that purchasers of both "preneed" and "atneed" funeral and cemetery services[1] typically choose a local funeral home or cemetery in order to make the memorial service, burial, and subsequent visitation more convenient.

The 29 geographic markets in which to analyze the effects of the Merger with respect to funeral services are: (1) Mobile, Alabama; (2) Auburn, California; (3) East Los Angeles County,

[1] "Preneed" refers to funeral and cemetery arrangements purchased prior to actual need (*i.e.*, death). "Atneed" refers to funeral and cemetery arrangements purchased after a death has occurred.

California (Catholic); (4) Los Angeles (Long Beach), California (Catholic); (5) Los Angeles (San Fernando Valley), California (Catholic); (6) Palmdale/Lancaster, California; (7) Northern San Diego, California; (8) Southern and Eastern San Diego, California; (9) Clearwater, Florida; (10) Jacksonville, Florida; (11) Miami-Dade County (Homestead), Florida; (12) Miami-Dade County (Miami), Florida; (13) Ocala, Florida; (14) Orlando, Florida; (15) Port St. Lucie, Florida; (16) Tampa, Florida (Hispanic); (17) Overland Park, Kansas; (18) South Kansas City, Kansas/Missouri; (19) New Orleans, Louisiana; (20) West Jackson, Mississippi; (21) North Kansas City, Missouri; (22) New Bern, North Carolina; (23) Raleigh, North Carolina; (24) Columbia, South Carolina; (25) Nashville, Tennessee; (26) Dallas, Texas; (27) Southeast Fort Worth, Texas; (28) Arlington-Alexandria, Virginia; and (29) Washington, D.C./Maryland suburbs (Jewish).

The 30 geographic markets in which to analyze the effects of the Merger with respect to cemetery services are: (1) South San Diego, California; (2) Jacksonville, Florida; (3) Miami-Dade County, Florida; (4) Ocala, Florida; (5) West Orlando, Florida; (6) Port St. Lucie, Florida; (7) Spring Hill/Hudson, Florida; (8) St. Petersburg/Largo, Florida; (9) Tampa, Florida; (10) Atlanta (Cobb County), Georgia; (11) Atlanta (Fairburn/College Park), Georgia; (12) Atlanta (Henry County), Georgia; (13) New Orleans, Louisiana; (14) Annapolis, Maryland; (15) Baltimore, Maryland; (16) North Kansas City, Missouri; (17) South Kansas City, Kansas/Missouri; (18) High Point, North Carolina; (19) Raleigh, North Carolina; (20) Philadelphia, Pennsylvania; (21) Greenville, South Carolina; (22) Kingsport, Tennessee; (23) Knoxville, Tennessee; (24) Dallas, Texas; (25) South Dallas, Texas (African American); (26) Southeast Fort Worth, Texas; (27) Houston, Texas; (28) Northwest Richmond, Virginia; (29) South Richmond, Virginia; and (30) Kearneysville, West Virginia.

Each of the relevant funeral and cemetery services markets is highly concentrated, and the proposed Merger would significantly increase market concentration and eliminate substantial direct competition between two significant funeral and cemetery services providers. Under the Herfindahl-

Hirschman Index ("HHI"), which is the standard measure of market concentration under the 2010 Department of Justice and Federal Trade Commission Merger Guidelines, an acquisition is presumed to create or enhance market power or facilitate its exercise if it increases by more than 200 points and results in a post-acquisition HHI that exceeds 2,500 points. SCI's merger with Stewart creates market concentration levels well in excess of these thresholds in the local markets listed above.

The anticompetitive implications of such significant increases are reinforced by evidence of intense head-to-head competition that would be eliminated by the proposed Merger. This competition between SCI and Stewart benefits consumers in the form of lower prices, improved products, and better service. Left unremedied, the proposed Merger likely would cause anticompetitive harm by enabling SCI to profit by unilaterally raising the prices of funeral and cemetery services, as well as reducing its incentive to improve quality and provide better service.

The high levels of concentration also increase the likelihood of competitive harm through coordinated interaction. In several funeral and cemetery services markets, coordinated interaction or tacit collusion may be likely due to the transparency of important competitive information, high concentration, and relatively small number of competitors.

New entry is unlikely to deter or counteract the anticompetitive effects of the proposed Merger. Among other entry barriers, both heritage (the consumer's tendency to use the same funeral home or cemetery for multiple generations) and reputation pose substantial barriers to entrants attempting to establish new funeral-services locations. The availability of suitable land and local zoning, health, and environmental regulations significantly hinder the ability of firms to enter into new cemetery-services locations. As a result, new entry sufficient to achieve a significant market impact is unlikely to occur.

Analysis to Aid Public Comment

IV. THE PROPOSED CONSENT AGREEMENT

The proposed Consent Agreement remedies completely the anticompetitive effects of the Merger by requiring the divestiture of SCI or Stewart funeral homes, cemeteries, and related assets in each relevant geographic market to a Commission-approved buyer (or buyers) within 180 days of SCI acquiring Stewart. Specifically, the proposed Consent Agreement requires the divestiture of 53 funeral-services facilities and 38 cemeteries, as well as related equipment, customer and supplier contracts, commercial trade names, and real property in the funeral and cemetery services markets at issue in this transaction. The assets to be divested include all of the associated assets and real property necessary for a Commission-approved buyer to independently and effectively operate each facility. *See* Appendix A to the proposed Decision and Order for a complete list of the divestiture assets.[2]

The proposed Consent Agreement contains several provisions designed to ensure that the divestitures are successful. First, the Commission will evaluate the suitability of the proposed purchasers of the divested assets to ensure that the competitive environment that would have existed but for the transaction is replicated by the required divestitures. If SCI fails to divest the assets within the 180 day time period to a Commission-approved buyer, the Consent Agreement permits the Commission to appoint a divestiture trustee to divest the assets. Second, SCI is required to provide transitional services to the Commission-approved acquirer. These transitional services will facilitate a smooth transition of the assets to the acquirer, and ensure continued and uninterrupted operation of the assets during the transition. Third, the Consent Agreement requires SCI to remove any contractual impediments that may deter the

[2] When reviewing Appendix A to the proposed Decision and Order, please note: 1) the column marked "FH/CEM" denotes the area of competitive concern as funeral homes ("FH"), cemeteries ("CEM"), or both ("FH/CEM"); and 2) in the far right column marked "Property Name & Address," those properties marked with a "(c)" next to the property name indicates that the facility is a "combo" (i.e., both a funeral home and cemetery). In all instances in which a combo asset is identified, the facility must be divested in its entirety regardless of whether the competitive concern is in funeral homes, cemeteries, or both.

current employees of the divested facilities from accepting offers of employment from any Commission-approved acquirer and to obtain all consents necessary to transfer the required assets. The Agreement also appoints a Hold Separate Trustee to monitor SCI's compliance with the terms of the Agreement. Finally, the Commission will have an opportunity to review any attempt by SCI to acquire any funeral or cemetery services asset in any of the geographic markets at issue, as well as certain markets where any future acquisition by SCI would likely cause substantial competitive harm. This prior notice provision has a term of ten years.

The Hold Separate Order requires the parties to maintain the viability of the divestiture assets as competitive operations until each facility is transferred to a Commission-approved acquirer. After SCI acquires Stewart, the Hold Separate Order requires that SCI segregate the 91 locations to be divested separate and apart from SCI's own death services business, and maintain these assets as independent competitive enterprises pending divestiture. To facilitate this process, the Hold Separate Order allows Paul A. Houston, the proposed Hold Separate Trustee, to appoint one or more Hold Separate Managers to assist with the management the daily operations of the held separate businesses in an effort to ensure competition in the relevant geographic markets. Additionally, the Hold Separate Order obligates SCI to provide sufficient working capital to the held separate businesses and to provide continued support services as needed in the interim. Overall, the Hold Separate Order and the Consent Agreement are designed to safeguard competition in the provision of death care services in these markets immediately post-acquisition.

The sole purpose of this analysis is to facilitate public comment on the Consent Agreement. This analysis does not constitute an official interpretation of the Consent Agreement or modify its terms in any way.

Complaint

IN THE MATTER OF

NISSAN NORTH AMERICA, INC.

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

Docket No. C-4454; File No. 122 3010
Complaint, May 1, 2014 – Decision, May 1, 2014

This consent order addresses Nissan North America, Inc.'s advertising, marketing, and sale of the Nissan Frontier pickup truck. The complaint alleges that respondent has marketed the Nissan Frontier to consumers through the "Hill Climb" advertisement, which depicts a Nissan Frontier pickup truck rescuing a dune buggy that is trapped in sand on a steep hill. The complaint further alleges that respondent falsely represented that the Hill Climb advertisement accurately represents the performance of an actual, unaltered Nissan Frontier pickup truck under the depicted conditions. The consent order prohibits respondent from misrepresenting, in the context of the advertisement as a whole, any material quality or feature of any Nissan-branded pickup truck through the depiction of a test, experiment, or demonstration.

Participants

For the *Commission*: *Matthew D. Gold* and *Evan Rose.*

For the *Respondent*: *Dominick Cromartie, Stuart Friedel, Joseph Lewczak,* and *Ronald Urbach, Davis & Gilbert LLP,* and *Amanda Reeves, Latham & Watkins LLP*.

COMPLAINT

The Federal Trade Commission, having reason to believe that Nissan North America, Inc., a corporation ("respondent"), has violated the provisions of the Federal Trade Commission Act, and it appearing to the Commission that this proceeding is in the public interest, alleges:

1. Respondent Nissan North America, Inc., is a California corporation with its principal office or place of business at One Nissan Way, Franklin, Tennessee 37067.

2. Respondent has manufactured, advertised, labeled, offered for sale, sold, and distributed products to the public, including the Nissan Frontier pickup truck.

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. Respondent has disseminated or has caused to be disseminated advertisements for the Nissan Frontier pickup truck, including "Hill Climb," a commercial that was disseminated on television and over the internet. (Exhibit A, transcript, and Exhibit B, DVD containing ad)

5. The Hill Climb advertisement depicts a Nissan Frontier pickup truck rescuing a dune buggy that is trapped in sand on a steep hill. The Nissan Frontier speeds up the sand dune and stops immediately behind the dune buggy. The Nissan Frontier then pushes the dune buggy up and over the top of the hill. Onlookers are portrayed observing the feat in amazement. A narrator subsequently states, "The mid-size Nissan Frontier with full-size horsepower and torque. Innovation for doers, innovation for all." The demonstration is portrayed in a realistic, "YouTube" style, as if shot with a mobile phone video camera. A statement appears onscreen in small type for the first three seconds of the thirty-second advertisement and disappears before the Nissan Frontier enters the frame. The statement reads, "Fictionalization. Do not attempt."

6. Through the means described in Paragraph 5, respondent has represented, expressly or by implication, that the Hill Climb advertisement accurately represented the performance of an actual, unaltered Nissan Frontier pickup truck under the depicted conditions.

7. In truth and in fact, the Hill Climb advertisement did not accurately represent the performance of an actual, unaltered Nissan Frontier pickup truck under the depicted conditions. In truth, both the Nissan Frontier pickup truck and the dune buggy were dragged to the top of the hill by cables, and the sand dune was made to appear to be significantly steeper than it actually

was. The Nissan Frontier pickup truck is incapable of performing the feat depicted in the Hill Climb advertisement. Therefore, the representation set forth in Paragraph 6 was, and is, false or misleading.

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

THEREFORE, the Federal Trade Commission this first day of May, 2014, has issued this complaint against respondent.

By the Commission, Commissioner McSweeny not participating.

Exhibit A

TBWA/CHIAT/DAY BROADCAST COPY

:30 TV
NATIONAL CLIENT: NISSAN
NISSAN FRONTIER JOB NO: FNTR-11-T5343
"Hill Climb" DATE: September 19, 2011

TBWA/CHIAT/DAY APPROVALS

PR DATE CW DATE AE DATE TM DATE

TECH DATE

VIDEO	AUDIO
©2011 Nissan North America Inc.	
OPEN TO A DUNE BUGGY STRUGGLING TO MAKE IT UP UP A SAND DUNE. **LEGAL DISCLAIMER: Dramatization – Do Not Attempt.**	**Spectator:** Gun it bro!
CUT TO SPECTATOR WITH A PUZZLED LOOK ON HIS FACE. CUT TO A SHOT OF A FRONTIER DRIVING UP THE SAND DUNE.	**Spectator:** What's this guy doing?
FRONTIER CONTINUES UP THE SAND DUNE AND HELPS THE DUNE BUGGY OVER THE TOP OF THE HILL.	
FRONTIER COMES BACK AROUND AND PERCHES ON THE TOP OF THE SAND DUNE, TRIUMPHANT.	**VO:** The midsize Nissan Frontier with full size horsepower and torque. Innovation for Doers. Innovation for all.
CUT TO NISSAN BADGE	
SUPER: NISSAN BADGE SHIFT_the way you move.	

Exhibit A

5353 GROSVENOR BLVD, LOS ANGELES, CA 90066-6913 TEL: (310) 305-5000 FAX: (310) 305-6000

Complaint

Exhibit B

Exhibit B:

DVD of NISSAN FRONTIER
"HILL CLIMB" TV Commercial
(See attached)

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 of a complaint which the Western Region-San Francisco proposed to present to the Commission for its consideration and which, if issued, would charge the respondent with violations of the Federal Trade Commission Act; and

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 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 Commission Rule 2.34, 16 C.F.R. § 2.34, now in further conformity with the procedure prescribed in Commission Rule 2.34, the Commission hereby issues its complaint, makes the following jurisdictional findings and enters the following order:

1. Respondent Nissan North America, Inc., is a California corporation with its principal office or place of business at One Nissan Way, Franklin, Tennessee 37067.

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

ORDER

DEFINITIONS

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

A. Unless otherwise specified, "respondent" shall mean Nissan North America, Inc., a corporation, its successors and assigns and its officers, agents, representatives, and employees.

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

I.

IT IS ORDERED that respondent, directly or through any corporation, subsidiary, division, or other device, in connection with the manufacturing, advertising, promotion, offering for sale, sale, or distribution of any Nissan-branded pick-up truck in or affecting commerce, shall not misrepresent, in the context of the advertisement as a whole, any material quality or feature of the advertised pick-up truck through the depiction of a test, experiment, or demonstration.

Provided, however, that nothing in this order shall be deemed to preclude the use of any production techniques that do not misrepresent a material quality or feature of the advertised truck.

II.

IT IS FURTHER ORDERED that respondent Nissan North America, 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, within thirty (30) days of any

written request, make available to the Federal Trade Commission for inspection and copying:

A. All advertisements and promotional materials containing the representation;

B. Any and all video, in complete and unedited form, and any and all still images taken during the production of any advertisement depicting a demonstration, experiment, or test; and

C. Any and all affidavits or certifications submitted by an employee, agent, or representative of respondent to a television network or to any other individual or entity, which affidavit or certification affirms the accuracy or integrity of a demonstration or demonstration techniques contained in an advertisement.

III.

IT IS FURTHER ORDERED that respondent Nissan North America, Inc., and its successors and assigns shall deliver a copy of this order to all current and, for the next five (5) years, all future Nissan North America Vice Presidents of Marketing and Nissan North America Directors of Marketing ("Personnel") 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 Nissan North America, Inc., and its successors and assigns shall deliver this order to current Personnel within thirty (30) days after the date of service of this order, and to future Personnel within thirty (30) days after the person assumes such position or responsibilities.

IV.

IT IS FURTHER ORDERED that respondent Nissan North America, Inc., and its successors and assigns shall notify the Commission at least thirty (30) days prior to any change in the corporation(s) that may affect compliance obligations arising under this order, including but not limited to a dissolution,

assignment, sale, merger, or other action that would result in the emergence of a successor corporation; the creation or dissolution of a subsidiary, parent, or affiliate that engages in any acts or practices subject to this order; the proposed filing of a bankruptcy petition; or a change in the corporate name or address. *Provided, however*, that, with respect to any proposed change in the corporation about which respondent learns less than thirty (30) days prior to the date such action is to take place, respondent shall notify the Commission as soon as is practicable after obtaining such knowledge. 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: In the Matter of Nissan North America, Inc., FTC File Number 122 3010.

V.

IT IS FURTHER ORDERED that respondent Nissan North America, Inc., and its successors and assigns, within sixty (60) days after the date of service of this order, shall each file with the Commission a true and accurate report, in writing, setting forth in detail the manner and form of their own compliance with this order. Within ten (10) days of receipt of written notice from a representative of the Commission, they shall submit additional true and accurate written reports.

VI.

This order will terminate on May 1, 2034, 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, Commissioner McSweeny not participating.

ANALYSIS OF CONSENT ORDER TO AID PUBLIC COMMENT

The Federal Trade Commission ("FTC" or "Commission") has accepted, subject to final approval, an agreement containing consent order from Nissan North America, Inc. ("respondent").

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

This matter involves the advertising, marketing, and sale of the Nissan Frontier pickup truck by respondent. Respondent has marketed the Nissan Frontier to consumers through the "Hill

Climb" advertisement, which respondent disseminated on television and over the internet. According to the FTC complaint, the Hill Climb advertisement deceptively demonstrated the capabilities of the Nissan Frontier.

Specifically, according to the FTC complaint, the Hill Climb advertisement depicts a Nissan Frontier pickup truck rescuing a dune buggy that is trapped in sand on a steep hill. The Nissan Frontier speeds up the sand dune and stops immediately behind the dune buggy. The Nissan Frontier then pushes the dune buggy up and over the top of the hill. Onlookers are portrayed observing the feat in amazement. A narrator subsequently states, "The mid-size Nissan Frontier with full-size horsepower and torque. Innovation for doers, innovation for all." According to the complaint, the demonstration is portrayed in a realistic, "YouTube" style, as if shot with a mobile phone video camera.

According to the complaint, respondent represented that the Hill Climb advertisement accurately represents the performance of an actual, unaltered Nissan Frontier pickup truck under the depicted conditions. The complaint further alleges that this claim is false, and thus violates the FTC Act, because the Nissan Frontier pickup truck is incapable of performing the feat depicted in the Hill Climb advertisement. In truth, according to the complaint, both the Nissan Frontier pickup truck and the dune buggy were dragged to the top of the hill by cables, and the sand dune was made to appear to be significantly steeper than it actually was.

The proposed consent order contains provisions designed to prevent respondent from engaging in similar acts or practices in the future. Specifically, Part I prohibits respondent from misrepresenting, in the context of the advertisement as a whole, any material quality or feature of any Nissan-branded pickup truck through the depiction of a test, experiment, or demonstration. Part I specifies that nothing in the order shall be deemed to preclude the use of any production techniques that do not misrepresent a material quality or feature of the advertised truck.

Part II of the proposed order requires respondent to maintain, and make available to the Commission upon written request, copies of relevant advertisements, as well as any and all unedited video and still images taken during the production of any advertisement depicting a demonstration, experiment, or test. Under Part II, respondent must also maintain any and all affidavits or certifications submitted by an employee, agent, or representative to any television network or other individual, where such affidavit or certification affirms the accuracy or integrity of a demonstration contained in an advertisement.

Parts III, IV, and V of the proposed order require respondent 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; and to file compliance reports with the Commission. Part VI provides that the order will terminate after twenty (20) years, with certain exceptions.

The purpose of this analysis is to facilitate public comment on the proposed order. It is not intended to constitute an official interpretation of the proposed order or to modify its terms in any way.

Complaint

IN THE MATTER OF

TBWA WORLDWIDE, INC.

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

Docket No. C-4455; File No. 122 3010
Complaint, May 1, 2014 – Decision, May 1, 2014

This consent order addresses TBWA Worldwide, Inc.'s advertising and marketing of the Nissan Frontier pickup truck. The complaint alleges that respondent created the "Hill Climb" advertisement, which depicts a Nissan Frontier pickup truck rescuing a dune buggy that is trapped in sand on a steep hill in a realistic, "YouTube" style, as if shot with a mobile phone video camera, to promote the Nissan Frontier pickup truck. The complaint further alleges that respondent falsely represented that the Hill Climb advertisement accurately represents the performance of an actual, unaltered Nissan Frontier pickup truck under the depicted conditions. The consent order prohibits respondent from misrepresenting, in the context of the advertisement as a whole, any material quality or feature of any pickup truck through the depiction of a test, experiment, or demonstration.

Participants

For the *Commission*: *Matthew D. Gold* and *Evan Rose.*

For the *Respondent*: *Dominick Cromartie, Stuart Friedel, Joseph Lewczak,* and *Ronald Urbach, Davis & Gilbert LLP*, and *Corey Roush, Hogan Lovells.*

COMPLAINT

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

1. Respondent TBWA Worldwide, Inc., is a Delaware corporation with its principal office or place of business at 488 Madison Avenue, New York, New York 10022.

2. Respondent, at all times relevant to this complaint, was an advertising agency of Nissan North America, Inc., and prepared and disseminated advertisements to promote the sale of the Nissan Frontier pickup truck.

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. Respondent has disseminated or has caused to be disseminated advertisements for the Nissan Frontier pickup truck, including "Hill Climb," a commercial that was disseminated on television and over the internet. (Exhibit A, transcript, and Exhibit B, DVD containing ad)

5. The Hill Climb advertisement depicts a Nissan Frontier pickup truck rescuing a dune buggy that is trapped in sand on a steep hill. The Nissan Frontier speeds up the sand dune and stops immediately behind the dune buggy. The Nissan Frontier then pushes the dune buggy up and over the top of the hill. Onlookers are portrayed observing the feat in amazement. A narrator subsequently states, "The mid-size Nissan Frontier with full-size horsepower and torque. Innovation for doers, innovation for all." The demonstration is portrayed in a realistic, "YouTube" style, as if shot with a mobile phone video camera. A statement appears onscreen in small type for the first three seconds of the thirty-second advertisement and disappears before the Nissan Frontier enters the frame. The statement reads, "Fictionalization. Do not attempt."

6. Through the means described in Paragraph 5, respondent has represented, expressly or by implication, that the Hill Climb advertisement accurately represented the performance of an actual, unaltered Nissan Frontier pickup truck under the depicted conditions.

7. In truth and in fact, the Hill Climb advertisement did not accurately represent the performance of an actual, unaltered Nissan Frontier pickup truck under the depicted conditions. In truth, both the Nissan Frontier pickup truck and the dune buggy were dragged to the top of the hill by cables, and the sand dune

was made to appear to be significantly steeper than it actually was. The Nissan Frontier pickup truck is incapable of performing the feat depicted in the Hill Climb advertisement. Therefore, the representation set forth in Paragraph 6 was, and is, false or misleading.

8. Respondent knew or should have known that the representation set forth in paragraph 6 was, and is, false or misleading.

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

THEREFORE, the Federal Trade Commission this first day of May, 2014, has issued this complaint against respondent.

By the Commission, Commissioner McSweeny not participating.

Exhibit A

TBWA/CHIAT/DAY BROADCAST COPY

:30 TV
NATIONAL CLIENT: NISSAN
NISSAN FRONTIER JOB NO: FNTR-11-T5343
"Hill Climb" DATE: September 19, 2011

TBWA/CHIAT/DAY APPROVALS

PR DATE CW DATE AE DATE TM DATE

TECH DATE

VIDEO	AUDIO
©2011 Nissan North America Inc.	
OPEN TO A DUNE BUGGY STRUGGLING TO MAKE IT UP UP A SAND DUNE. **LEGAL DISCLAIMER: Dramatization – Do Not Attempt.**	**Spectator:** Gun it bro!
CUT TO SPECTATOR WITH A PUZZLED LOOK ON HIS FACE. CUT TO A SHOT OF A FRONTIER DRIVING UP THE SAND DUNE.	**Spectator:** What's this guy doing?
FRONTIER CONTINUES UP THE SAND DUNE AND HELPS THE DUNE BUGGY OVER THE TOP OF THE HILL.	
FRONTIER COMES BACK AROUND AND PERCHES ON THE TOP OF THE SAND DUNE, TRIUMPHANT.	**VO:** The midsize Nissan Frontier with full size horsepower and torque. Innovation for Doers. Innovation for all.
CUT TO NISSAN BADGE	
SUPER: NISSAN BADGE SHIFT_the way you move.	

Exhibit A

5353 GROSVENOR BLVD, LOS ANGELES, CA 90066-6913 TEL: (310) 305-5000 FAX: (310) 305-6000

Complaint

Exhibit B

Exhibit B:

DVD of NISSAN FRONTIER
"HILL CLIMB" TV Commercial
(See attached)

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 of a complaint which the Western Region-San Francisco proposed to present to the Commission for its consideration and which, if issued, would charge the respondent with violations of the Federal Trade Commission Act; and

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 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 comment received from an interested person pursuant to Commission Rule 2.34, 16 C.F.R. § 2.34, now in further conformity with the procedure prescribed in Commission Rule 2.34, the Commission hereby issues its complaint, makes the following jurisdictional findings and enters the following order:

1. Respondent TBWA Worldwide, Inc., is a Delaware corporation with its principal office or place of business at 488 Madison Avenue, New York, New York 10022.

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

ORDER

DEFINITIONS

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

A. Unless otherwise specified, "respondent" shall mean TBWA Worldwide, Inc., a corporation, its successors and assigns and its officers, agents, representatives, and employees, but shall not include any corporation, subsidiary, or division that does not operate under the name TBWA/Chiat/Day, Chiat/Day, or any substantially similar name.

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

I.

IT IS ORDERED that respondent, directly or through any corporation, subsidiary, division, or other device, in connection with the manufacturing, advertising, promotion, offering for sale, sale, or distribution of any pick-up truck in or affecting commerce, shall not misrepresent, in the context of the advertisement as a whole, any material quality or feature of the advertised pick-up truck through the depiction of a test, experiment, or demonstration.

Provided, however, that nothing in this order shall be deemed to preclude the use of any production techniques that do not misrepresent a material quality or feature of the advertised truck.

Provided, further, that it shall be a defense hereunder that the respondent neither knew nor had reason to know that the test, experiment, or demonstration misrepresented a material quality or feature of the advertised truck.

II.

IT IS FURTHER ORDERED that respondent shall, for five (5) years after the last date of dissemination of any representation covered by this order, maintain and, within thirty (30) days of any written request, make available to the Federal Trade Commission for inspection and copying:

A. All advertisements and promotional materials containing the representation;

B. Any and all video, in complete and unedited form, and any and all still images taken during the production of any advertisement depicting a demonstration, experiment, or test; and

C. Any and all affidavits or certifications submitted by an employee, agent, or representative of respondent to a television network or to any other individual or entity, which affidavit or certification affirms the accuracy or integrity of a demonstration or demonstration techniques contained in an advertisement.

III.

IT IS FURTHER ORDERED that respondent shall deliver a copy of this order to all current and, for the next five (5) years, all future account directors and creative directors having direct and supervisory or managerial responsibilities with respect to the subject matter of this order ("Personnel"), and shall secure from each such person a signed and dated statement acknowledging receipt of the order. Respondent TBWA Worldwide, Inc., and its successors and assigns shall deliver this order to current Personnel within thirty (30) days after the date of service of this order, and to future Personnel within thirty (30) days after the person assumes such position or responsibilities.

IV.

IT IS FURTHER ORDERED that TBWA Worldwide, Inc., and its successors and assigns shall notify the Commission at least

thirty (30) days prior to any change in the corporation(s) that may affect compliance obligations arising under this order, including but not limited to a dissolution, assignment, sale, merger, or other action that would result in the emergence of a successor corporation; the creation or dissolution of a subsidiary, parent, or affiliate that engages in any acts or practices subject to this order; the proposed filing of a bankruptcy petition; or a change in the corporate name or address. *Provided, however*, that, with respect to any proposed change in the corporation about which TBWA Worldwide, Inc., learns less than thirty (30) days prior to the date such action is to take place, TBWA Worldwide, Inc., 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: In the Matter of TBWA Worldwide, Inc., FTC File Number 122 3010.

V.

IT IS FURTHER ORDERED that TBWA Worldwide, Inc., and its successors and assigns, within sixty (60) days after the date of service of this order, shall each file with the Commission a true and accurate report, in writing, setting forth in detail the manner and form of their own compliance with this order. Within ten (10) days of receipt of written notice from a representative of the Commission, they shall submit additional true and accurate written reports.

VI.

This order will terminate on May 1, 2034, 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, Commissioner McSweeny not participating.

ANALYSIS OF CONSENT ORDER TO AID PUBLIC COMMENT

The Federal Trade Commission ("FTC" or "Commission") has accepted, subject to final approval, an agreement containing consent order from TBWA Worldwide, Inc. ("respondent").

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

Analysis to Aid Public Comment

This matter involves the advertising and marketing of the Nissan Frontier pickup truck by respondent. Respondent is an advertising agency of Nissan North America, Inc., and prepared and disseminated the "Hill Climb" advertisement, which promoted the Nissan Frontier pickup truck. According to the FTC complaint, the Hill Climb advertisement, which appeared on television and over the internet, deceptively demonstrated the capabilities of the Nissan Frontier.

Specifically, according to the FTC complaint, the Hill Climb advertisement depicts a Nissan Frontier pickup truck rescuing a dune buggy that is trapped in sand on a steep hill. The Nissan Frontier speeds up the sand dune and stops immediately behind the dune buggy. The Nissan Frontier then pushes the dune buggy up and over the top of the hill. Onlookers are portrayed observing the feat in amazement. A narrator subsequently states, "The mid-size Nissan Frontier with full-size horsepower and torque. Innovation for doers, innovation for all." According to the complaint, the demonstration is portrayed in a realistic, "YouTube" style, as if shot with a mobile phone video camera.

According to the complaint, respondent represented that the Hill Climb advertisement accurately represents the performance of an actual, unaltered Nissan Frontier pickup truck under the depicted conditions. The complaint further alleges that this claim is false, and thus violates the FTC Act, because the Nissan Frontier pickup truck is incapable of performing the feat depicted in the Hill Climb advertisement. The complaint further alleges that respondent knew or should have known that the claim is false. In truth, according to the complaint, both the Nissan Frontier pickup truck and the dune buggy were dragged to the top of the hill by cables, and the sand dune was made to appear to be significantly steeper than it actually was.

The Hill Climb advertisement was created by TBWA Chiat/Day Los Angeles, a division of TBWA Worldwide, Inc. Because TBWA Chiat/Day Los Angeles is not a formal corporate entity, the Commission's order names TBWA Worldwide, Inc., as respondent. Via the order's definition of "respondent," however, the injunctive provisions of the order apply only to TBWA

Chiat/Day Los Angeles and to its sister agency, TBWA Chiat/Day New York.

The proposed consent order contains provisions designed to prevent respondent from engaging in similar acts or practices in the future. Specifically, Part I prohibits respondent from misrepresenting, in the context of the advertisement as a whole, any material quality or feature of any pickup truck through the depiction of a test, experiment, or demonstration. Part I specifies that nothing in the order shall be deemed to preclude the use of any production techniques that do not misrepresent a material quality or feature of the advertised truck. Consistent with prior FTC cases involving advertising agencies, Part I also declares that respondent can be held liable for violating Part I of the order only if it knew or should have known that the test, experiment, or demonstration misrepresented a material quality or feature of the advertised truck.

Part II of the proposed order requires respondent to maintain, and make available to the Commission upon written request, copies of relevant advertisements, as well as any and all unedited video and still images taken during the production of any advertisement depicting a demonstration, experiment, or test. Under Part II, respondent must also maintain any and all affidavits or certifications submitted by an employee, agent, or representative to any television network or other individual, where such affidavit or certification affirms the accuracy or integrity of a demonstration contained in an advertisement.

Part III of the proposed order requires respondent to provide copies of the order to certain of its personnel. Parts IV and V of the proposed order require TBWA Worldwide, Inc., to notify the Commission of changes in corporate structure that might affect compliance obligations under the order; and to file compliance reports with the Commission. Part VI provides that the order will terminate after twenty (20) years, with certain exceptions.

The purpose of this analysis is to facilitate public comment on the proposed order. It is not intended to constitute an official interpretation of the proposed order or to modify its terms in any way.

Complaint

IN THE MATTER OF

COURTESY AUTO GROUP, INC.

CONSENT ORDER, ETC. IN REGARD TO ALLEGED VIOLATIONS OF SECTION 5 OF THE FEDERAL TRADE COMMISSION ACT, THE CONSUMER LEASING ACT, AND REGULATION M

Docket No. 9359; File No. 132 3171
Complaint, January 7, 2014 – Decision, May 1, 2014

This consent order addresses Courtesy Auto Group, Inc.'s advertising of automobile leases and failing to disclose the costs and terms of certain leases offered, despite the respondent's use of certain triggering terms in the advertisements. The complaint alleges that respondent has advertised that consumers can pay $0 up-front to lease a car for a specific monthly payment amount but, the advertised payment amounts exclude substantial fees, including but not limited to an acquisition fee. The consent order requires that the Respondent clearly and conspicuously make all of the disclosures required by the Consumer Leasing Act and Regulation M if it states relevant triggering terms, including the monthly lease payment. The order also prohibits the respondent from misrepresenting any material fact about the price, sale, financing, or leasing of any vehicle.

Participants

For the *Commission*: *Courtney Estep* and *Mark Glassman.*

For the *Respondent*: *Robert A. Peretti, Liberati & Peretti, LLP.*

COMPLAINT

The Federal Trade Commission, having reason to believe that Courtesy Auto Group, Inc., a corporation ("respondent"), has violated provisions of the Federal Trade Commission Act ("FTC Act"), the Consumer Leasing Act ("CLA"), and its implementing Regulation M, and it appearing to the Commission that this proceeding is in the public interest, alleges:

1. Respondent is a Massachusetts corporation with its principal office or place of business at 11 Scott Street, Attleboro, Massachusetts 02703. Respondent offers automobiles for sale or lease to consumers.

2. The acts or practices of respondent 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. Since at least October 2012, respondent has disseminated or caused to be disseminated advertisements to the public promoting the purchase, finance, and leasing of automobiles.

4. Respondent has disseminated or caused to be disseminated advertisements promoting consumer leases for automobiles, as the terms "advertisement" and "consumer lease" are defined in Section 213.2 of Regulation M, 12 C.F.R. §213.2, as amended.

5. One such advertisement has been posted on the website YouTube.com. A video copy of the advertisement is attached as Exhibit A, and screenshot captures of the video are attached as Exhibit B. The advertisement contains the following statements and depictions:

2013 KIA Sorento

$239/mo *buy for* *i*
with $0 Down *or* *$20,980*

While these statements appear, a voice-over states:

> Get behind the wheel of the new 2013 Kia Sorento, now lease priced for $239 a month with zero down, or sale priced at $20,980.

At the end of the advertisement, a 380-word block of text scrolls past at high speed, comprised of 33 lines of small, blurry white print against a black background. The text contains the following statements:

> . . . . Sorento: Priced with all applicable Manufacturer rebates and incentives. Does not include tax, title, acquisition, registration or doc fees. Soul: APR financing available, subject to credit approval by Kia Motors Finance (KMF)

> [Hyundai Motor Finance (HMF) in Massachusetts and D.C.], through KMF/HMK, to very well qualified buyers and not available on balloon financing. Only a limited number of buyers will qualify for advertised APR. Downpayment will vary depending on APR. . . .

6. A similar advertisement has appeared on respondent's website, www.courtesyma.com. A video copy of the advertisement is attached as Exhibit C, and screenshot captures of the video are attached as Exhibit D. The advertisement includes a still photo depicting a 2013 Kia Sorento underneath the following prominent text:

2013 Kia Sorento
Lease for
$239/mo
with $0 down
OR
Buy for $20,980

Adjacent to the still photo is a box in which a video advertisement for the vehicle plays, with a voice-over stating "Get behind the wheel of the new 2013 Kia Sorento, now lease priced for $239 a month."

Near the end of the video ad, a block of text appears briefly within the box containing the video screen, before being replaced at the end of the video with a graphic allowing consumers to enter personal information to initiate contact with respondent. The block of text states:

> . . . . Sorento: Priced with all applicable Manufacturer rebates and incentives. Does not include tax, title, acquisition, registration or doc fees. Not all model trim levels will be applicable. Kelley Blue Book: Minus the mileage, wear and tear up to $10,000 fair. Not to be combined with any other offer. See dealer for complete details.

If consumers scroll down using the bar to the right of the web browser screen, a block of small text appears near the bottom of the screen containing the first four sentences of the statement above.

Thus, consumers cannot pay "$0 down" to lease the advertised vehicles for the monthly payment amounts offered; they must also pay significant fees, including but not limited to an acquisition fee. Respondent has represented that its acquisition fee is $595.

7. Additional advertisements have appeared on the landing page of respondent's website. One such advertisement has appeared in a "slider" panel that automatically presents a sequence of automobile offers prominently at the top of the landing page. A video depicting a user navigating through the advertisement and its links described below is attached as Exhibit E, and screenshot captures of the video are attached as Exhibit F.

The banner includes a still photo depicting a 2013 Kia Soul accompanied by the following text:

2013 Kia Soul

$199 a Month

$0 Due at Signing

Now at
Courtesy Kia!

See Dealer for full details

The landing page includes no additional information about the offer. If consumers click on the banner, they are taken to a page apparently showing respondent's inventory of 2013 Kia Souls. This page includes no additional information regarding lease offers, and instead lists various sale prices for each of the cars. If consumers click on the link for a particular car, they are taken to a page for that car, which includes a box labeled "Current Specials." In some but not all instances, the box includes among other things a monthly payment amount. In such cases, if

consumers click on a small "Disclaimer" link at the bottom of the box, a pop-up box containing dense, small, light gray text against a white background appears. The pop-up box includes the statement:

> (1) Disclaimer - $199 a Month with $0 due at signing 2013 Kia Soul. See dealer for details. Not all applicants will qualify.

Respondent's website thus does not disclose important additional terms of the prominently advertised lease, including but not limited to whether consumers must pay tax, tags, registration or doc fees, the number of lease payments, and whether an extra charge may be imposed at the end of the lease.

FEDERAL TRADE COMMISSION ACT VIOLATIONS

Count I

Misrepresentation of Amount Due at Lease Inception

8. Through the means described in Paragraphs 5 through 7, respondent has represented, expressly or by implication, that consumers can pay $0 at lease inception to lease the advertised vehicle for the advertised monthly payment amount.

9. In truth and in fact, consumers cannot pay $0 at lease inception to lease the advertised vehicle for the advertised monthly payment amount. Consumers must also pay significant fees, including but not limited to an acquisition fee. Therefore, the representation set forth in Paragraph 8 was, and is, false or misleading.

10. Respondent's practices 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).

VIOLATION OF THE CONSUMER LEASING ACT AND REGULATION M

11. Under Section 184 of the CLA and Section 213.7 of Regulation M, advertisements promoting consumer leases are required to make certain disclosures ("additional terms") if they state any of several terms, such as the amount of any payment ("CLA triggering terms"). 15 U.S.C. § 1667c; 12 C.F.R. § 213.7.

12. Respondent's advertisements promoting consumer leases, including but not necessarily limited to those described in Paragraphs 5 through 7, are subject to the requirements of the CLA and Regulation M.

Count II

Failure to Disclose or to Disclose Clearly and Conspicuously Required Lease Information

13. Respondent's advertisements promoting consumer leases, including but not necessarily limited to those described in Paragraphs 5 through 7, have included CLA triggering terms, but have failed to disclose or to disclose clearly and conspicuously additional terms required by the CLA and Regulation M, including one or more of the following:

a. That the transaction advertised is a lease.

b. The total amount due prior to or at consummation or by delivery, if delivery occurs after consummation.

c. Whether or not a security deposit is required.

d. The number, amount, and timing of scheduled payments.

e. With respect to a lease in which the liability of the consumer at the end of the lease term is based on the anticipated residual value of the property, that an extra charge may be imposed at the end of the lease term.

14. Therefore, the practices set forth in Paragraph 13 of this complaint have violated Section 184 of the CLA, 15 U.S.C. § 1667c, and Section 213.7 of Regulation M, 12 C.F.R. § 213.7.

NOTICE

Notice is hereby given to the respondent that the ninth day of September, 2014, at 10:00 a.m., is hereby fixed as the time, and the Federal Trade Commission offices at 600 Pennsylvania Avenue, N.W., Room 532-H, Washington, D.C. 20580, as the place when and where a hearing will be had before an Administrative Law Judge of the Federal Trade Commission, on the charges set forth in this complaint, at which time and place you will have the right under the Federal Trade Commission Act to appear and show cause why an order should not be entered requiring you to cease and desist from the violations of law charged in this complaint.

You are notified that the opportunity is afforded you to file with the Federal Trade Commission an answer to this complaint on or before the fourteenth (14th) day after service of it upon you. An answer in which the allegations of the complaint are contested shall contain a concise statement of the facts constituting each ground of defense; and specific admission, denial, or explanation of each fact alleged in the complaint or, if you are without knowledge thereof, a statement to that effect. Allegations of the complaint not thus answered shall be deemed to have been admitted.

If you elect not to contest the allegations of fact set forth in the complaint, the answer shall consist of a statement that you admit all of the material facts to be true. Such an answer shall constitute a waiver of hearings as to the facts alleged in the complaint and, together with the complaint, will provide a record basis on which the Commission shall issue a final decision containing appropriate findings and conclusions, and a final order disposing of the proceeding. In such answer, you may, however, reserve the right to submit proposed findings of fact and conclusions of law under Rule 3.46 of the Commission's Rules of Practice for Adjudicative Proceedings.

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

The Administrative Law Judge shall hold a prehearing scheduling conference not later than ten (10) days after the answer is filed by the 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., Room 532-H, Washington, D.C. 20580. Rule 3.21(a) requires a meeting of the parties' counsel as early as practicable before the prehearing scheduling conference, but in any event no later than five (5) days after the answer is filed by the respondent. Rule 3.31(b) obligates counsel for each party, within five (5) days of receiving respondent's answer, to make certain disclosures without awaiting a formal discovery request.

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

Moreover, the Commission has reason to believe that, if the facts are found as alleged in the complaint, it may be necessary and appropriate for the Commission to seek relief to redress injury to consumers, or other persons, partnerships or corporations, in the form of restitution for past, present, and future consumers and such other types of relief as are set forth in Section 19(b) of the Federal Trade Commission Act. The Commission will determine whether to apply to a court for such relief on the basis of the adjudicative proceedings in this matter and such other factors as are relevant to consider the necessity and appropriateness of such action.

ORDER

DEFINITIONS

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

A. Unless otherwise specified, "respondent" shall mean Courtesy Auto Group, Inc., and its successors and assigns.

B. "Advertisement" shall mean a commercial message in any medium that directly or indirectly promotes a consumer transaction.

C. "Clearly and conspicuously" shall mean as follows:

1. In a print advertisement, the disclosure shall be in a type size, location, and in print that contrasts with the background against which it appears, sufficient for an ordinary consumer to notice, read, and comprehend it.

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

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

4. In a radio advertisement, the disclosure shall be delivered in a volume and cadence sufficient for an ordinary consumer to hear and comprehend it.

5. In all advertisements, the disclosure shall be in understandable language and syntax. Nothing contrary to, inconsistent with, or in mitigation of the disclosure shall be used in any advertisement or promotion.

D. "Consumer lease" shall mean a contract in the form of a bailment or lease for the use of personal property by a natural person primarily for personal, family, or household purposes, for a period exceeding four months and for a total contractual obligation not exceeding the applicable threshold amount, whether or not the lessee has the option to purchase or otherwise become the owner of the property at the expiration of the lease, as set forth in Section 213.2 of Regulation M, 12 C.F.R. § 213.2, as amended.

E. "Lease inception" shall mean prior to or at consummation of the lease or by delivery, if delivery occurs after consummation.

F. "Material" shall mean likely to affect a person's choice of, or conduct regarding, goods or services.

G. "Motor vehicle" or "vehicle" shall mean:

1. Any self-propelled vehicle designed for transporting persons or property on a street, highway, or other road;

2. Recreational boats and marine equipment;

3. Motorcycles;

4. Motor homes, recreational vehicle trailers, and slide-in campers; and

5. Other vehicles that are titled and sold through dealers.

I.

IT IS HEREBY ORDERED that respondent and its officers, agents, representatives, and employees, directly or indirectly, in connection with any advertisement for the purchase, financing, or leasing of motor vehicles, shall not, in any manner, expressly or by implication:

A. Misrepresent the cost of:

1. Leasing a vehicle, including but not necessarily limited to, the total amount due at lease inception, the downpayment, amount down, acquisition fee, capitalized cost reduction, any other amount required to be paid at lease inception, and the amounts of all monthly or other periodic payments; or

2. Purchasing a vehicle with financing, including but not necessarily limited to, the amount or percentage of the downpayment, the number of payments or period of repayment, the amount of any payment, and the repayment obligation over the full term of the loan, including any balloon payment; or

B. Misrepresent any other material fact about the price, sale, financing, or leasing of any vehicle.

II.

IT IS FURTHER ORDERED that respondent and its officers, agents, representatives, and employees, directly or indirectly, in connection with any advertisement for any consumer lease, shall not, in any manner, expressly or by implication:

A. State the amount of any payment or that any or no initial payment is required at lease inception, without

disclosing clearly and conspicuously the following terms:

1. That the transaction advertised is a lease;

2. The total amount due at lease signing or delivery;

3. Whether or not a security deposit is required;

4. The number, amounts, and timing of scheduled payments; and

5. That an extra charge may be imposed at the end of the lease term in a lease in which the liability of the consumer at the end of the lease term is based on the anticipated residual value of the vehicle; or

B. Fail to comply in any respect with Regulation M, 12 C.F.R. Part 213, as amended, and the Consumer Leasing Act, 15 U.S.C. §§ 1667-1667f, as amended.

III.

IT IS FURTHER ORDERED that respondent 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;

C. All evidence in its possession or control that contradicts, qualifies, or calls 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. Any documents reasonably necessary to demonstrate full compliance with each provision of this order, including but not limited to all documents obtained, created, generated, or that in any way relate to the requirements, provisions, or terms of this order, and all reports submitted to the Commission pursuant to this order.

IV.

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

V.

IT IS FURTHER ORDERED that respondent shall notify the Commission at least thirty (30) days prior to any change in the corporation(s) that may affect compliance obligations arising under this order, including but not limited to a dissolution, assignment, sale, merger, or other action that would result in the emergence of a successor corporation; the creation or dissolution of a subsidiary, parent, or affiliate that engages in any acts or practices subject to this order; the proposed filing of a bankruptcy petition; or a change in the corporate name or address. *Provided, however*, that, with respect to any proposed change in the corporation about which respondent learns less than thirty (30) days prior to the date such action is to take place, respondent shall notify the Commission as soon as is practicable after obtaining such knowledge. 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 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: FTC v. Courtesy Auto Group, Inc.

VI.

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 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.

VII.

This order will terminate twenty (20) years from the date of its issuance, or twenty (20) years from the most recent date that the United States or the 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;

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.

IN WITNESS WHEREOF, the Federal Trade Commission has caused this complaint to be signed by its Secretary and its official seal to be hereto affixed, at Washington, D.C. this seventh day of January, 2014.

By the Commission.

Exhibit A

Exhibit A

[Video Copy of the Advertisement Described In Paragraph 5]

Complaint

Exhibit B

Video Image Screenshot:

Scrolling Text Block Screenshot:

Offers end 1/2/13. Sorento: Priced with all applicable Manufacturer rebates and incentives. Does not include tax, title, acquisition, registration or doc fees. Soul: APR financing available, subject to credit approval by Kia Motors Finance (KMF) [Hyundai Motor Finance (HMF) in Massachusetts and D.C.], through KMF/HMK, to very well qualified buyers and not available on balloon financing. Only a limited number of customers will qualify for advertised APR. Down payment will vary depending on APR. Bonus Cash from KMF/HMF must be applied as a down payment. Must take delivery from a participating dealer and from retail stock from 9/5/2012 to 1/2/2013. New vehicles only. This incentive is for a limited time offer on eligible Kia vehicles and may not be combined with other special offers except where specified. Dealer contribution may vary and could affect actual monthly payment. Finance contract must be signed and dated no later than 1/2/2013. Truth in Lending Act Disclosure: Down payment will vary with APR and credit. For example, 1.9% APR with $2500 down payment provides for 36 monthly payments of $28.6 per $1000 financed for qualified buyers. The rates described are for estimation purposes only, you may not be able to finance at this rate. Sportage: APR financing available, subject to credit approval by Kia Motors Finance (KMF) [Hyundai Motor Finance (HMF) in Massachusetts and D.C.], through KMF/HMK, to very well qualified buyers and not available on balloon financing. Only a limited number of customers will qualify for advertised APR. Down payment will vary depending on APR. Bonus Cash from KMF/HMF must be applied as a down payment. Must take delivery from a participating dealer and from retail stock from 9/5/2012 to 1/2/2013. New vehicles only. This incentive is for a limited time offer on

Complaint

Exhibit C

Exhibit C

[Video Copy of the Advertisement Described In Paragraph 6]

Exhibit D

Website Advertisement Containing Video and Still Image:

Text Block Appearing Near the End of the Website Video Advertisement:

Video Screen at the Conclusion of the Video: Text Block at the Bottom of the Webpage:

Page 3 (Exhibit D)

Exhibit E

Exhibit E

[Video Depicting A User Navigating Through the Advertisement and Its Links Described In Paragraph 7]

Exhibit F

Courtesy Kia Landing Page – www.courtesyma.com:

Landing page after clicking on the banner advertisement above:

Web page after clicking on a car listed in inventory and then clicking on the "Disclaimer" link:

Page 3 (Exhibit F)

DECISION AND ORDER

The Federal Trade Commission ("Commission") having heretofore issued its Administrative Complaint charging Respondent Courtesy Auto Group, Inc., hereinafter referred to as Respondent, with violations of Section 5 of the Federal Trade Commission Act, as amended, 15 U.S.C. § 45 ("FTC Act"), Section 184 of the Consumer Leasing Act, 15 U.S.C. §1667c, and Section 213.7 of Regulation M, 12 C.F.R. §213.7, and Respondent having been served with a copy of the Complaint, together with a notice of contemplated relief; 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 Complaint, a statement that the signing of said Consent

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

The Secretary of the Commission having thereafter withdrawn the matter from adjudication in accordance with Commission Rule 3.25(c), 16 C.F.R. § 3.25(c); and

The Commission having considered the matter and having thereupon accepted the executed Consent Agreement and placed such Agreement on the public record for a period of thirty (30) days, now in further conformity with the procedure described in Commission Rule 3.25(f), the Commission hereby makes the following jurisdictional findings and issues the following Decision and Order ("Order):

1. Respondent, Courtesy Auto Group, Inc., is a Massachusetts corporation with its principal office or place of business at 11 Scott Street, Attleboro, MA 02703.

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

A. Unless otherwise specified, "Respondent" shall mean Courtesy Auto Group, Inc., and its successors and assigns.

B. "Advertisement" shall mean a commercial message in any medium that directly or indirectly promotes a consumer transaction.

C. "Clearly and conspicuously" shall mean as follows:

1. In a print advertisement, the disclosure shall be in a type size, location, and in print that contrasts with the background against which it appears, sufficient for an ordinary consumer to notice, read, and comprehend it.

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

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

4. In a radio advertisement, the disclosure shall be delivered in a volume and cadence sufficient for an ordinary consumer to hear and comprehend it.

5. In all advertisements, the disclosure shall be in understandable language and syntax. Nothing contrary to, inconsistent with, or in mitigation of the disclosure shall be used in any advertisement or promotion.

D. "Consumer lease" shall mean a contract in the form of a bailment or lease for the use of personal property by a natural person primarily for personal, family, or

household purposes, for a period exceeding four months and for a total contractual obligation not exceeding the applicable threshold amount, whether or not the lessee has the option to purchase or otherwise become the owner of the property at the expiration of the lease, as set forth in Section 213.2 of Regulation M, 12 C.F.R. § 213.2, as amended.

E. "Lease inception" shall mean prior to or at consummation of the lease or by delivery, if delivery occurs after consummation.

F. "Material" shall mean likely to affect a person's choice of, or conduct regarding, goods or services.

G. "Motor vehicle" or "vehicle" shall mean:

1. Any self-propelled vehicle designed for transporting persons or property on a street, highway, or other road;

2. Recreational boats and marine equipment;

3. Motorcycles;

4. Motor homes, recreational vehicle trailers, and slide-in campers; and

5. Other vehicles that are titled and sold through dealers.

I.

IT IS HEREBY ORDERED that Respondent and its officers, agents, representatives, and employees, directly or indirectly, in connection with any advertisement for the purchase, financing, or leasing of motor vehicles, shall not, in any manner, expressly or by implication:

A. Misrepresent the cost of:

1. Leasing a vehicle, including but not necessarily limited to, the total amount due at lease inception, the downpayment, amount down, acquisition fee, capitalized cost reduction, any other amount required to be paid at lease inception, and the amounts of all monthly or other periodic payments; or

2. Purchasing a vehicle with financing, including but not necessarily limited to, the amount or percentage of the downpayment, the number of payments or period of repayment, the amount of any payment, and the repayment obligation over the full term of the loan, including any balloon payment; or

B. Misrepresent any other material fact about the price, sale, financing, or leasing of any vehicle.

II.

IT IS FURTHER ORDERED that Respondent and its officers, agents, representatives, and employees, directly or indirectly, in connection with any advertisement for any consumer lease, shall not, in any manner, expressly or by implication:

A. State the amount of any payment or that any or no initial payment is required at lease inception, without disclosing clearly and conspicuously the following terms:

1. That the transaction advertised is a lease;

2. The total amount due at lease signing or delivery;

3. Whether or not a security deposit is required;

4. The number, amounts, and timing of scheduled payments; and

5. That an extra charge may be imposed at the end of the lease term in a lease in which the liability of the consumer at the end of the lease term is based on the anticipated residual value of the vehicle; or

B. Fail to comply in any respect with Regulation M, 12 C.F.R. Part 213, as amended, and the Consumer Leasing Act, 15 U.S.C. §§ 1667-1667f, as amended.

III.

IT IS FURTHER ORDERED that Respondent 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;

C. All evidence in its possession or control that contradicts, qualifies, or calls 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. Any documents reasonably necessary to demonstrate full compliance with each provision of this order, including but not limited to all documents obtained, created, generated, or that in any way relate to the requirements, provisions, or terms of this order, and all reports submitted to the Commission pursuant to this order.

IV.

IT IS FURTHER ORDERED that Respondent shall deliver a copy of this order to all current and future principals, officers,

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

V.

IT IS FURTHER ORDERED that Respondent shall notify the Commission at least thirty (30) days prior to any change in the corporation(s) that may affect compliance obligations arising under this order, including but not limited to a dissolution, assignment, sale, merger, or other action that would result in the emergence of a successor corporation; the creation or dissolution of a subsidiary, parent, or affiliate that engages in any acts or practices subject to this order; the proposed filing of a bankruptcy petition; or a change in the corporate name or address. *Provided, however*, that, with respect to any proposed change in the corporation about which Respondent learns less than thirty (30) days prior to the date such action is to take place, Respondent shall notify the Commission as soon as is practicable after obtaining such knowledge. 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 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: FTC v. Courtesy Auto Group, Inc.

VI.

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 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.

VII.

This order will terminate on May 1, 2034, 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;

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 McSweeny not participating.

ANALYSIS OF CONSENT ORDER TO AID PUBLIC COMMENT

The Federal Trade Commission ("FTC") has accepted, subject to final approval, an agreement containing a consent order from Courtesy Auto Group, 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 FTC 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.

Respondent is a motor vehicle dealer. According to the FTC Complaint, Respondent has advertised that consumers can pay $0 up-front to lease a car for a specific monthly payment amount. The complaint alleges that, in fact, the advertised payment amounts exclude substantial fees, including but not limited to an acquisition fee. The complaint alleges therefore that the Respondent's representations are false or misleading in violation of Section 5 of the FTC Act. In addition, the complaint alleges a violation of the Consumer Leasing Act and Regulation M for failing to disclose the costs and terms of certain leases offered, despite the Respondent's use of certain triggering terms in the advertisements.

The proposed order is designed to prevent the Respondent from engaging in similar deceptive practices in the future. Part I.A prohibits the Respondent from misrepresenting the cost of: (1) leasing a vehicle, including but not limited to the total amount due at lease inception, the downpayment, amount down, acquisition fee, capitalized cost reduction, any other amount required to be paid at lease inception, and the amounts of all monthly or other periodic payments; or (2) purchasing a vehicle with financing, including but not necessarily limited to the amount or percentage of the downpayment, the number of payments or period of repayment, the amount of any payment, and the repayment obligation over the full term of the loan, including any balloon payment. Part I.B prohibits the Respondent from misrepresenting

any other material fact about the price, sale, financing, or leasing of any vehicle.

Part II of the proposed order addresses the CLA allegation. It requires that the Respondent clearly and conspicuously make all of the disclosures required by CLA and Regulation M if it states relevant triggering terms, including the monthly lease payment. In addition, Part II prohibits any other violation of CLA and Regulation M.

Part III of the proposed order requires Respondent to keep copies of relevant advertisements and materials substantiating claims made in the advertisements. Part IV requires that Respondent provide copies of the order to certain of its personnel. Part V requires notification to the Commission regarding changes in corporate structure that might affect compliance obligations under the order. Part VI requires the Respondent to file compliance reports with the Commission. Finally, Part VII 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 complaint or proposed order, or to modify in any way the proposed order's terms.

Complaint

IN THE MATTER OF

VISANT CORPORATION, JOSTENS, INC., AND AMERICAN ACHIEVEMENT CORPORATION

COMPLAINT AND FINAL ORDER IN REGARD TO ALLEGED VIOLATIONS OF SECTION 5 OF THE FEDERAL TRADE COMMISSION ACT AND SECTION 7 OF THE CLAYTON ACT

Docket No. 9362; File No. 141 0033
Complaint, April 17, 2014 – Decision, May 7, 2014

The complaint alleges that the acquisition of American Achievement Corporation by Jostens, Inc., a subsidiary of Visant Corporation, would have anti-competitive effects in the markets for high school and college class rings in the United States. The Order dismisses the Complaint because the parties abandoned the transaction.

Participants

For the *Commission*: *Christopher Abbott, Maggie DiMoscato, Michelle Fetterman, Stephanie Greco, Peter Herrick, William Huynh, Amy Posner, Stephanie Reynolds, Jenny Schwab, Mark Seidman,* and *Stelios Xenakis.*

For the *Respondents*: *Ellen L. Frye* and *Joseph F. Tringali, Simpson Thacher & Bartlett LLP*; and *Jeffrey D. Ayer, Molly S. Boast, Ali M. Stoeppelwerth*, and *Jonathan R. Yarowsky, Wilmer Cutler Pickering Hale .and Dorr LLP.*

COMPLAINT

Pursuant to the provisions of the Federal Trade Commission Act ("FTC Act"), and by virtue of the authority vested in it by the Act, the Federal Trade Commission ("Commission"), having reason to believe that Respondents Visant Corporation ("Visant"), Jostens, Inc. ("Jostens"), and American Achievement Corporation ("AAC"), having executed a stock purchase agreement in violation of Section 5 of the FTC Act, 15 U.S.C. § 45, which if consummated would violate Section 7 of the Clayton Act, as amended, 15 U.S.C. § 18, and Section 5 of the FTC Act, and it

appearing to the Commission that a proceeding by it in respect thereof would be in the public interest, hereby issues its complaint pursuant to Section 5(b) of the FTC Act, 15 U.S.C. § 45(b), and Section 11(b) of the Clayton Act, 15 U.S.C. § 21(b), stating its charges as follows:

I.
NATURE OF THE CASE

1. High school and college students in the United States purchase class rings to commemorate their academic achievement and show their affiliation to their alma maters. In schools around the country, class rings symbolize longstanding traditions and shared values across generations of students and alumni, representing an enduring connection to the school and its community. Today, three vendors control over [redacted] percent of these class ring sales: Visant (through its Jostens subsidiary), AAC, and Herff Jones, Inc. ("Herff Jones"). Collectively known as the "Big Three," Jostens, AAC, and Herff Jones have competed against one another for nearly a century and together they have long dominated the high school and college class rings markets. The Big Three vigorously compete for high school and college class ring accounts on a regular basis. As one AAC document exclaims: [redacted] Respondents now propose to reduce the Big Three to a "Big Two," eliminating robust head-to-head competition and greatly enhancing the remaining two companies' ability to collude. The result will be higher prices and lower quality and service for students across the United States.

2. Visant, through its Jostens subsidiary, seeks to acquire AAC for approximately [redacted] (the "Acquisition"). The Acquisition will combine Jostens, the leading high school class rings vendor and a strong second in college class ring sales, with AAC, the leading college class ring vendor and the number two in high school class ring sales. Respondents' combined market shares will account for approximately [redacted] percent of high school and [redacted] percent of college class ring sales nationwide. The resulting market shares for high school and college class rings far exceed the market concentration levels presumed likely to result in anticompetitive effects under the relevant case law and the U.S.

Department of Justice and Federal Trade Commission Horizontal Merger Guidelines ("Merger Guidelines").

3. The vigorous head-to-head competition between Jostens and AAC currently benefits students, as well as their parents and schools. That competition results in lower ring prices, better warranty protection, improved services, and contributions to school programs, such as scholarship funds and educational support programs. The Acquisition will eliminate the competition that produces these benefits. Moreover, the Acquisition will leave two firms controlling over [redacted] percent of the manufacture and sale of high school and college rings in the United States. Firms in this industry already successfully track each other's pricing and offer similar ring lines, services, and complementary graduation products. The Acquisition will leave two firms with high visibility into each other's day-to-day pricing and bidding activities, making the industry ripe for anticompetitive coordination between the remaining Big Two.

4. New entry and expansion into the relevant markets will not prevent the Acquisition's anticompetitive effects. Manufacturing is a significant barrier to entry. It is expensive and time consuming to establish effective production and to fabricate the significant ring mold inventories needed to compete with the Big Three. The well-established reputations the Big Three have burnished over the last century are an important aspect of the business and serve to keep entry barriers high. They also control sales representatives who often have long-standing relationships with high school and college administrators. Those sales representatives compete with each other to earn exclusive on-campus selling rights. Competitors outside of the Big Three rarely dislodge their entrenched sales representatives. Further, the Big Three's sales representatives sign non-compete or non-solicit agreements that prohibit them from selling competing class rings and other graduation products. Finally, the significant brand equity enjoyed by the Big Three makes sufficient entry and fringe competitor expansion difficult and unlikely.

5. Respondents cannot show cognizable efficiencies that would outweigh the anticompetitive effects that will occur if the Acquisition is consummated.

II.

BACKGROUND

A.
Jurisdiction

6. Respondents, and each of their relevant operating entities and parent entities are, and at all relevant times have been, engaged in commerce or in activities affecting "commerce" as defined in Section 4 of the FTC Act, 15 U.S.C. § 44, and Section 1 of the Clayton Act, 15 U.S.C. § 12.

7. The Acquisition constitutes an acquisition subject to Section 7 of the Clayton Act, 15 U.S.C. § 18.

B.
Respondents

8. Respondent Visant is a holding company incorporated under and by virtue of the laws of Delaware. Headquartered in Armonk, New York, Visant is a leading marketing and publishing services enterprise that operates through multiple subsidiaries. For fiscal year 2013, Visant generated approximately $1.1 billion in sales revenue, of which 17% was derived from the sale of class rings and other jewelry.

9. Respondent Jostens is a Visant subsidiary. Jostens is a leading manufacturer and seller of class rings and other graduation products, including graduation announcements, diplomas and diploma covers, caps and gowns, and yearbooks. Jostens relies heavily on a network of approximately [redacted] exclusive sales representatives to sell these products directly to schools and students at both high schools and colleges. Jostens sells a small number of class rings through the retail channel under the Gold Lance brand.

10. Respondent AAC is owned by the private equity fund Fenway Partners Capital Fund II, LP. Incorporated under and by virtue of the laws of Delaware, AAC is headquartered in Austin, Texas. AAC is a leading manufacturer and seller of class rings,

varsity jackets, and other graduation products, including graduation announcements, diplomas and diploma covers, and yearbooks, utilizing approximately exclusive sales representatives. AAC sells both high school and college class rings through its Balfour brand. AAC also sells a substantial volume of high school class rings through the retail channel at Walmart, department stores, national jewelry chains, and independent jewelry stores. AAC's sales revenue in fiscal year 2013 totaled of which percent was derived from class ring sales.

C.
The Acquisition

11. Pursuant to a November 19, 2013 stock purchase agreement (the "Agreement"), Jostens proposes to pay approximately million to acquire all of AAC's common and non-voting preferred stock, discharge fully AAC's indebtedness, and to cover its management fees, bonuses, and transaction expenses. Visant guaranteed Jostens' obligations under the Agreement.

III.
CLASS RINGS OVERVIEW

A.
High School Class Rings Overview

12. High school students purchase class rings to commemorate their high school experiences, express pride in their school, and celebrate a significant milestone in their lives. This purchase carries enduring sentimental value for students and their parents. High school class rings are crafted in a variety of metals, weights, and styles for both men and women. Class rings are highly customizable to individualize the ring for each student. For example, each student can style the shank (or side) of his or her ring with various design features, such as the high school's mascot, emblems for sports and extracurricular activities, and the student's name and graduation year.

13. High school class rings are sold through two channels: on-campus and retail. The vast majority—over [redacted] percent by revenue—of high school class rings are sold by the Big Three to their national networks of on-campus sales representatives. These sales representatives—who are not employees of the Big Three and are thus considered independent—compete with each other to earn the exclusive right to sell one of the Big Three's class rings and other products on a particular campus. In addition to class rings, the sales representatives typically sell a full line of graduation products, including graduation announcements, diplomas and diploma covers, caps and gowns, and other graduation-related accessories.

14. The agreements between the Big Three and their sales representatives grant each representative the exclusive right to sell that vendor's class rings and other graduation products in a specified territory. The sales representatives in turn grant exclusivity to their respective Big Three vendor for class rings and some other products. The Big Three prohibit their sales representatives from selling graduation products (including class rings) manufactured by a competitor and require their sales representatives to sign non-compete or non-solicit agreements to deter defections.

15. The Big Three and their sales representatives frequently share competitive intelligence, including regular reporting by the representatives on pricing and competition in their territories. The Big Three routinely support their sales representatives by providing goods, services, and other support directly to the high schools and students to win high school accounts. Respondents also have a high degree of input into and effect on the prices their sales representatives charge end-consumers. Jostens and AAC generally set a suggested retail price ("SRP") for the sales representatives to charge end-customer students and parents. Although the sales representatives make a commission on each ring sale, Jostens and AAC design their commission structures to discourage their representatives from deviating substantially from the SRPs.

16. The Big Three's sales representatives compete with each other to be selected by a high school's principal or administrator

as the school's exclusive on-campus class ring seller through a formal or informal selection process. High school principals, on behalf of their students, seek the best price and quality rings and the highest levels of customer service. Sales representatives also often compete by offering to fund scholarships, sponsoring school improvements, offering educational support programs, and supplying free products to faculty and under-privileged students. The class ring vendors subsidize the costs of these "value-added programs" and incentive packages, especially when trying to win new accounts or avoid losing their existing accounts. All of this competition benefits students.

17. Once an on-campus vendor is chosen, that vendor's sales representative has exclusive access to the students at the school. Yet, despite this exclusivity, the on-campus sales representative knows that if he or she performs poorly (e.g., by charging too much or providing poor service), he or she risks losing the school account to a rival on-campus vendor. Sales representatives typically visit their schools several times over the course of a school year, not only to market and sell class rings and other graduation products to students and parents, but also to size rings, walk students through the ordering process, and address any service-related issues. Sales representatives typically also visit schools supplied by their rivals in an effort to win them over as new accounts.

18. High school class rings are also sold through the retail channel in brick-and-mortar stores and online. The brick-and-mortar retailers selling high school class rings include Walmart, department stores, national jewelry chains, and independent jewelers. Jostens sells a small number of high school class rings through retail. In contrast, AAC is by far the largest vendor of high school class rings sold through the retail channel. AAC manufactures approximately [redacted] percent of all high school class rings sold through retail, with about [redacted] percent of those retail units sold through Walmart. Herff Jones does not manufacture or sell retail high school class rings, so the combined entity will control more than [redacted] percent of the retail channel following the Acquisition.

19. There are significant differences between high school class rings sold by retailers and those sold on-campus. Retailers offer fewer style, design, and metal options as compared to the Big Three's on-campus sales representatives. For example, the Big Three's on-campus rings have mascots and designs unique to particular high schools, whereas typically retail rings do not. Retailers also offer substantially less comprehensive warranties than those available for on-campus rings. Finally, the level of customer service provided by retailers is not comparable to the high level of service and attention afforded to students and parents by on-campus sales representatives, who are often experts in the field and very experienced in working with students on the ordering process and the on-campus class rings' abundant customizable features.

B.
College Class Rings Overview

20. Like high school class rings, college class rings commemorate a student's successful post-secondary education and express a sense of affiliation with a college and its alumni. But unlike high schools, nearly all college rings are sold through college bookstores, alumni associations, and student agencies. College bookstores generally select their class ring vendors through periodic formal requests for proposals ("RFPs") and competitive reviews. Class ring vendors need college approval to sell rings with the college's licensed official name, marks, logos, and other insignia. Once approved, class ring vendors pay licensing royalties to certain licensing companies. Retailers sell very few college class rings. For example, [redacted] because it does not offer class rings with college-licensed marks, seals, logos, or other insignia.

21. College class rings fall into two broad categories: (1) official rings that do not differ substantially from student to student and year to year at a particular college and are offered through official ring programs ("ORPs"); and (2) multi-choice rings that allow students a greater degree of personalization. Colleges with ORPs select an exclusive class ring vendor through a RFP or bid process. For multi-choice class ring accounts, a college may approve multiple vendors. For multi-choice rings,

vendors compete in a RFP or bid process to be an approved vendor. Each approved vendor then competes side-by-side on the college's campus against the other approved vendor(s) to sell class rings to students.

22. In the college market, sales representatives—many of whom are employed directly by the vendor—are also very important. Sales representatives provide marketing materials to promote the college's class rings, assist students with in-person ring selection and order completion, and address any service issues. Vendors of college class rings make significant expenditures to support their sales representatives and other marketing initiatives.

IV.
THE RELEVANT PRODUCT MARKETS

23. The first relevant product market in which to analyze the Acquisition's effects is the manufacture and sale of high school class rings. No other product serves the same commemorative function, carries the same traditions, or imparts the same sentimental value for high school students as high school class rings. Other products are not included in this relevant product market because not enough consumers would switch to such products to make a small but significant and non-transitory increase in price ("SSNIP") of high school class rings unprofitable for a hypothetical monopolist.

24. The second relevant market in which to analyze the Acquisition's effects is the manufacture and sale of college class rings. No other product serves the same commemorative function, carries the same traditions, or imparts the same sentimental value for college students as college class rings. Other products are not included in this relevant product market because not enough consumers would switch to such products to make a SSNIP of college class rings unprofitable for a hypothetical monopolist.

25. Defining separate relevant product markets for high school and college class rings is appropriate because college

students do not view high school class rings as substitutes for college class rings and vice versa.

V.
THE RELEVANT GEOGRAPHIC MARKET

26. The relevant geographic market in which to analyze the effects of the Acquisition is no broader than the United States. The Big Three manufacture and sell class rings to their broad networks of sales representatives that enable them to compete on a nationwide basis. [redacted] The Big Three are the only major high school and college class ring manufacturers that distribute nationwide and have sales in most regions of the country. Respondents track each other's market shares on a national level. Although each of the Big Three has areas of the United States where it is a stronger or weaker competitor relative to the other two vendors, no other manufacturer or seller of high school and college class rings operates on a comparable scale.

VI.
MARKET STRUCTURE AND THE ACQUISITION'S PRESUMPTIVE ILLEGALITY

27. Post-Acquisition, the combined firm will control more than [redacted] percent of the high school ring market and more than [redacted] percent of the college class ring market, resulting in a dominant firm with only one meaningful (but much smaller) competitor in each market. Under the relevant case law and the Merger Guidelines, the Acquisition is presumptively unlawful, as it will greatly increase concentration in markets that already are highly concentrated.

28. The Herfindahl-Hirschman Index ("HHI") measures market concentration under the Merger Guidelines. A merger or acquisition is presumed likely to create or enhance market power, and thus is presumed illegal, when the post-merger HHI exceeds 2,500 points and the merger or acquisition increases the HHI by more than 200 points. Here, the market concentration levels for both markets exceed these thresholds by a wide margin. The post-Acquisition HHI in the high school class rings market will be 6,213, an increase of 2,492 points. The post-Acquisition HHI in the college class rings market will be 7,524, an increase of 3,430. The HHI figures for the high school and college class ring markets are summarized in Tables 1 and 2 below.[1]

Market Concentration Table 1: High School Class Rings[2]

Company	2013 Revenues	Pre-Merger Share	Post-Merger Share
Jostens			
AAC			
Herff Jones			
Dunham Manufacturing			
J. Lewis Small			
Custom Personalization Solutions			
National Recognition Products			
J. Jenkins Sons Co., Inc.			
Total			
HHIs		**3,721**	**6,213**
Delta			**2,492**

[1] Visant, AAC, and Herff Jones revenues are net of sales representative commissions.

[2] Individual shares may not add up to 100% due to rounding.

[3] 2007 revenue.

Market Concentration Table 2: College/University Class Rings[2]

Company	2013 Revenues	Pre-Merger Share	Post-Merger Share
Jostens			
AAC			
Herff Jones			
National Recognition Products			
J. Lewis Small			
Total			
HHIs		**4,094**	**7,524**
Delta			**3,430**

VII.
ANTICOMPETITIVE EFFECTS

A.
The Acquisition Will Eliminate Direct, Head-to-Head Competition Between Jostens and AAC

29. The Acquisition will eliminate direct, head-to-head competition between two of the three largest class ring vendors in the relevant markets. Students and parents benefit substantially from competition between Jostens and AAC, in the form of lower class ring prices, better product quality, improved customer service and warranties, and financial support from Jostens and AAC to their schools. The Acquisition will likely reduce these benefits significantly, harming students, parents, and schools by eliminating Jostens' and AAC's incentives to compete against one another.

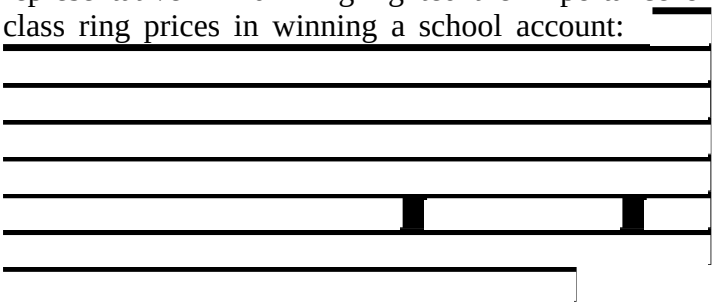
1. The Acquisition Will Likely Harm High School Students

30. Respondents set their wholesale class ring prices to their sales representatives based in part on the competitive conditions in the marketplace, including in particular, feedback they receive from their sales representatives regarding their competitors' on-campus prices.

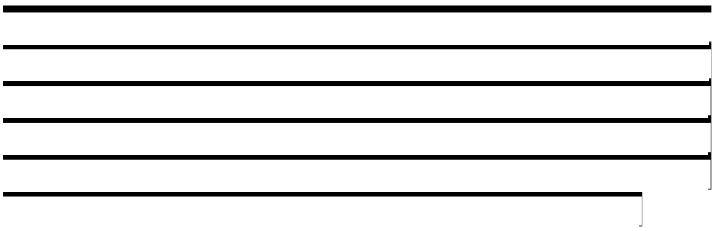
31. Jostens' and AAC's sales representatives vigorously compete with each other to be selected as a high school's exclusive on-campus class ring seller. To the extent on-campus high school class rings face competition from retail high school class rings, the bulk of this competition comes from AAC, given it produces the vast majority of the rings sold in the retail channel.

32. High school administrators take into account their students' interests when selecting their school's on-campus class ring vendor. As a result, they care about and consider price, quality, reputation, and service when selecting a representative. Moreover, even though the Big Three have high retention rates for their high school accounts, Jostens' and AAC's sales representatives regularly solicit each other's schools in an attempt to steal accounts from one another. This ongoing competition incents incumbent sales representatives to provide responsive customer service and lower prices to high school students, parents, and administrators in order to maintain their accounts. Indeed, Respondents' ordinary-course business documents confirm that Jostens and AAC compete directly with each other along price, quality, and service dimensions when trying to win high school accounts:

a. Feedback collected by Jostens from its sales representative in 2012 highlighted the importance of class ring prices in winning a school account:



b.



c. In 2013, Jostens gave pricing concessions to a sales representative competing to keep [redacted] class ring business. In a discussion with the sales representative, Jostens stated: [redacted]

d. In 2013, in an attempt to win the [redacted] class ring bid, one of AAC's Regional Managers requested the [redacted] to take the account away from Jostens.

e. In 2012, Jostens' sales representatives in [redacted] took two of AAC's long-standing high school class ring accounts [redacted] by working with Jostens to offer competitive pricing: [redacted]

f. In 2011, an AAC sales representative requested price concessions, noting: [redacted]

33. Jostens and AAC also track each other's warranty options, with AAC introducing its extended warranty option for its on-campus high school class rings in response to Jostens' introduction of a similar warranty. Both Jostens and AAC have also developed several high school educational enrichment programs, in part, to compete against one other.

34. Eliminating this head-to-head price and non-price competition between Jostens and AAC substantially enhances the combined firm's ability to exercise market power. The Acquisition will allow the combined firm to recapture the substantial business that Jostens and AAC would otherwise lose to one another, and will thus increase the combined firm's

incentive to increase prices and reduce quality and service levels. It will also reduce the combined firm's incentive to offer financial support and to fund educational enrichment programs that benefit schools and their students, because these value-added benefits are, in large part, the products of competition between Jostens and AAC for high school accounts.

35. In addition to the loss of competition between Jostens and AAC in the on-campus channel, the Acquisition will lessen competition between Jostens' on-campus and AAC's retail businesses. There is limited competition between on-campus rings and those sold at retail given the many style, design, metal option, warranty, and service differences. Nevertheless, to the extent that such competition exists, AAC sells approximately [redacted] percent of all high school class rings sold through the retail channel. To the extent Jostens' on-campus high school class rings today face competition from retail high school class rings, most of this competition comes from AAC. Currently, AAC has a strong incentive to use its retail presence to compete aggressively on price with Jostens' on-campus class rings, particularly in areas where AAC has few or no sales representatives. Eliminating that competition will enhance the combined firm's ability to raise prices in both channels, further harming high school students across the country.

2. The Acquisition Will Likely Harm College Students

36. AAC and Jostens are also the number one and two college class ring vendors and compete vigorously in that market; Herff Jones is a distant third. Retailers sell very few college class rings, and as the market shares reflect, vendors other than the Big Three are virtually nonexistent in the college class ring market.

37. The Acquisition will allow the combined firm to exercise enhanced market power, harming consumers. Competition between college class ring vendors generally takes one of two forms: (1) competing in a RFP or bid process to be selected for the ORP; or (2) competing side-by-side on college campuses against another approved vendor to sell class rings to students.

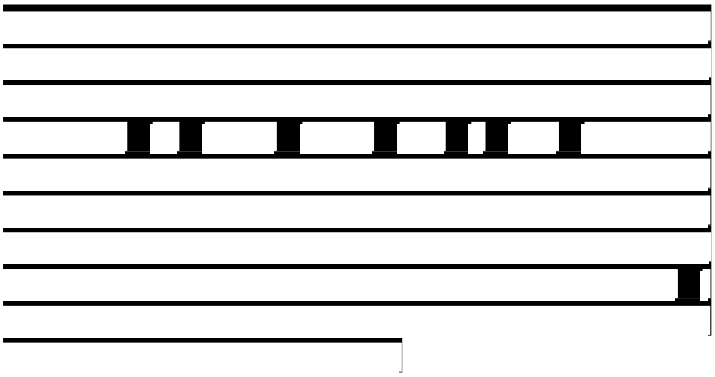
38. Respondents' ordinary-course business documents illustrate the significant competition between Jostens and AAC in both competitive settings. For example, in 2011, AAC's Director of College Marketing agreed to a sales representative's request for lower class ring prices to stay competitive in a side-by-side: [redacted] That same Director of College Marketing approved price reductions for side-by-sides at several universities the year before, noting the [redacted] Respondents' documents further highlight this head-to-head competition in the college market:

a. In 2012, one of AAC's regional managers reported [redacted] in an effort to win [redacted] class ring business, and that: [redacted]

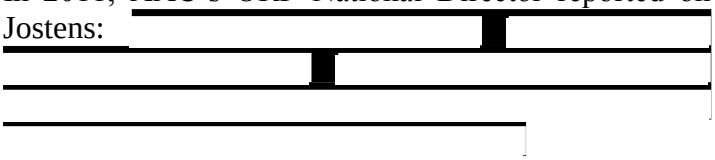
b. In 2011, an AAC sales representative noted that in a side-by-side at St. Mary's College: [redacted]

c. A 2011 AAC internal memorandum noted: [redacted]

d. In 2011, AAC and Jostens bid against each other to be the exclusive ring supplier for the [redacted] with AAC noting,



e. In 2011, AAC's ORP National Director reported on Jostens:



39. Colleges play one vendor off another to get lower college class ring pricing and better quality and service. Post-Acquisition, colleges will no longer have the ability to use Jostens to improve AAC's bids or vice-versa. Moreover, the combined firm will be able to recapture college class rings sales that Jostens and AAC would otherwise lose to one another by increasing its ring prices or lowering its ring quality. Importantly, competition from the only other significant vendor, Herff Jones, is unlikely to alleviate this harm or otherwise protect college class ring consumers. suggests that it is a substantially less desirable option than AAC and Jostens for many colleges and their students.

B.
The Acquisition Will Likely Lead to Anticompetitive Coordination

40. The Acquisition will result in an effective duopoly of Jostens/AAC and Herff Jones, enhancing their incentive and ability to coordinate behavior in the markets for high school and college class rings. Both of these markets already have many features that increase the likelihood of post-Acquisition

coordination, including substantial price transparency, stable market shares, and high barriers to entry.

41. After the Acquisition, with only two major manufacturers of high school and college class rings, it will become substantially easier for the remaining Big Two to coordinate with one another on price and non-price terms to achieve supracompetitive prices or other anticompetitive outcomes.

42. Post-Acquisition, detection of cheating in a coordinated scheme will become significantly easier. Today, information regarding which firm wins or loses particular accounts can be opaque in many instances. Although a member of the Big Three can safely assume a lost account went to one of the other two, it is often unsure to which one. The Acquisition eliminates this uncertainty by leaving only one firm to which each is likely to lose.

43. By acquiring AAC, Jostens will eliminate the Big Three vendor with the most divergent competitive incentives, given AAC's uniquely large presence in the retail channel. AAC, unlike Herff Jones and Visant, sells a significant number of its high school class rings through the retail channel. After the Acquisition, Jostens' incentive to disrupt a coordination scheme using the AAC retail brands is much lower as compared to AAC's pre-Acquisition incentive.

44. Today, the high school and college class ring markets are both highly concentrated, with the Big Three accounting for approximately [redacted] percent of the high school market and nearly [redacted] percent of the college market. Market shares have remained relatively stable over the last several years, with little shifting among the Big Three, and limited entry or expansion by fringe vendors.

45. The Big Three have substantial visibility into each other's pricing in both relevant markets—both the wholesale prices to sales representatives and retailers, and the end prices charged to students and parents. For example, the Big Three make their end pricing information readily available online. The Big Three's sales representatives also have tremendous insight into local

competitive conditions and are able to obtain their rivals' class ring prices. College class ring sales representatives also are able to observe their competitors' activities where they are selling in side-by-side situations. Where colleges engage in RFPs, the Big Three receive direct feedback about rivals from college decision-makers during the RFP process and from competitive bid documents shared post-award.

46. Post-Acquisition, the combined Jostens/AAC and Herff Jones, already possessing substantial up-to-date price and non-price information about each other, will have increased opportunity and incentives to coordinate their behavior.

VIII.
ENTRY BARRIERS

47. Neither entry by new class ring vendors, nor expansion by existing market participants will deter or counteract the Acquisition's likely serious competitive harm in the relevant markets.

48. New class ring vendor entry will not be likely, timely, or sufficient to offset the Acquisition's harmful effects. Creating an effective class ring manufacturing operation requires a significant investment of capital and time. Class ring manufacturing requires the production of molds. Regardless of whether the molds are produced through traditional hand tooling or modern computer-aided methods, a new entrant would need to build a large inventory of molds in order to offer the highly customized rings that would enable it to compete effectively. For example, AAC currently has ring molds, while a fringe competitor, , after years of effort and significant investment has approximately Even if new class ring manufacturing entry did occur, it is unlikely that it would be sufficient to offset the Acquisition's harm because of the time it would take a new vendor to build up its mold inventory.

49. Difficulty gaining access to distribution channels presents an additional barrier to new entry or expansion in the markets for high school and college class rings. Sales representatives are crucial for selling on-campus high school and college class rings, in large part because of their enduring customer relationships. The Big Three vendors use non-compete and non-solicit agreements to discourage their sales representatives from switching to other competitors. In addition, high schools continue to prefer an on-campus class rings vendor that also sells a full line of graduation products. Successful entry into the class ring markets would therefore likely require simultaneous entry into multiple product lines, either through manufacture or third-party sourcing agreements. Entering the market for college class rings, moreover, would require a new entrant to pay licensing fees. Ring vendors normally must pay a royalty for the use of college's name, seal, logo, or other insignia.

50. Meaningful entry into the retail channel would be difficult as well. An entrant would have to overcome the same manufacturing and mold inventory hurdles because retailers generally require customizable rings. In addition, any class ring vendor attempting to enter the retail channel would have to be able to fulfill orders, as retailers do not want to develop their own customization platforms or hold inventory.

51. Brand name and reputation also remain important to high schools and colleges regardless of whether class rings are sold on-campus or through retail. The Big Three have been manufacturing and selling rings for nearly a century and have well-established reputations. Building a reputation that a significant number of consumers will trust requires time and money. New entrants and online vendors cannot easily overcome this reputational hurdle.

52. Entry is also unlikely because neither relevant market is growing. Indeed, the high school class ring market has seen significant declines, which act as a significant deterrent to entry.

53. There is no recent history of meaningful entry, as the Big Three have maintained the lion's share of the markets for at least

five years. In fact, Jostens acquired a fringe competitor, Intergold, in 2010.

54. Growth of fringe competitors sufficient to offset the Acquisition's likely significant competitive harm is also unlikely. Existing third-party competitors attempting to expand their presence in the class rings markets face the same manufacturing and distribution barriers as new entrants. While various fringe competitors have attempted to expand their presence in the class rings markets, none has meaningfully increased its market share.

IX.
EFFICIENCIES

55. Extraordinary merger-specific efficiencies are necessary to outweigh the Acquisition's likely significant harm to competition in the markets for the manufacture and sale of high school and college class rings. Respondents cannot show cognizable efficiencies necessary to justify the Acquisition in light of its substantial potential to harm competition.

X.
VIOLATION

COUNT I – ILLEGAL AGREEMENT

56. The allegations of Paragraphs 1 through 55 above are incorporated by reference as though fully set forth.

57. The Agreement constitutes an unfair method of competition in violation of Section 5 of the FTC Act, as amended, 15 U.S.C. § 45.

COUNT II – ILLEGAL ACQUISITION

58. The allegations of Paragraphs 1 through 55 above are incorporated by reference as though fully set forth.

59. The Acquisition, if consummated, may substantially lessen competition in the relevant markets in violation of Section 7 of the Clayton Act, as amended, 15 U.S.C. § 18, and is an unfair

method of competition in violation of Section 5 of the FTC Act, as amended, 15 U.S.C. § 45.

NOTICE

Notice is hereby given to the Respondents that the seventeenth day of September, 2014, at 10 a.m., is hereby fixed as the time, and the Federal Trade Commission offices at 600 Pennsylvania Avenue, N.W., Room 532, Washington, D.C. 20580, as the place, when and where an evidentiary hearing will be had before an Administrative Law Judge of the Federal Trade Commission, on the charges set forth in this complaint, at which time and place you will have the right under the Federal Trade Commission Act and the Clayton Act to appear and show cause why an order should not be entered requiring you to cease and desist from the violations of law charged in the complaint.

You are notified that the opportunity is afforded you to file with the Commission an answer to this complaint on or before the fourteenth (14th) day after service of it upon you. An answer in which the allegations of the complaint are contested shall contain a concise statement of the facts constituting each ground of defense; and specific admission, denial, or explanation of each fact alleged in the complaint or, if you are without knowledge thereof, a statement to that effect. Allegations of the complaint not thus answered shall be deemed to have been admitted.

If you elect not to contest the allegations of fact set forth in the complaint, the answer shall consist of a statement that you admit all of the material facts to be true. Such an answer shall constitute a waiver of hearings as to the facts alleged in the complaint and, together with the complaint, will provide a record basis on which the Commission shall issue a final decision containing appropriate findings and conclusions and a final order disposing of the proceeding. In such answer, you may, however, reserve the right to submit proposed findings and conclusions under Rule 3.46 of the Commission's Rules of Practice for Adjudicative Proceedings.

Failure to file an answer within the time above provided shall be deemed to constitute a waiver of your right to appear and to

contest the allegations of the complaint and shall authorize the Commission, without further notice to you, to find the facts to be as alleged in the complaint and to enter a final decision containing appropriate findings and conclusions, and a final order disposing of the proceeding.

The Administrative Law Judge shall hold a prehearing scheduling conference not later than ten (10) days after the Respondents file their answers. Unless otherwise directed by the Administrative Law Judge, the scheduling conference and further proceedings will take place at the Federal Trade Commission, 600 Pennsylvania Avenue, N.W., Room 532, Washington, D.C. 20580. Rule 3.21(a) requires a meeting of the parties' counsel as early as practicable before the pre-hearing scheduling conference (but in any event no later than five (5) days after the Respondents file their answers). Rule 3.31(b) obligates counsel for each party, within five (5) days of receiving the Respondents' answers, to make certain initial disclosures without awaiting a discovery request.

NOTICE OF CONTEMPLATED RELIEF

Should the Commission conclude from the record developed in any adjudicative proceedings in this matter that the Acquisition challenged in this proceeding violates Section 5 of the Federal Trade Commission Act, as amended, and/or Section 7 of the Clayton Act, as amended, the Commission may order such relief against Respondents as is supported by the record and is necessary and appropriate, including, but not limited to:

1. If the Acquisition is consummated, divestiture or reconstitution of all associated and necessary assets, in a manner that restores two or more distinct and separate, viable and independent businesses in the relevant markets, with the ability to offer such products and services as Visant and AAC were offering and planning to offer prior to the Acquisition.

2. A prohibition against any transaction between Visant and AAC that combines their businesses in the relevant markets, except as may be approved by the Commission.

3. A requirement that, for a period of time, Visant and AAC provide prior notice to the Commission of acquisitions, mergers, consolidations, or any other combinations of their businesses in the relevant markets with any other company operating in the relevant markets.

4. A requirement to file periodic compliance reports with the Commission.

5. Any other relief appropriate to correct or remedy the anticompetitive effects of the transaction or to restore AAC as a viable, independent competitor in the relevant markets.

IN WITNESS WHEREOF, the Federal Trade Commission has caused this complaint to be signed by its Secretary and its official seal to be hereto affixed, at Washington, D.C., this seventeenth day of April, 2014.

By the Commission.

ORDER DISMISSING COMPLAINT

On April 17, 2014, the Federal Trade Commission issued the Administrative Complaint in this matter, having reason to believe that Respondents Visant Corporation ("Visant"), Jostens, Inc. ("Jostens"), and American Achievement Corporation ("AAC") had executed a Stock Purchase Agreement, in violation of Section 5 of the Federal Trade Commission Act, 15 U.S.C. § 45, which if consummated would violate Section 7 of the Clayton Act, 15 U.S.C. § 18. Complaint Counsel and Respondents have now filed a Joint Motion to Dismiss Complaint, which states that on April 17, 2014, Respondents Visant Corporation and Jostens, Inc. terminated the Stock Purchase Agreement between themselves and American Achievement Corporation.[1]

[1] *See* Joint Motion To Dismiss Complaint (Apr. 25, 2014), *available on the Commission Website at* http://www.ftc.gov/system/files/documents/cases/

The Commission has determined to dismiss the Administrative Complaint without prejudice, as the most important elements of the relief set out in the Notice of Contemplated Relief in the Administrative Complaint have been accomplished without the need for further administrative litigation.[2] In particular, Respondents have announced that they have abandoned the proposed acquisition, and have terminated the Stock Purchase Agreement they had previously executed for the proposed transaction.

For the foregoing reasons, the Commission has determined that the public interest warrants dismissal of the Administrative Complaint in this matter. The Commission has determined to do so without prejudice, however, because it is not reaching a decision on the merits. Accordingly,

IT IS ORDERED THAT the Administrative Complaint in this matter be, and it hereby is, dismissed without prejudice.

By the Commission.

140425visantmtntodismiss.pdf, *citing* Visant Corporation, Termination of a Material Definitive Agreement (Form 8-K) (Apr. 17, 2014).

[2] *See, e.g.*, *In the Matter of Integrated Device Technology, et al.*, Docket No. 9354, Order Dismissing Complaint (Jan. 15, 2013), *at* http://www.ftc.gov/sites/default/files/documents/cases/2013/01/130115idtcmpt.pdf; *In the Matter of Reading Health System, et al.*, Docket No. 9353, Order Dismissing Complaint (Dec. 7, 2012), *at* http://www.ftc.gov/sites/default/files/documents/cases/2012/12/121207readingsircmpt.pdf; *In the Matter of OSF Healthcare System, et al.*, Docket No. 9349, Order Dismissing Complaint (Apr. 13, 2012), *at* http://www.ftc.gov/os/adjpro/d9349/120413rockfordorder.pdf; *In the Matter of Omnicare, Inc.*, Docket No. 9352, Order Dismissing Complaint (Feb. 22, 2012), *at* http://www.ftc.gov/os/adjpro/d9352/120223omnicareorder.pdf; *In the Matter of Thoratec Corporation and HeartWare International, Inc.*, Docket No. 9339, Order Dismissing Complaint (Aug. 11, 2009), *at* http://www.ftc.gov/os/adjpro/d9339/090811thoatecorder.pdf; *In the Matter of CSL Limited, et al.*, Docket No. 9337, Order Dismissing Complaint (June 22, 2009), *at* http://www.ftc.gov/os/adjpro/d9337/090622commorderdismisscomplaint.pdf.

Complaint

IN THE MATTER OF

GENELINK, INC.
D/B/A
GENELINK BIOSCIENCES, INC.

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

Docket No. C-4456; File No. 112 3095
Complaint, May 8, 2014 – Decision, May 8, 2014

This consent order addresses GeneLink, Inc., also doing business as GeneLink Biosciences, Inc.'s advertising and promotion of purported genetically customized nutritional supplements and skin repair serum products sold through a multi-level marketing network. The complaint alleges that GeneLink represented that genetic disadvantages identified through the companies' DNA assessments are scientifically proven to be mitigated by or compensated for with the companies' nutritional supplements. The complaint further alleges that these custom-blended nutritional supplements: (1) effectively compensate for genetic disadvantages identified by respondents' DNA assessments, thereby reducing an individual's risk of impaired health or illness, and (2) treat or mitigate diabetes, heart disease, arthritis, and insomnia. Additionally, the complaint alleges that GeneLink failed to provide reasonable and appropriate security for consumers' personal information. The consent order requires GeneLink 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 order also prohibits GeneLink from making any representation about the health benefits, performance, or efficacy of any Covered Product or any Covered Assessment, unless the representation is non-misleading, and respondent relies on 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 claim is true.

Participants

For the *Commission*: *Megan Cox, Keith Fentonmiller, Carolyn L. Hann, Mary L. Johnson,* and *Laura Riposo VanDruff.*

For the *Respondent*: *John Graubert* and *Jeannie Perron, Covington & Burling LLP.*

COMPLAINT

The Federal Trade Commission, having reason to believe that GeneLink, Inc., a corporation, and foru™ International Corporation, formerly known as GeneWize Life Sciences, Inc. ("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 GeneLink, Inc. ("GeneLink"), also doing business as GeneLink Biosciences, Inc., is a publicly held Pennsylvania corporation with its principal office or place of business at 8250 Exchange Drive, Suite 120, Orlando, Florida 32809.

2. Respondent foru™ International Corporation ("foru™"), formerly known as GeneWize Life Sciences, Inc., is a Delaware corporation with its principal office or place of business at 1231 Greenway Drive, Suite 200, Irving, Texas 75038.

3. Respondents have developed, advertised, labeled, offered for sale, and sold through a multi-level marketing system utilizing affiliates and licensees, nutritional supplements and skincare products, including a line of customized products sold under several names such as LifeMap ME DNA Customized Nutritional Supplements, GeneWize Customized Nutritional Supplements, LifeMap ME DNA Customized Skin Repair Serum, and GeneWize Customized Skin Repair Serum.

4. Respondents purport to customize their nutritional supplements and skincare products to each consumer's genetic disadvantages. Using an "at home" cheek swab kit, each consumer submits a cheek swab to respondents. Respondents then send the swab sample to a third-party laboratory for analysis of genetic variations called single nucleotide polymorphisms ("SNPs"). Based on the laboratory test results, respondents prepare a DNA assessment that recommends specific levels of nutritional support based on each SNP analyzed.

5. Respondents' LifeMap Healthy Aging Assessment analyzes 12 SNPs that purportedly affect nutritional health and

aging, and their LifeMap Skin Health Assessment, formerly known as the Dermagenetic SNP Assessment, analyzes six SNPs that purportedly affect skin health and aging (collectively, "DNA Assessments"). According to respondents, each SNP "predicts biochemical processes that are associated with significant physiological disadvantages, . . . the negative potential [of which] has been scientifically proven to be modulated by nutritional supplementation." Compl. Ex. A.

6. Based on the DNA Assessments, respondents offer dietary supplements and skincare products that are purportedly customized to each consumer's unique genetic profile.

7. In their business practices, respondents obtain consumers' genetic information. Since 2008, respondents have collected genetic information from nearly 30,000 consumers.

8. Respondents' nutritional supplements are "drugs" or "food" within the meaning of Sections 12 and 15 of the Federal Trade Commission Act ("FTC Act").

9. Respondents' skincare products are "drugs" or "cosmetics" within the meaning of Sections 12 and 15 of the FTC Act.

10. 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.

Advertising and Marketing

11. Respondents have developed and disseminated or caused to be disseminated advertisements, packaging, and promotional materials for respondents' genetically customized nutritional supplements and skincare products including, but not limited to, Exhibits A through I. These materials contain the following statements and depictions:

A. LifeMap ME DNA Customized Nutritional Supplement Pamphlet (Ex. A)

Healthy Aging is Now as Close as Your **DNA!**
Genetically Customized Nutritional Supplements
Made Exclusively for You.

* * *

Why These Aging Genes?
Although human DNA contains several million natural genetic variations (called SNPs), GeneLink scientists used the following criteria to choose the SNPs for the GeneWize Healthy Aging DNA Assessment:

1. **Valid**: The existence of the SNP is supported by solid, credible, scientific evidence.
2. **Important**: A SNP predicts biochemical processes that are associated with significant physiological disadvantages.
3. **Frequent**: [T]he SNP is relatively common among the general population.
4. **Actionable**: A SNP's negative potential has been scientifically proven to be modulated by nutritional supplementation.

B. The New Wellness Frontier Brochure (Ex. B)

By analyzing and understanding your unique genetic strengths and weaknesses, you can eliminate the guesswork and "genetically guide" the optimal nutritional supplement or skincare formulation to match your LifeMap Healthy Aging Assessment™.

. . . Research shows that we can measure SNPs and have the ability to impact the expression of our genes through proper nutritional support.

* * *

What will I feel after taking my LifeMap ME Formula?
Since everyone's body is different, you'll likely receive unique benefits from your product. Some of the benefits you may notice and some you may not. Some of the most common benefits people report include:

- Ability to fall asleep faster
- Longer, deeper sleep . . .

You may or may not experience these same results. Your body is unique and so is your formula. It makes sense that your results will be unique too.

C. Your Genetic Compass Brochure (Ex. C)

GENETICALLY GUIDED PERSONALIZATION OF NUTRIENT AND SKIN CARE FORMULATIONS.
The Nutragenetic and Dermagenetic SNP assessments [*i.e.*, the DNA Assessments] examine a variety of genes which are responsible for making proteins that play a very important role in our overall health. These include oxidative stress, heart and circulatory health, immune health, bone health, pulmary [sic] health, eye/vision health, defense against environmental pollutants, collagen breakdown, photoaging, skin slacking & wrinkling and mild irritation.

KEY POINT *If the Nutragenetic and Dermagenetic SNP test predicts that you might not be as efficient as possible in any given health area, you may be able to do something about it. For every SNP tested, there are potentially compensating and enhancing nutrients that can put you on a better path toward optimal health.*

* * *

There are millions of SNPs. However, only certain subsets are associated with increased risk for disease

and physiologic health conditions. . . . GeneLink selects only those SNPs which can be addressed using nutrients or formulations or lifestyle modifications.

D. Welcome to genewize [sic]: Making Wellness Personal Brochure (Ex. D)

What Are Your Options to Improve Health and Wellbeing?

- Eating healthier?
- Pharmaceuticals?
- Exercise?
- Guessing at supplements?
- Genetically guided nutrition!

Do you have a plan to capitalize on this new science?

*** * ***

GeneWize . . . Connecting the Dots

- Over 14 Years R&D Prior To Launch
- Developed significant DNA tests for SNPs on "Heavy Lifters"
- Developed "SNP Boosts" to mitigate, compensate, or bypass SNP effects
- Powerful health and wellness benefits!

***ONLY* comprehensive genetically guided products!**

A View Into Your Patient or Customer . . .

- Patented DNA Collection Kit
- Sophisticated Assessment
- Confidentiality
- Pinpoint Genetic Predispositions
- Personalized Formula

Over 500,000 Possibilities

With a simple cheek swab . . . .

We Assess . . . Others Guess . . .

E. Cover Letter to GeneWize Fulfillment Package (Ex. E)

LifeMap Essentials™
Your Foundation for Optimal Wellness

Welcome and congratulations for taking an important next step toward healthy aging with the most advanced and scientifically proven nutritional supplement programs available – the **LifeMap Nutrition™ System**, which consists of the following:

1. The **LifeMap DNA collection kit** (provided by GeneLink, Inc.)
2. The **LifeMap Essentials™** formula (A non-custom foundation supplement to be taken while awaiting your Healthy Aging Report & DNA guided LifeMap Custom formula)
3. The **LifeMap DNA Healthy Aging Report™** (results in about 4 weeks after mailing your DNA collection kit)
4. The **LifeMap Custom™** formula (A totally customized formula based on your DNA)

F. GeneWize Official Website, mygenewize.com (Ex. F)

LifeMap Nutrition™ System Testimonials

Seeing is believing but I can't believe what [I] am seeing!

. . . [T]he best of all is the lack of pain on my knees and hips when running. Running was my passion but severe knee and hip pain kept me from it the last 10

years. LifeMap is renewing me in ways I never thought possible. . . .

Loving life, Margarita Nido Stewart

* * *

GeneWize has changed my health and my life!

I'm in my 5th month on the LifeMap Custom supplements and I'm amazed by my personal results. So far I've experienced great sleep, great energy, great skin, and much more. Plus, I continually notice even more positive changes: prior to taking the LifeMap supplements, my memory wasn't the greatest – but now I feel much sharper mentally! This is very important to me because my Mother had Alzheimer's. . . .

Roberta Johnson, GeneWize Affiliate, Miami, Florida

* * *

Thanks for the Memories

. . . I do have certain health challenges and when I started taking my LifeMap Product, after about a week and a half I was amazed to feel tremendous results! Before, I was getting only about three hours of sleep, now I can finally sleep! My concentration & memory also seem to be improving! . . .

Lina M. Oliver
* * *

LifeMap Nutrition Meets Karaoke!

After taking the LifeMap Product for only two weeks I have a lot more energy and my dry skin has improved dramatically. . . . I also began to see something amazing happen: I went from getting very little sleep

at night to now sleeping like a baby! I've been waking up feeling so refreshed that I want to jump up and down on my bed like a child . . . . I'm feeling so happy I've been out singing Karaoke and having a blast.

You couldn't pay me to stop taking the LifeMap Nutrition™. I have the energy to pursue my dreams of being a singer, and much more! . . .

Talina Oblander

* * *

Wife Says, "Send me my LifeMap Nutrition too."

I have been taking the LifeMap Nutrition™ supplement now for two months.

Although I wanted my wife to try the program too, she just wouldn't budge. She said she'd have to wait to see how I felt first. Well, I'm now sleeping through the night for the first time in twelve years. . . .

Ernest Smith

* * *

Another Sleep Story. It's Making Us Sleepy

I've always had a problem with sleeping through the night. Within two days of taking the LifeMap product I immediately noticed I was finding the special peace a full seven to eight hours of sleep offers. Problem solved! GeneWize has revolutionized my life and I bless all the company every day for it's [sic] incredible science. . . .

Kent Riedesel

G. GeneWize e-lift newsletter: Monthly E-News Exclusively for GeneWize Affiliates (Ex. G)

Spotlighting Top Leader
Chief Alexander Taku:
My Visionary Source Of Success In GeneWize

. . . I decided to enroll in GeneWize and know my DNA . . . six months ago. . . . My health condition prior to this occasion was life-threatening. . . . I was a serious diabetic and cardiac patient. . . . One would never have imagined . . . that a company would come up with free DNA assessments for all! . . . Six months on the products has produced wonderful results. My blood sugar has stabilized at 80/130 and my diabetic problem is over, while a recent medical report has revealed the reduction of my heart to normal size. . . . For the last six months, I have only been taking my free GeneWize nutritional supplements. . . .

H. GeneWize Affiliate Website, thegenecollective.com (Ex. H)

Zero limits
Gene Team

* * *

I've been fielding a lot of questions about just what Genewize [sic] has done for people.
I myself can report deeper sleep and healthier feeling skin. I've talked with a number of people who have experienced improvements in everything from blood pressure to eczema to hormonal issues to arthritis. The most common observations people note are better sleep and improved energy levels. . .

* * *

I am a Massage Therapist and have had tremendous pain and stiffness in the morning after doing too many

massages for the last few years. I used to take Glucosamine, which did seem to help with the pain and stiffness, but it wasn't total relief. After taking the LifeMap product it hit me one day that I was no longer in pain when I woke in the morning, and the stiffness had disappeared. You see, my Genetic Assessment Report had found that I need maximum support for the car ilage [sic] in my body. Mystery solved! . . . .

Warm Regards, A.R., LMP

* * *

. . . [T]he best of all is he [sic] lack of pain on my knees and hips when running. Running was my passion but severe knee and hip pain kept me from it the last 10 years. LifeMap is renewing me in ways I never thought possible. ?? [sic] Thank you to all those behind the GeneWize Lifemap [sic] Nutrition™ System . . . Now, can you imagine what LifeMap is doing to what we can't see!!!

Loving life, M.N.S.

I. LifeMap ME DNA Skin Repair Serum Pamphlet (Ex. I)

Historic Evolution in Skin Care
Genetically Customized Skin Care Made Exclusively for You.

* * *

What Do Your Genes Know That You Don't?

DNA profiling revolutionized the legal world, and now it's doing the same for skin care. Now the same technology can be used to identify a whole new set of perpetrators. The main suspects? Collagen breakdown, sun damage, sensitivity, and oxidative

stress caused by free radical activity due to environmental polution [sic].

So how do you know how susceptible you are to these aging culprits?

Take a minute to swab inside your cheek. Place your DNA sample inside our bar-coded envelope, and send to our lab. We assess six skin health genes to tell you what skin aging problems you're likely to face as you age.

The information is then used to customize a skin repair serum using a combination of active ingredients selected to compensate for particular deficiencies in areas of skin aging, wrinkling, collagen breakdown, irritation and the skin's ability to defend against environmental stresses.

* * *

How Does it Work?

* * *

The patented, non-invasive simple swab allows you to peek into your predispositions to discover what your genes have to say about your skin aging future.

* * *

Clinically Proven Results

An eight-week, double blind, randomized and controlled clinical study compared the performance of placebo skin care versus the performance of the "genetically-customized" skin care formula containing active ingredients designed for each participant. For those using the genetically-customized formulation, 62% reported substantial reduction in the appearance of wrinkles after 14 days of treatment. After 56 days, the number of participants reporting reduction in the appearance of wrinkles rose to 70%. Similarly, after

14 days, 56% of the participants indicated improved skin firmness and after eight weeks of treatment those with improvements in skin firmness rose to 70%.

* * *

LifeMap ME DNA Skin Repair Ingredient List
Thanks to the custom nature of our product, the ingredient list will represent the latest breakthrough ingredients which have been clinically proven to enhance or diminish aging predispositions.

12. Through the means described in Paragraph 11, respondents have represented, expressly or by implication, that genetic disadvantages identified through respondents' DNA Assessments are scientifically proven to be mitigated or compensated for with nutritional supplementation.

13. In truth and in fact, genetic disadvantages identified through respondents' DNA Assessments are not scientifically proven to be mitigated or compensated for with nutritional supplementation. Therefore, the representation set forth in Paragraph 12 was, and is, false or misleading.

14. Through the means described in Paragraph 11, respondents have represented, expressly or by implication, that their custom-blended nutritional supplements effectively compensate for genetic disadvantages identified by respondents' DNA Assessments, thereby reducing an individual's risk of impaired health or illness.

15. Through the means described in Paragraph 11, respondents have represented, expressly or by implication, that they possessed and relied upon a reasonable basis that substantiated the representation set forth in Paragraph 14 at the time the representation was made.

16. In truth and in fact, respondents did not possess and rely upon a reasonable basis that substantiated the representation set forth in Paragraph 14, at the time the representation was made.

Therefore, the representation set forth in Paragraph 15 was, and is, false or misleading.

17. Through the use of testimonials, as described in Paragraph 11, respondents have represented, expressly or by implication, that their custom-blended nutritional supplements treat or mitigate diabetes, heart disease, arthritis, and insomnia, among other ailments.

18. Through the means described in Paragraph 11, respondents have represented, expressly or by implication, that they possessed and relied upon a reasonable basis that substantiated the representations set forth in Paragraph 17 at the time the representations were made.

19. In truth and in fact, respondents did not possess and rely upon a reasonable basis that substantiated the representations set forth in Paragraph 17, at the time the representations were made. Therefore, the representation set forth in Paragraph 18 was, and is, false or misleading.

20. Through the means described in Paragraph 11, including, but not necessarily limited to, the statements and depictions contained in the materials attached as Exhibit I, respondents have represented, expressly or by implication, that their genetically customized skin repair serum is scientifically proven to: (a) reduce the appearance of wrinkles and improve skin firmness; and (b) enhance or diminish aging predispositions, including collagen breakdown, sun damage, and oxidative stress.

21. In truth and in fact, respondents' genetically customized skin repair serum is not scientifically proven to: (a) reduce the appearance of wrinkles and improve skin firmness; or (b) enhance or diminish aging predispositions, including collagen breakdown, sun damage, and oxidative stress. Therefore, the representations set forth in Paragraph 20 were, and are, false or misleading.

22. Respondents have provided advertisements and promotional materials to affiliates for use in their marketing and sale of respondents' genetically customized nutritional

supplements and skincare products, including the attached Exhibits A and G.

23. Through the means described in Paragraph 22, respondents have provided means and instrumentalities to respondents' affiliates in furtherance of the deceptive and misleading acts or practices alleged in Paragraphs 12 through 21.

Data Security

24. Through sales of purported genetically customized nutritional supplements and skincare products, respondents obtain consumers' personal information, including, but not limited to, consumers' names, addresses, email addresses, telephone numbers, dates of birth, Social Security numbers, bank account numbers, credit card account numbers, and genetic information.

25. Respondents use third parties to receive, process, or maintain this personal information ("service providers"), and respondents store consumers' personal information on their corporate network.

26. Respondents permit service providers to access consumers' personal information so that service providers may, among other services, develop and maintain respondents' customer relationship management database, fulfill customers' orders, and develop related applications.

27. Misuse of the types of personal information respondents collect – including Social Security numbers, dates of birth, and genetic information – can facilitate identity theft, privacy harms, and other consumer injuries.

28. Since at least November 2008, respondents have disseminated or caused to be disseminated to consumers privacy policies and statements, including, but not limited to, a Privacy Protection Policy (Exhibit J). This policy contains the following statements:

GeneWize Life Sciences, Inc. Privacy Protection Policy (Exhibit J)

GeneWize Life Sciences respects the privacy of every individual and has taken every precaution to create a process that allows individuals to maintain the highest level of privacy. All information provided by the individual taking the assessment is kept on a secure server . . . .

* * *

We send Personal Customer Information to third-party subcontractors and agents that work on our behalf to provide certain services. These third parties do not have the right to use the Personal Customer Information beyond what is necessary to assist us or fulfill your order. They are contractually obligated to maintain the confidentiality and security of the Personal Customer Information and are restricted from using such information in any way not expressly authorized by GENEWIZE.

29. Respondents have engaged in a number of practices that, taken together, failed to provide reasonable and appropriate security for consumers' personal information. Among other things, respondents:

a. Failed to implement reasonable policies and procedures to protect the security of consumers' personal information collected and maintained by respondents;

b. Failed to require by contract that service providers implement and maintain appropriate safeguards for consumers' personal information;

c. Failed to provide reasonable oversight of service providers, for instance by requiring that service providers implement simple, low-cost, and readily

available defenses to protect consumers' personal information;

d. Created unnecessary risks to personal information by:

i. maintaining consumers' personal information, including consumers' names, addresses, email addresses, telephone numbers, dates of birth, Social Security numbers, and bank account numbers, in clear text;

ii. providing respondents' employees, regardless of business need, with access to consumers' complete personal information;

iii. providing service providers with access to consumers' complete personal information, rather than, for example, to fictitious data sets, to develop new applications;

iv. failing to perform assessments to identify reasonably foreseeable risks to the security, integrity, and confidentiality of consumers' personal information on respondents' network; and

v. providing a service provider that needed only certain categories of information for its business purposes with access to consumers' complete personal information; and

e. Did not use readily available security measures to limit wireless access to their network.

30. In March 2012, respondents' failure to provide reasonable oversight of service providers and respondents' failure to limit employees' access to consumers' personal information resulted in a vulnerability that, until respondents were alerted by an affiliate, provided that affiliate with the ability to access the personal information of every foru™ (then known as GeneWize) customer and affiliate in respondents' customer relationship management database. The personal information that could have been accessed

included consumers' names, addresses, email addresses, telephone numbers, dates of birth, and Social Security numbers.

31. Through the means described in Paragraph 28, respondents have represented, expressly or by implication, that they implement reasonable and appropriate measures to secure consumers' personal information.

32. In truth and in fact, as set forth in Paragraph 29, respondents have not implemented reasonable and appropriate measures to protect consumers' personal information from unauthorized access. Therefore, the representation set forth in Paragraph 31 was, and is, false or misleading.

33. As set forth in Paragraph 29, respondents failed to employ reasonable and appropriate measures to prevent unauthorized access to consumers' personal information. Respondents' practices are likely to cause substantial injury to consumers that is not reasonably avoidable by consumers themselves and is not outweighed by countervailing benefits to consumers or competition. This practice was, and is, an unfair act or practice.

34. 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 FTC Act.

THEREFORE, the Federal Trade Commission, this eighth day of May, 2014, has issued this complaint against respondents.

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

Complaint

Exhibit A

Exhibit A

Complaint

Exhibit A

Complaint

Exhibit B

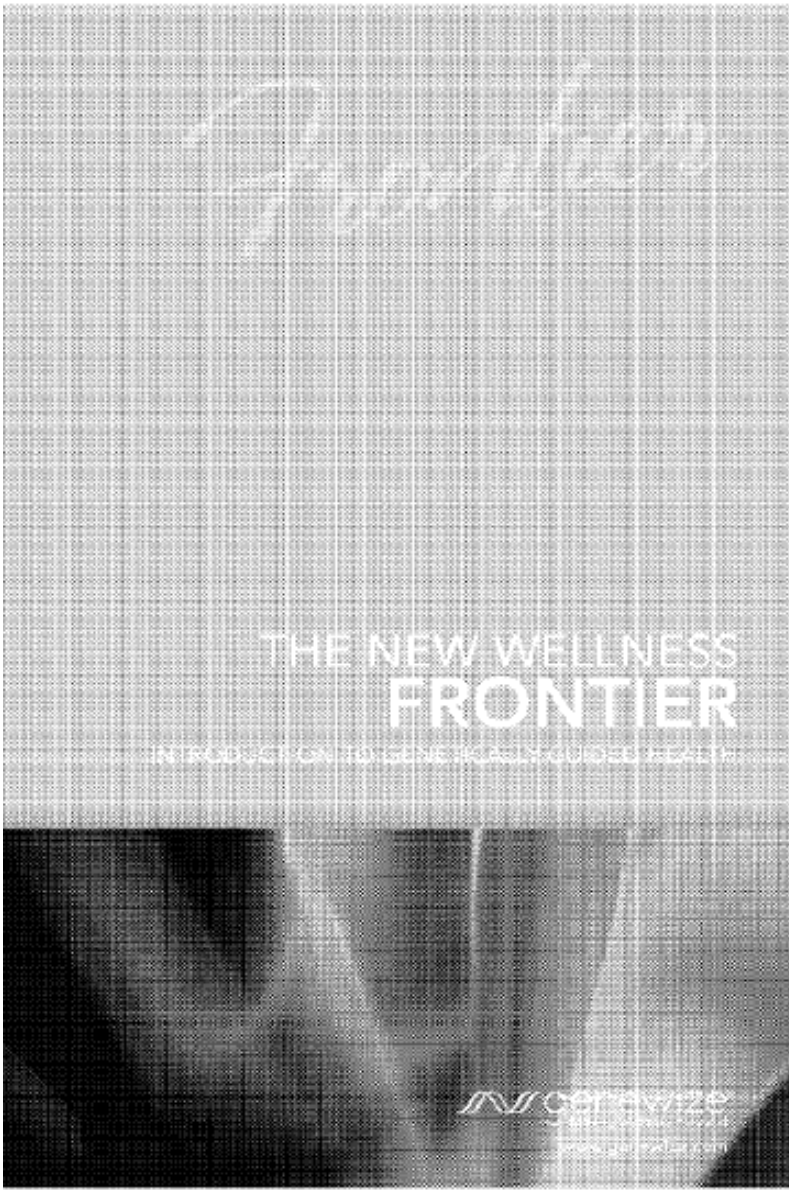
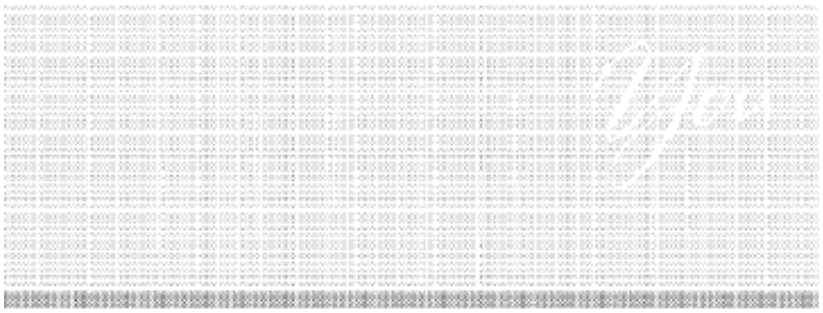


Exhibit B



GENETICS AND **PERSONALIZED** HEALTH

Recently, scientists have confirmed that each of us has unique, "genetically determined" body chemistries.

Even small variations in your genes can have a significant influence on how well your body responds to food, nutrients, physical activity, environmental stresses and how you may be predisposed to a variety of other important health and physiological conditions.

By analyzing and understanding your unique genetic strengths and weaknesses, you can eliminate the guesswork and "genetically guide" the optimal nutritional supplement or skincare formulation to match your LifeMap Healthy Aging Assessment™.

This is a revolutionary new scientific approach to delivering formulations that fulfill INDIVIDUAL needs, based on confidential genetic testing.

GENETICS TUTORIAL

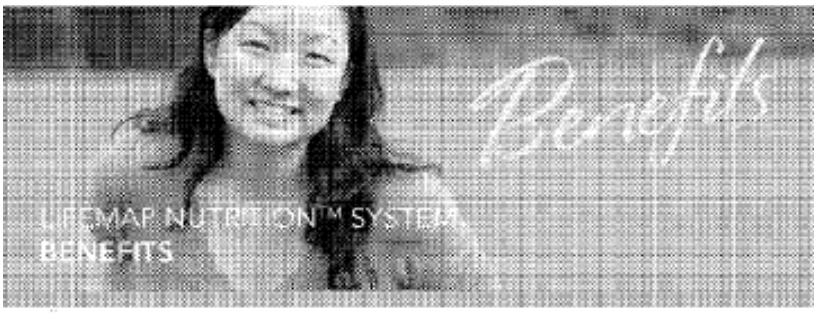
Within every human cell is an individual's blueprint for life – their DNA. DNA contains the master information that is needed to construct and maintain the human body.

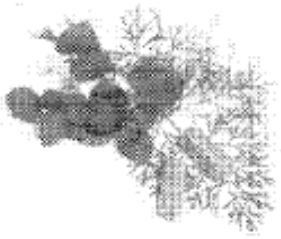
SMALL CHANGES IN DNA THAT IMPACT OUR PHYSIOLOGY

On a strictly DNA basis, humans are surprisingly alike. Despite our apparent differences, the DNA between any two people is 99.1% identical. That 0.9% variation in DNA, however, is hugely important, accounting for most of our physical differences.

Small variations in DNA are called polymorphisms. Skin type is a common human polymorphism. Depending on the order in which the nucleotides in your DNA line up, you could have different skin. Some polymorphisms are so small, they affect the order of just one pair of nucleotides. These are called single nucleotide polymorphisms or SNPs (pronounced "snips"). Research shows that we can measure SNPs and have the ability to impact the expression of our genes through proper nutritional support.

Exhibit B





THE LIFEMAP NUTRITION™ SYSTEM HAS THESE FEATURES:

- Pharmaceutical grade manufacturing
- Significant antioxidant support
- Whole foods
- Organic ingredients
- 5,000 to 9,000 ORAC units
- Includes Cat's Claw for its antioxidant activity.
- Less caffeine than ¼ cup of coffee
- Affordable at about $3/day

ENVIRONMENTALLY FRIENDLY, SOCIALLY RESPONSIBLE PACKAGING

GeneWize is an environment-friendly company. Here are some ways we deliver socially responsible nutrition.

- Recycled packaging
- No plastic bottles or boxes
- Reusable daily pouches
- Vegetable-based capsules
- No animal products or testing

COMMON QUESTIONS...

Do I need to take my other supplements?

The LifeMap Nutrition™ System will in many cases replace most multivitamins you are taking and your formula is so rich in antioxidants, you may be able to replace those supplements too. Certain supplements may not be available in the LifeMap Nutrition™ System.

What do you do with my DNA and how do you protect my privacy?

Your privacy is very important to us. We protect you by sending your DNA to our lab with only a bar code so your name is not identified with the sample. Once the analysis is completed your DNA is destroyed and your results are sent to our secure database to create your personalized supplement.

What will I feel after taking my LifeMap [illegible] Formula?

Since everyone's body is different, you'll likely receive unique benefits from your product. Some of the benefits you may notice and some you may not. Some of the most common benefits people report include:

- Ability to fall asleep faster
- Longer, deeper sleep
- More energy during the day
- Softer skin
- Stronger hair and nails

You may or may not experience these same results. Your body is unique and so is your formula. It makes sense that your results will be unique too.

Exhibit B

Complaint

Exhibit C

Exhibit C

THE **NEW SCIENCE** OF **NUTRAGENETICS** AND **DERMAGENETICS**

Nutragenetics and Dermagenetics are a combination of the sciences of genetics, nutrition and skin care that reveal personalized information regarding an individual's status and provides the basis for selecting a dietary, nutritional and skin care program best suited to achieving the healthiest and longest life possible.

- Nutragenetics and Dermagenetics use SNP testing to identify areas of an individual's genetic make-up that may be functioning less than optimally.
- Nutragenetics and Dermagenetics can help guide individuals in choosing the optimal combination of nutrients and vitamins and topical active ingredients matched to their unique genetic make-up.

For the first time, this revolutionary SNP science is making it possible to personalize and tailor health and skin care products. How is this done?

GENETICALLY GUIDED PERSONALIZATION OF NUTRIENT AND SKIN CARE FORMULATIONS.

The Nutragenetic and Dermagenetic SNP assessments examine a variety of genes which are responsible for making proteins that play a very important role in our overall health. These include oxidative stress, heart and circulatory health, immune health, bone health, pulmary health, eye/vision health, defense against environmental pollutants, collagen breakdown, photoaging, skin slacking & wrinkling and mild irritation.

KEY POINT *If the Nutragenetic and Dermagenetic SNP test predicts that you might not be as efficient as possible in any given health area, you may be able to do something about it. For every SNP tested, there are potentially compensating and enhancing nutrients that can put you on a better path toward optimal health.*

KEY POINT *Due to our busy lifestyles and environmental exposure, most people don't have enough time in everyday life for 5-6 servings of fruits and vegetables as well as a total skin care regime. It is logical then that most everyone should use a basic multivitamin and mineral formulation as well as base topical skin care formulation to cover the major areas of general nutrition and skin fitness, and add additional ingredients based upon your personal genetic SNP test results.*

C

Exhibit C

Complaint

GeneLink's statistical results demonstrate that virtually everyone tested will require Added Support and/or Maximum Support in at least one or two gene SNP areas.

Why are the SNPs used in GeneLink's profiles selected over millions of others?

There are millions of SNPs. However, only certain subsets are associated with increased risk for disease and physiologic health conditions.

GeneLink selects only 'functional SNPs' which indicate poor enzyme function via epidemiological or biochemical studies.

Additionally, GeneLink selects only those SNPs which can be addressed using nutrients or formulations or lifestyle modifications.

These SNPs physically reside in either the coding region (protein portion) of the gene which can alter enzyme function or they reside in the promoter region which affects the level of expression of the gene in question.

What is the clinical research that ties nutritional supplements and topical skin treatments to support SNP predispositions?

All of the enzymes represented in the SNP profile have been well-studied and there is biochemical evidence in almost every instance that correlates why an enzyme affected by the SNP does not function properly. Additionally, there is leading clinical evidence linking SNPs to nutrition.

Thus, for major enzymatic players of oxidative stress, there is a clear fit with the genetics, epidemiology and biochemistry.

For several of the SNPs, there is a direct link between having the SNP and being able to lower oxidative stress or the potential health risks associated with oxidative stress by the ingestion or application of particular antioxidant nutrients and active ingredients.

For example the SNP for methylenetetrahydrofolate reductase (MTHFR or Heart, Circulatory Health-2), produces an enzyme with decreased affinity (Km) for its direct substrate, 5,10 methylene-THF, which can cause a build up of homocysteine, which is deleterious to heart health. Increasing folic acid (upstream substrate) or the product of the enzyme reaction (5 methyl-THF) can ameliorate the build-up of homocysteine.

For some SNPs there is no definitive clinical evidence available to date that directly links the benefit of a nutrient to the SNP. These studies will come in time. Nevertheless, the fact that the biochemical parameters for all of the SNPs are so well known provides a *rational nutritional approach* to addressing unfavorable physiological conditions, based on scientific knowledge of how the SNP specifically functions.

Who conducted the research and who endorses GeneLink's research?

GeneLink's medical and scientific advisors along with independent academic laboratories and medical centers have conducted nearly 100% of the work. GeneLink's medical and scientific advisors hold positions at major research institutions.

The science and technical information behind GeneLink's technology has been favorably reviewed by the scientific staff department of our various clients and collaborative partners.

Studies have been statistically quantified and involve sophisticated molecular biology, biochemistry and genetic analyses.

C

Exhibit C

Complaint

Exhibit D

Exhibit D GNLK015269
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What Are Your Options To Improve Health and Wellbeing?
• Eating healthier?
• Pharmaceuticals?
• Exercise?
• Guessing at supplements?
• Genetically guided nutrition!
Do you have a plan to capitalize on this new science?
Exhibit D
GNLK015273
CONFIDENTIAL


GeneWize...Connecting the Dots
• Over 14 Years R&D Prior To Launch
• Developed significant DNA tests for SNPs on "Heavy Lifters"
• Developed "SNP Boosts" to mitigate, compensate, or bypass SNP effects
• Powerful health and wellness benefits!
ONLY comprehensive genetically guided products!
Exhibit D
GNLK015276
CONFIDENTIAL

Complaint


A View Into Your Patient or Customer...
• Patented DNA Collection Kit
• Sophisticated Assessment
• Confidentiality
• Pinpoint Genetic Predispositions
• Personalized Formula
Over 500,000
Possibilities
With a simple cheek swab...
Exhibit D
GNLK015277
CONFIDENTIAL

Exhibit D

GNLK015278
CONFIDENTIAL

Complaint

Exhibit E

LifeMap Essentials™
Your Foundation for Optimal Wellness

Welcome and congratulations for taking an important next step toward healthy aging with the most advanced and scientifically proven nutritional supplement programs available – the **LifeMap Nutrition™ System**, which consists of the following:

1. The **LifeMap DNA collection kit** (provided by GeneLink, Inc.)
2. The **LifeMap Essentials™** formula (A non-custom foundation supplement to be taken while awaiting your Healthy Aging Report & DNA guided LifeMap Custom formula)
3. The **LifeMap DNA Healthy Aging Report™** (results in about 4 weeks after mailing your DNA collection kit)
4. The **LifeMap Custom™** formula (A totally customized formula based on your DNA)

Your LifeMap Essentials™ formula is the cornerstone of the LifeMap Nutrition System and forms the 'base foundation' for every individually customized LifeMap Custom product.

LifeMap Essentials is as premium plant based formula, carefully designed to provide the "key essentials" of a proper diet and to help you prepare and maintain optimal nutritional support while you are awaiting the results of your LifeMap Healthy Aging DNA Assessment and your personal DNA-guided LifeMap Custom formula (Please note: the processing time for your DNA assessment & LifeMap Custom formula is about 4 to 8 weeks from the time you mail back your DNA collection kit).

It contains a generous selection of fruits and vegetable powders with the highest phytonutrient content along with important anti-aging "superfruit" extracts such as the Brazilian acai berry, the Himalayan goji berry and the Southeast Asian mangosteen. In addition, your Essentials formula also contains a comprehensive vitamin blend, flax seeds (a source of omega-3 fatty acids) and fructooligosaccharides – a natural prebiotic fiber that promotes enhanced intestinal health for optimal nutrient absorption.

For antioxidant protection, **LifeMap Essentials** contains over 7500 ORAC (Oxygen Radical Absorbance Capacity) units, the equivalent ORAC value of eight (8) servings of fruits and vegetables. For even extra antioxidant protection, we've added OxyPhyte® Ultra, a proprietary blend of antioxidant-rich apple, white tea and rosemary extracts which has proven bioavailability in human clinical studies.

For DNA repair, we've included 350 mg of AC-11®, a patented, advanced, clinically-tested bioactive compound derived from the South American herb *Uncaria tomentosa* (Cat's Claw). AC-11® has been clinically demonstrated systemically to reduce both oxidative damage and non-oxidative damage to DNA caused by stress, viruses or bacteria as well as reduce inflammation and improve immune function in human clinical trials.

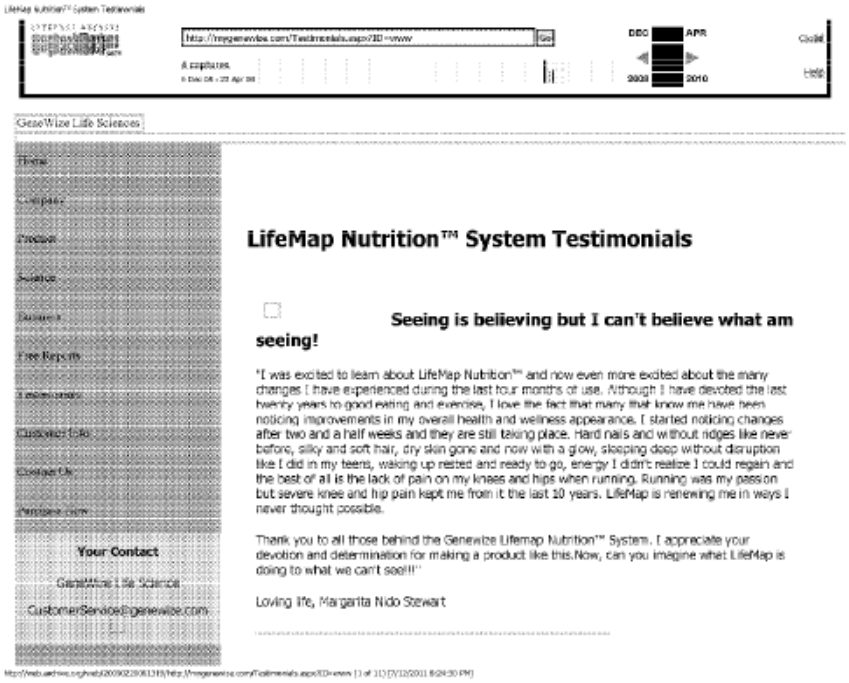
Directions for use:

Take five (5) capsules in the AM and five (5) capsules in the PM (with or without food) for a total of ten (10) capsules daily. These vegetarian capsules are specially designed that can be swallowed as you would any capsule or tablet, or if you prefer, can be broken open and mixed with your favorite juice or beverage.

We are truly grateful for you and excited to be a part of your health future.

Sincerely,
The Formulation Scientists at GeneWize Life Sciences

Exhibit F



GeneWize Life Sciences

Your Contact

GeneWize Life Sciences

CustomerService@genewize.com

LifeMap Nutrition™ System Testimonials

Seeing is believing but I can't believe what am seeing!

"I was excited to learn about LifeMap Nutrition™ and now even more excited about the many changes I have experienced during the last four months of use. Although I have devoted the last twenty years to good eating and exercise, I love the fact that many that know me have been noticing improvements in my overall health and wellness appearance. I started noticing changes after two and a half weeks and they are still taking place. Hard nails and without ridges like never before, silky and soft hair, dry skin gone and now with a glow, sleeping deep without disruption like I did in my teens, waking up rested and ready to go, energy I didn't realize I could regain and the best of all is the lack of pain on my knees and hips when running. Running was my passion but severe knee and hip pain kept me from it the last 10 years. LifeMap is renewing me in ways I never thought possible.

Thank you to all those behind the Genewize Lifemap Nutrition™ System. I appreciate your devotion and determination for making a product like this.Now, can you imagine what LifeMap is doing to what we can't see!!!"

Loving life, Margarita Nido Stewart

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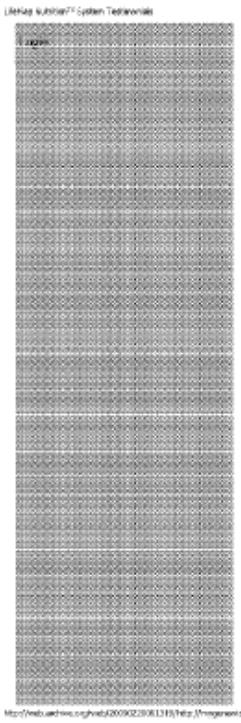
Exhibit F



LifeMap Nutrition™ System Testimonials

George Mureşan

Me and My Elbow Feel Great!

"I always took vitamins throughout my NBA Career. After an injury in 1998, my doctor gave me even more vitamins and minerals to take but I got very sick after taking them. I called the doctor, but he couldn't suggest anything other than to tell me to keep on taking the vitamins. I kept on feeling so sick that I decided just to stop taking supplements at all. When I was first introduced to GeneWize in 2008 I was very skeptical, but I decided to give it a try. After about a week of being on the LifeMap Nutrition™ a continual discomfort in my right elbow subsided. I also found I could sleep through the night again and my energy improved. I've been taking the LifeMap Supplements for several months now and just feel great."

Gheorghe Mureşan, Former NBA Player

Partnering with Your Body: Dialing it in by "Assessing, not Guessing"

"I have been supplementing for years as I have always believed it is necessary for me to partner with my body so it can care for itself and give it all the advantages necessary to maintain health and balance. I have always thought supplements were just that - a way to get my body what it needs so it can do its job. Once I looked through my assessment, I found that I was taking some supplements that I really didn't need and NOT taking ones I did need. The time, effort and money that the LifeMap customized supplement saves me every month is staggering. To try and put a product like this together on my own would cost a fortune and honestly, who has the time?"

" The results have been really substantial. I have always been a pretty good sleeper, or so I thought. The profound shift in the depth and quality of sleep I get now is amazing and I no longer have those afternoon lulls of energy. I can't imagine ever going back to generic, mass marketed off the shelf supplements. The GeneWize product is truly fantastic!"

Keith O'Brien, Independent Founding Affiliate

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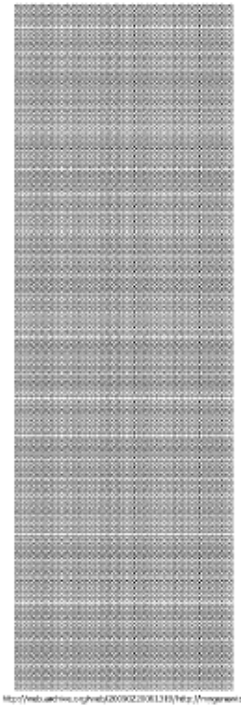
Exhibit F



LifeMap Nutrition™ System Testimonials

GeneWize has changed my health and my life!

"I'm in my 5th month on the LifeMap Custom supplements and I'm amazed by my personal results. So far I've experienced great sleep, great energy, great skin, and much more. Plus, I continually notice even more positive changes: prior to taking the LifeMap supplements, my memory wasn't the greatest - but now I feel much sharper mentally! This is very important to me because my Mother had Alzheimers."

" The Healthy Aging DNA Assessment provided me with such valuable information. At 52, some of my assessment results weren't a surprise, but I wasn't expecting to learn I had a double SNP in my detox gene. In our toxic world, this is valuable information we could use when we're very young- the younger the better!"

"With all of great benefits I'm experiencing, I know the LifeMap Custom supplements are supplying me with the 'right fuel' and a much needed tune up! GeneWize has changed my health and my life for the better!"

Roberta Johnson, GeneWize Affiliate, Miami, Florida

How To Get the LifeMap Edge

Greg Minor

"Taking care of your body is essential. With GeneWize's LifeMap Nutrition™ System and products, I am not only taking care of my body, I have an edge. I feel great knowing that I am giving my body exactly what it needs."

Greg Minor
Former NBA Player for the Boston Celtics

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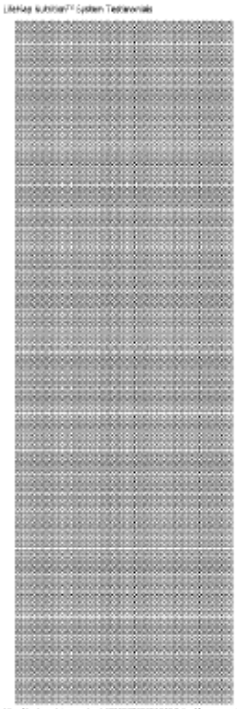
Exhibit F



after removing the acrylics, but it only took three months.

One other thing is I had a health assessment done last week with a Certified Natural Health Professional and she told me my GeneWize supplements actually make me stronger than if I wasn't taking them. I love our products and I am so grateful to be a part of our company.

Thank you GeneWize!

Jillian Montes De Oca

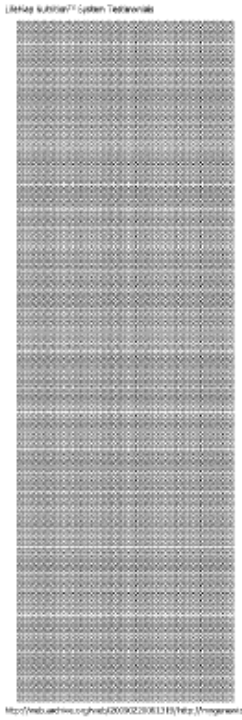
More Sleep, Less Starbucks

When I received my customized report I was surprised to see that (genetically speaking) I did not require any added support for the SNPs that affect cholesterol. I may have been wasting money buying supplements that my body doesn't actually need! I love that I now know in which areas I need genetic support, and it is so satisfying taking my LifeMap supplements with confidence that I'm doing the best thing for my body.

After taking the LifeMap Product for just a week I began noticing that my energy level throughout the day remained so constant. I was no longer experiencing dips in my energy in the mid-afternoon which used to have me looking for caffeine. Within two weeks, I found that I was getting a much better night's sleep--better than I've had since having children! I was falling asleep more easily, and would wake the next morning in the same position as when I'd fallen asleep. I wasn't waking several times throughout the night anymore.

I can only attribute these improvements to my LifeMap supplements because nothing else has changed about my daily routine.

Thank you, Genewize!
Anne Zirkle



LifeMap Nutrition™ System Testimonials

Randy Keeps it Short and Sweet

After taking the LifeMap Product it made me feel more energetic

Randy Levine

Thanks for the Memories

When I received my customized report, I was very happy to see my DNA Assessment results, especially since I don't know about my parents. So in a way it was also a surprise!

I do have certain health challenges and when I started taking my LifeMap Product, after about a week and a half I was amazed to feel tremendous results! Before, I was getting only about three hours of sleep, now I can finally sleep! My concentration & memory also seem to be improving!

Thanks to all the scientists and doctors that made it possible!

Now is my turn to help people with the LifeMap Nutrition™ Product!

Lina M. Oliver

LifeMap Nutrition Meets Karaoke!

After taking the LifeMap Product for only two weeks I have a lot more energy and my dry skin has improved dramatically. (I noticed these changes within two weeks). I also began to see something amazing happen: I went from getting very little sleep at night to now sleeping like a baby! I've been waking up feeling so refreshed that I want to jump up and down on my bed like a child (I am 27 years old). I'm feeling so happy I've been out singing Karaoke and having a blast.

You couldn't pay me to stop taking the LifeMap Nutrition™. I have the energy to pursue my dreams of being a singer, and much more!

I can't THANK YOU enough GeneWize.

I LOVE YOU! XOXO

http://web.archive.org/web/20090223081318/http://mygenewize.com/Testimonials.aspx?ID=www (8 of 11) [3/12/2011 8:24:30 PM]

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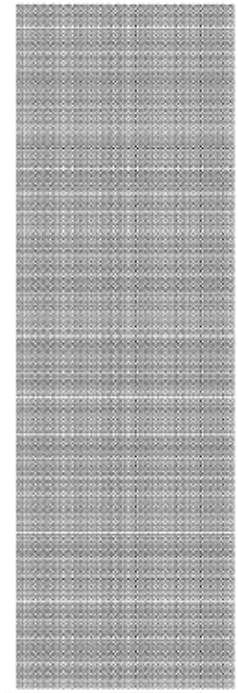
Exhibit F



LifeMap Nutrition™ System Testimonials

Telina Oblender

Wife Says, "Send me my LifeMap Nutrition too."

I have been taking the LifeMap Nutrition™ supplement now for two months.

Although I wanted my wife to try the program too, she just wouldn't budge. She said she'd have to wait to see how I felt first. Well, I'm now sleeping through the night for the first time in twelve years.

Oh, by the way, my wife is now waiting to receive her own LifeMap Nutrition™.

Thank You GeneWize!

Ernest Smith

Another Sleep Story. It's Making Us Sleepy

I've always had a problem with sleeping through the night. Within two days of taking the LifeMap product I immediately noticed I was finding the special peace a full seven to eight hours of sleep offers. Problem solved! GeneWize has revolutionized my life and I bless all the company every day for it's incredible science.

Warmest Regards,

Kent Riecksel

Lawn Mower Malaise

My husband and I have been taking our supplements for a month and a half now. We have both noticed differences and it is helping us in so many ways, not only nourishing our bodies and helping get rid of free radicals and all, it seems to be balancing us as well. What I mean by this is basically our moods.

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Exhibit G

e-lift

genewize
Making Wellness Personal

MONTHLY E-NEWS EXCLUSIVELY FOR GENEWIZE AFFILIATES January 2010

Only When You're Standing on Higher Ground ...can you reach out and lift others. Someone is looking to you for the vision, the belief, the plan. Use what you gain here to clarify your purpose, fire-up your passion and go all the way to the top.

Principles that Make a Difference

There are two principles that will have a major impact on your enrolling results (for both customers and Affiliates) AND will impact your overall attitude. Taking this a step further, if you don't accept these principles, it's almost impossible to maintain a positive attitude as you build your business. I didn't invent these principles, but over time I've learned to understand and respect their power.

PRINCIPLE ONE: People need (and want) to Like and Trust You
If people don't buy you, they won't buy anything that comes out of your mouth. People must like and trust you if they are going to do business with you (as a customer or as an Affiliate). This is a life lesson – not just a business lesson.

continued on page 2

Contents

Spotlighting Top Leader Chief Alexander Taku: My Visionary Source Of Success In GeneWize

As a traditional ruler, community leader and philanthropist, at the age of sixty three, I have spent over four decades of my life dealing directly with the life of others. I am an American trained political consultant, and a traditional ruler from Southern Cameroons in Central Africa. I am a community leader and a former member of Parliament in Cameroon. At the end of my studies in the United States, I worked for 19 years as Human Resources Manager at Pecten Cameroon Oil Company, a subsidiary of Shell Oil, USA. I have also served in various positions in community based organizations: as member of the Washington, D.C. Mayor Task Force for International Affairs, Co-founder and Chair of the Continental African Community-Montgomery County; Member, Ethnic Committee and the African Affairs Advisory Board, Montgomery County, Maryland.

I have also recorded 15 years of experience and leadership positions in Network Marketing, the last of which was National Director with 5 Linx Enterprises. During my fifteen years in the Direct Sales Industry, I have not found any company with such a popular product which can improve the lives and health of every human being on earth.

I decided to enroll in GeneWize and know my DNA when Rob Podles presented the opportunity to me six months ago. He assured me of the possibility of processing my DNA and paying for my initial product for less than five hundred dollars. My health condition prior to this occasion was life-threatening. Like my parents and most members of my family, I was a serious diabetic and cardiac patient. My mother died of diabetes while my father died from a massive heart attack! I never dreamed of being able to get my DNA test because it was too expensive for a retired citizen like me. One would never have imagined for one moment that a company would come up with free DNA assessments for all! The next appreciation was the possibility for me to receive my products at no extra cost. Of course, I took the opportunity and immediately signed up four Affiliates and no longer had to pay a dime for my nutritional products. Six months on the products has produced wonderful results. My blood sugar has stabilized at 80/130 and my diabetic problem is over, while a recent medical report has revealed the reduction of my heart to normal size. Generally, I feel very strong. For the last six months, I have only been taking my free GeneWize nutritional supplements.

I salute the decision of the corporate management team to devote one

continued on page 2

Exhibit G **GNLK003448**

Complaint

e-lift

genewize

We've heard story after story about how in some cases, Affiliates joined another Affiliate's business just by being asked. "If you're involved," they said, "let's get started."

Start being intentional about learning about other people's needs and you'll begin building a personal brand for yourself that says, "When I think of you, I think of someone that I like and respect."

If you focus on all of the little things that you can do to become more likeable and trustworthy (such as returning calls, keeping commitments, being interested in others, listening carefully, being more joyful, etc.) both your LIFE and your business will become more enjoyable AND fulfilling.

PRINCIPLE TWO: Like it or not, it's a numbers game, even IF people like and trust you.

You must understand that finding people to join your business and/or to purchase your products is a numbers game. The more people you speak to, the more you invite to your presentations the more people will join your team or purchase and experience our products. Yes, you can do a lot of things to increase your results over time, but you must accept and internalize the fact that success is a numbers game.

Before you start making calls and presentations, it's critical to recognize that not everyone will accept your invitation to learn about the products or the business. You will be turned down often, but you cannot allow those who decline your invitation to discourage you. It's absolutely vital that you maintain a positive attitude and move on to the next person.

To Your Good Health and Success

Monte

Monte Taylor
CEO GeneWize Life Sciences

Spotlighting Top Leader Chief Alexander Taku: (continued)

other issue of the Life Map News Letter as the E-lift edition, dedicated to recognizing top performers in the GeneWize community and about the tools that our organization offers to enable and sustain success and wellness in the Direct Sales Business.

I was proud and excited when I received the phone call from Rob Podles, inviting me to prepare this statement as a guest in the program. I also take this opportunity to explain how in the midst of my top leadership positions in other outfits in the Direct Sales Business, I chose GeneWize as the source of my lifetime success and legacy.

The secret of my stable road to success during my six months' affiliation with GeneWize has been hidden in my strong belief in the strength of the customized nutritional product. In fact, the scientific discovery of Human DNA, especially in Wellness, constitutes a landmark in our civilization. Luckily for me, the nutritional and skin care products manifested openly favorably on me. The DNA results clearly reflected my bill of health. The success of the product in reawakening and sharpening my genes to contain and neutralize my health problems has tremendously changed my life. My choice of GeneWize over the other direct sales businesses became obvious, especially, because, we are talking about me, you and us. This business is about our lives and life has no duplicate!!!.

The success of the products on me, coupled with the wonderful effective system placed at my disposal by the company are responsible for my ability to successfully reach out and sign-in several Affiliates in the GeneWize Wellness Empire. My enhanced ability to successfully create a favorable environment accounts for my increasing enrollment of more Affiliates to benefit from the GeneWize Revolution.

My approach has been to keep it simple. I make sure that our product speaks for itself and utilize the system to work for me. The effect of wonderful product, the excellent tools provided in my Website and the unmatched dynamic team in Customer Service, Compliance and the dynamic team of the passionate consumer-friendly Up-line have combined to begin the successful journey of transforming my mighty circle of influence into a huge success of Healthy Wealth. That is why my success cannot be attributed to me alone - it is rightly the result of the best product, the best system, and the best team in the Direct Sales Industry.

The success we are recording today in GeneWize must be rightly attributed to our founders and God's inspiration for their scientific breakthrough and the timing for us to be the standard bearers of the transformation to the Healthy Wealth that GeneWize brings to the World.

Where do I go from here with this mighty opportunity? Sky is the limit. I now feel more than twenty years younger and have begun living my dreams. I now feel, this is the time to build a legacy for my grand children my community, my tribe, my country and the world to remember me as one of those pioneer Affiliates who helped to change the world through the opportunity provided by the GeneWize Life Sciences. This way, I have paved the way for a healthy wealthy life, while helping to assure that I live on many years in health and wellness.

Chief Alexander Taku Fuasonganyi

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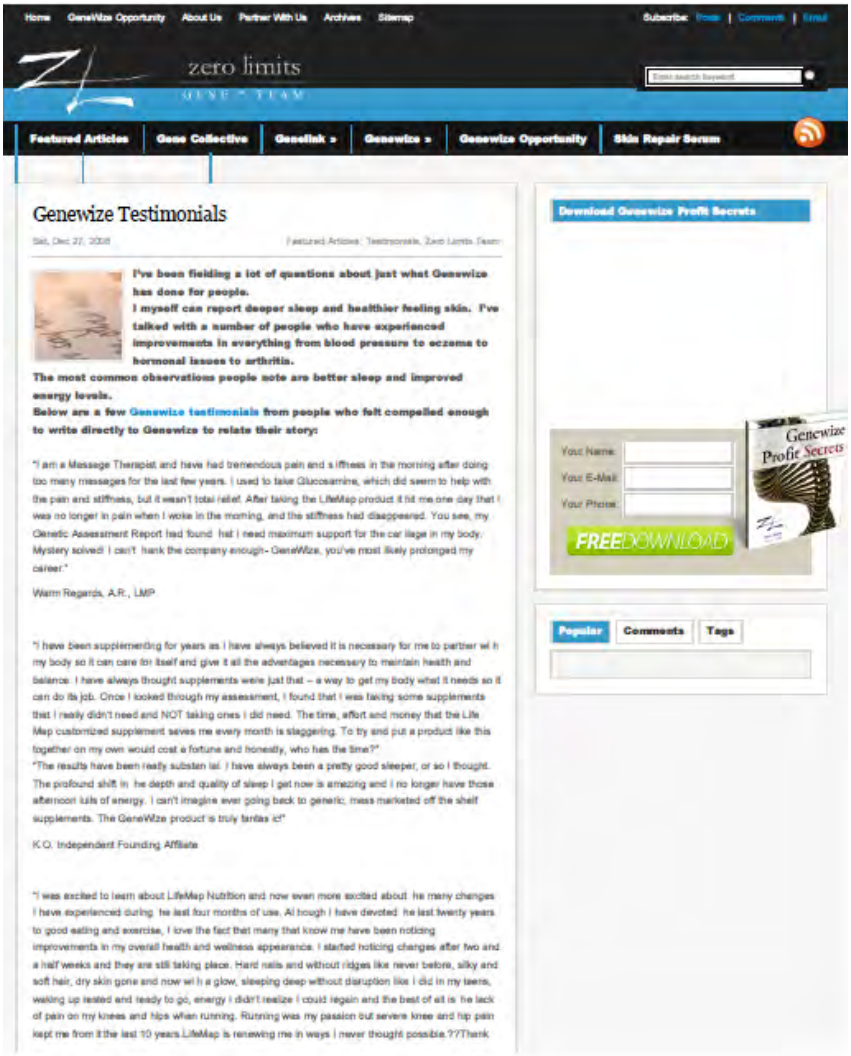
Exhibit H



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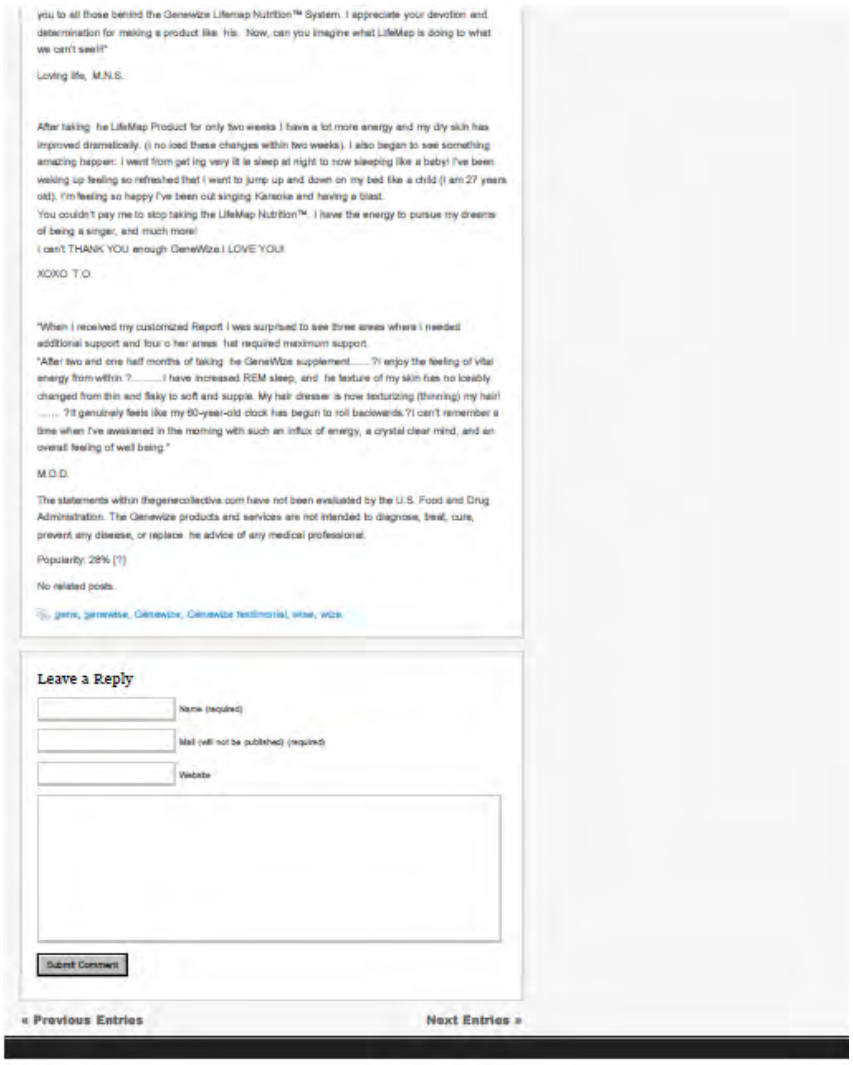

you to all those behind the Genewize Lifemap Nutrition™ System. I appreciate your devotion and determination for making a product like his. Now, can you imagine what LifeMap is doing to what we can't see!!!"

Loving life, M.N.S.

After taking he LifeMap Product for only two weeks I have a lot more energy and my dry skin has improved dramatically. (i no ioed these changes within two weeks). I also began to see something amazing happen: I went from get ing very lit le sleep at night to now sleeping like a baby! I've been waking up feeling so refreshed that I went to jump up and down on my bed like a child (I am 27 years old). I'm feeling so happy I've been out singing Karaoke and having a blast.
You couldn't pay me to stop taking the LifeMap Nutrition™. I have the energy to pursue my dreams of being a singer, and much more!
I can't THANK YOU enough GeneWize.I LOVE YOU!

XOXO T.O.

"When I received my customized Report I was surprised to see three areas where I needed additional support and four o her areas hat required maximum support.
"After two and one half months of taking he GeneWize supplement..... ?I enjoy the feeling of vital energy from within.?.....I have increased REM sleep, and he texture of my skin has ho iceably changed from thin and flaky to soft and supple. My hair dresser is now texturizing (thinning) my hair! ..... ?It genuinely feels like my 60-year-old clock has begun to roll backwards.?I can't remember a time when I've awakened in the morning with such an influx of energy, a crystal clear mind, and an overall feeling of well being."

M.D.D.

The statements within thegenecollective.com have not been evaluated by the U.S. Food and Drug Administration. The Genewize products and services are not intended to diagnose, treat, cure, prevent any disease, or replace he advice of any medical professional.

Popularity: 28% [?]

No related posts.

gene, genewize, Genewize, Genewize testimonial, wize, wize

Leave a Reply

Name (required)

Mail (will not be published) (required)

Website

Submit Comment

« Previous Entries Next Entries »

Exhibit H

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Exhibit I

Exhibit I

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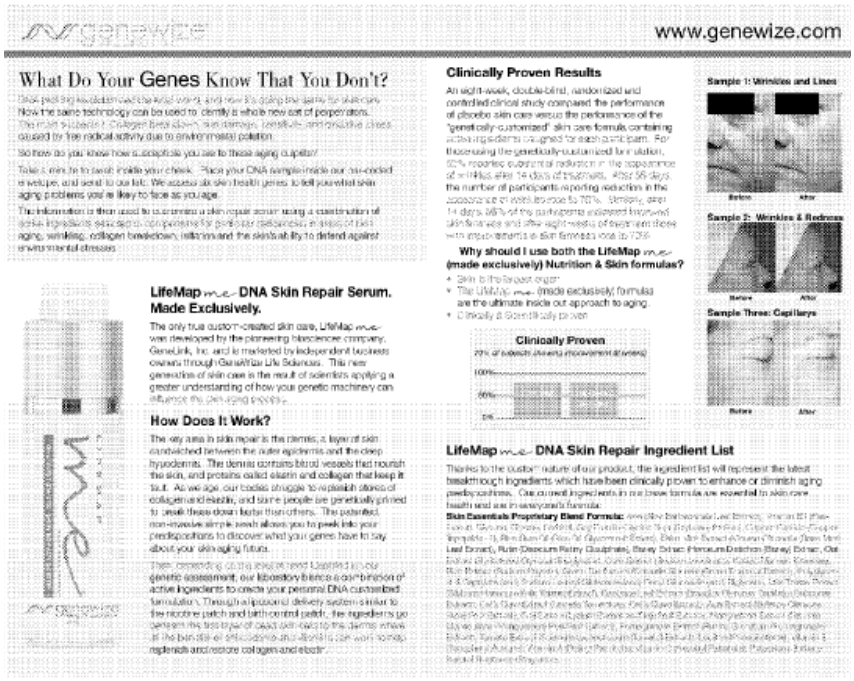

www.genewize.com

What Do Your Genes Know That You Don't?

Now the same technology can be used to identify a whole new set of perpetrators.

How do you know how susceptible you are to these aging culprits?

Take a mini-tie to swab inside your cheek. Place your DNA sample inside our pre-coded envelope, and send to our lab. We access six skin health genes to tell you what skin aging problems you are likely to face as you age.

The information is then used to customize a skin repair serum using a combination of active ingredients selected and compounded for your particular needs, in areas of fast aging, wrinkling, collagen breakdown, inflammation and the skin's ability to defend against environmental stresses.

Clinically Proven Results

An eight-week, double-blind, randomized and controlled clinical study compared the performance of placebo skin care versus the performance of the "genetically-customized" skin care formula containing active ingredients designed for each participant. For decreasing the genetically-customized formulation, 92% reported substantial reduction in the appearance of wrinkles after 14 days of treatment. After 56 days the number of participants reporting reduction in the appearance of wrinkles rose to 100%. Similarly, after 14 days, 96% of the participants observed improved skin texture and after eight weeks of treatment those with photo-damaged skin formulas rose to 100%.

Sample 1: Wrinkles and Lines

Before After

Sample 2: Wrinkles & Redness

Before After

Sample Three: Capillarys

Before After

Why should I use both the LifeMap me- (made exclusively) Nutrition & Skin formulas?

- Skin is the largest organ
- The LifeMap me- inside exclusively formulas are the ultimate inside out approach to aging
- Clinically & Scientifically proven

Clinically Proven

20% of subjects showed improvement at week 2

100%

50%

0%

LifeMap me- DNA Skin Repair Serum. Made Exclusively.

The only true custom-created skin care, LifeMap me- was developed by the pioneering bioscience company, GeneLink, Inc. and is marketed by independent business owners through GeneWize Life Sciences. This new generation of skin care is the result of scientists applying a greater understanding of how your genetic machinery can influence the (anti-aging) process.

How Does It Work?

The key area in skin repair is the dermis, a layer of skin sandwiched between the outer epidermis and the deep hypodermis. The dermis contains blood vessels that nourish the skin, and proteins called elastin and collagen that keep it taut. As we age, our bodies struggle to replenish stores of collagen and elastin, and some people are genetically primed to break these down faster than others. This patented, non-invasive simple swab allows you to peek into your predispositions to discover what your genes have to say about your skin aging future.

Then, according to the areas of need identified in our genetic assessment, our laboratory blends a combination of active ingredients to create your personal DNA customized formulation. Through a liposomal delivery system similar to the nicotine patch and birth control patch, the ingredients go between the first layer of dead skin cells to the dermis where in the twinkle of an eye, active ingredients can work to help replenish and restore collagen and elastin.

LifeMap me- DNA Skin Repair Ingredient List

Thanks to the custom nature of our product, the ingredient list will represent the latest breakthrough ingredients which have been clinically proven to enhance or diminish aging predispositions. Our current ingredients in our base formula are essential to skin care health and are in everyone's formula:

Skin Essentials Proprietary Blend Formula:

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GeneWize Life Sciences, Inc. ("GENEWIZE") Privacy Protection Policy:

GeneWize Life Sciences respects the privacy of every individual and has taken every precaution to create a process that allows individuals to maintain the highest level of privacy. All information provided by the individual taking the assessment is kept on a secure server and all samples are identified by barcode only. This information is never shared with a third party. After the evaluation is completed and validated, all DNA sample material is destroyed. We will NEVER share any of your personal information with anyone.

- All SNP collection kits, swab and mailing envelopes are bar-coded for tracking and confidentiality.
- After receiving the swabs, the lab confirms and uploads the bar-coded samples for confidentiality, tracking, and control.
- The DNA is extracted from the swab and the lab amplifies the region of the DNA containing the SNP. The technique used to amplify the individual's DNA is called a polymerase chain reaction (PCR).
- The SNP is then detected with a proprietary technology, and a variety of important quality control systems are in place to ensure accuracy and repeatability.
- The results of the detected SNPs are then analyzed and compiled by special software and translated electronically into a confidential report called a LifeMap Healthy Aging Assessment™.

1. When you use our site, we receive and collect certain information. The information that we receive and collect depends on what you do when you visit GENEWIZE.

Automatically Collected Information: Some information is automatically received and sometimes collected from you when you visit the GENEWIZE site. We receive and collect the name of the domain and host from which you access the Internet; the Internet protocol (IP) address of the computer you are using; the browser software you use and your operating system; the date and time you access our site; and the Internet address of the web site from which you linked directly to our site. We use this information to monitor the usage of our site. Also, when we send emails to you, we may be able to identify information about your email address, such as whether you can read graphic-rich HTML emails. All of the information we automatically capture provides us with the ability to enhance our customers' search and shopping experiences and to determine aggregate information about our user base and usage patterns.

Information Collected via Cookies. We use cookies to enhance the browsing and shopping experience on the GENEWIZE site. "Cookies" are small files or records that we place on your computer's hard drive to collect information about your activities on GENEWIZE site. The cookies transmit this information back to the computers at GENEWIZE or our third-party

distributors of banners and newsletters; these computers are, generally speaking, the only computers which are authorized to read such information. The information captured makes it possible for us (i) to speed navigation, keep track of items in your shopping cart, and provide you with custom tailored content; (ii) to remember information you gave to us so you don't have to recover it each time you visit the GENEWIZE site; (iii) to monitor the effectiveness of certain of our marketing campaigns; and (iv) to monitor total number of visitors, pages viewed, and the total number of banners served.

Most people do not know that cookies are being placed on their computers when they visit the GENEWIZE site or most web sites because browsers are typically set to accept cookies. You can choose to have your browser warn you every time a cookie is being sent to you or you can turn off cookie placement. If you refuse cookies, you will not be able to open a GENEWIZE Shopping Cart and therefore will not be able to complete an order with us online. Also, by not using cookies, your overall Internet browsing experience will be affected.

If you would like to obtain more information about the third-party distribution of banners on the GENEWIZE site and to know your choices about having such cookies turned off, please visit www.privacychoices.org. If you turn off the cookies, you will still see banners on our site; however, the banners will not be tailored to your shopping experience.

Information Collected Using Pixel Tags or Clear GIFs. To help us understand the effectiveness of certain of our email marketing efforts, GENEWIZE may use "message format" and "message open" sensing technologies. Both technologies require the use of pixel tags or clear GIFs (also called web beacons). The "message format" sensing technology allows us to recognize whether you have enabled your email program to receive HTML emails. If so, this information is then associated with your email address so that subsequent messages can be sent to you in HTML format. The "message open" sensing technology allows us to recognize whether you have opened our email message. We can only detect this if you have enabled your email program to receive HTML emails.

Information You Actively Submit to GENEWIZE. For most of the browsing services we provide, we neither require nor collect "Personal Customer Information" – first name, email address, billing address, shipping address(es), phone number and credit card information. You can browse the GENEWIZE site and take as much time as you want to view our products and services without having to submit such Personal Customer Information. Even when you use our shopping carts as you browse, there is no need to submit Personal Customer Information.

In the following instance, however, we do need you to actively submit Personal Customer Information: when you want to become an Independent Business Owner (IBO), open an account or complete an order.

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2. How we use and share Personal Customer Information

Occasionally, GENEWIZE uses Personal Customer Information to market products and services.

GENEWIZE shares Personal Customer Information that we collect as follows:

Subcontractors. We send Personal Customer Information to third-party subcontractors and agents that work on our behalf to provide certain services. These third parties do not have the right to use the Personal Customer Information beyond what is necessary to assist us or fulfill your order. They are contractually obligated to maintain the confidentiality and security of the Personal

Exhibit J

Customer information and are restricted from using such information in any way not expressly authorized by GENEWIZE.

Service Providers. We send Personal Customer Information to third-party providers of goods and services that you may purchase from time to time on our site (e.g., ISPs). Like subcontractors, these third parties do not have the right to use the Personal Customer Information beyond what is necessary to assist us. They are contractually obligated to maintain the confidentiality and security of the Personal Customer Information and are restricted from using such information in any way not expressly authorized by GENEWIZE.

Membership programs. We may work with certain companies who, in conjunction with their own membership programs or rewards programs, require that we disclose purchasing information about their customers who visit the GENEWIZE site through links from the partner sites, or use the partner's credit card to make purchases on the GENEWIZE site (e.g., to earn commissions for purchases made on the GENEWIZE site through outside links from the partner site, such as planned pay cards). We disclose only the information required to make these programs work and support your membership with them, which typically includes the name and/or email address of the user as well as the dollar amount of purchases made. We disclose this information to companies under an agreement that requires that they obtain your consent first, usually under the membership or participation rules. If you do not want us to disclose this information to the strategic partner, then you must contact them directly.

Credit card companies. Credit card transactions are handled by a third-party financial institution and their vendors, which receive the credit card number and other personal identifying information only to verify the credit card numbers and process transactions.

Law Enforcement Investigations. GENEWIZE may release Personal Customer Information when we believe, in our good judgment, that such release is reasonably necessary to comply with law, enforce or apply the terms of any of our policies or user agreements, or to protect the rights, property, or safety of GENEWIZE, our users, or others.

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3. Communications from GENEWIZE

As a customer, you may receive the following communications from GENEWIZE. Communications related to transaction and account maintenance activities. These communications include without limitation: order confirmations, order update notices, order problem notices, and notices regarding material changes to site policies and account management procedures.

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4. Underage customers

Our products and services are marketed for purchase by adults or with the consent of adults. This is why GENEWIZE requires a credit card that has been authorized for use to complete purchases on our site.

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5. Changes to Privacy Policy

This privacy policy was last changed on November 15, 2008. GENEWIZE reserves the right to modify or amend this policy at any time by posting the revised privacy policy on our site. The

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changes will only affect the information we collect after the effective date of the change to our privacy policy unless we clearly express otherwise.

6. Questions or comments

If you have any questions regarding our privacy policy, please email at compliance@genewize.com.

For all other inquiries, please contact customerservice@genewize.com.

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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 which the Bureau of Consumer Protection proposed to present to the Commission for its consideration and which, if issued by the Commission, would charge the respondent with violation of the Federal Trade Commission Act, 15 U.S.C. § 45 *et seq.*; and

The respondent, its attorney, and counsel for the Commission having thereafter executed an agreement containing a consent order ("consent agreement"), which includes: a statement by the 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 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 filed thereafter by interested persons pursuant to Commission Rule 2.34, 16 C.F.R. § 2.34, now in further conformity with the procedure prescribed in Commission Rule 2.34, the Commission hereby issues its complaint, makes the following jurisdictional findings and enters the following order:

1. Respondent GeneLink, Inc. is a Pennsylvania corporation with its principal office or place of business at 8250 Exchange Drive, Suite 120, Orlando, Florida 32809.

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

ORDER

DEFINITIONS

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

A. Unless otherwise specified, "respondent" means GeneLink, Inc., a corporation, also doing business as GeneLink Biosciences, Inc., its successors and assigns, and its officers, agents, representatives, and employees.

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

C. "Covered Product" means any drug, food, or cosmetic that is: (a) customized or personalized for a consumer based on that consumer's DNA or SNP (single nucleotide polymorphism) assessment, including, but not limited to, LifeMap ME DNA Customized Nutritional Supplements, GeneWize Nutritional Supplements, LifeMap ME DNA Customized Skin Repair Serum, and GeneWize Customized Skin Repair Serum; or (b) promoted to modulate the effect of genes.

D. "Covered Assessment" means any genetic test or assessment, including, but not limited to, the Healthy Aging Assessment and LifeMap Healthy Aging Assessment.

E. "Essentially Equivalent Product" means a product that contains the identical ingredients, except for inactive ingredients (*e.g.*, binders, colors, fillers, excipients), in the same form and dosage, and with the same route of administration (*e.g.*, orally, sublingually), as the Covered Product; *provided that* the Covered Product may contain additional ingredients if reliable scientific evidence generally accepted by experts in the field

demonstrates that the amount and combination of additional ingredients is unlikely to impede or inhibit the effectiveness of the ingredients in the Essentially Equivalent Product.

F. "Drug" means as defined in Section 15(c) of the FTC Act, 15 U.S.C. § 55(c).

G. "Food" means as defined in Section 15(b) of the FTC Act, 15 U.S.C. § 55(b).

H. "Cosmetic" means as defined in Section 15(e) of the FTC Act, 15 U.S.C. § 55(e).

I. "Adequate and well-controlled human clinical study" means a human clinical study that: is randomized and adequately controlled; utilizes valid end points generally recognized by experts in the relevant disease field; yields statistically significant between-group results; and is conducted by persons qualified by training and experience to conduct such a study. Such study shall be double-blind and placebo-controlled; *provided*, *however*, *that*, any study of a conventional food need not be placebo-controlled or double-blind if placebo control or blinding cannot be effectively implemented given the nature of the intervention. For the purposes of this proviso, "conventional food" does not include any dietary supplement, any customized or personalized product based on a consumer's DNA or SNP assessment, or any product promoted to modulate the effect of genes. Respondent shall have the burden of proving that placebo-control or blinding cannot be effectively implemented.

J. "Endorsement" means as defined in the Commission's Guides Concerning the Use of Endorsements and Testimonials in Advertising, 16 C.F.R. § 255.0.

K. "Licensee" means a person or entity, including a sublicensee, with whom respondent or its licensee has a business agreement.

L. "Affiliate" means any person or entity who participates in an Affiliate Program.

M. "Affiliate Program" means any arrangement whereby any person or entity: (a) provides respondent with, or refers to respondent, potential or actual customers; or (b) otherwise markets, advertises, or offers for sale any product or service on behalf of respondent.

N. "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 bank account, debit card, or credit card account number; (g) a persistent identifier, such as a customer number held in a "cookie" or processor serial number; or (h) clinical laboratory testing information, including test results. 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.

O. The term "including" in this order means "without limitation."

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

I.

IT IS ORDERED that respondent, directly or through any corporation, partnership, subsidiary, division, licensee, affiliate, 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, mitigate, or reduce the risk of diabetes, heart disease, arthritis, or insomnia, unless the representation is non-misleading and, at the time the representation is made, respondent possesses and relies upon competent and reliable scientific evidence that substantiates that the representation is true. For purposes of this Part I, "competent and reliable scientific evidence" shall consist of at least two adequate and well-controlled human clinical studies of the Covered Product, or of an Essentially Equivalent Product, conducted by different researchers, independently of each other, that conform to acceptable designs and protocols and whose results, when considered in light of the entire body of relevant and reliable scientific evidence, are sufficient to substantiate that the representation is true; *provided that*, if the respondent represents that such product is effective in the diagnosis, cure, mitigation, treatment, prevention, or the reduction of risk of disease for persons with a particular genetic variation or single nucleotide polymorphism ("SNP"), then studies required under this Part I shall be conducted on human subjects with such genetic variation or SNP. Respondent shall have the burden of proving that a product satisfies the definition of an Essentially Equivalent Product.

II.

IT IS FURTHER ORDERED that respondent, directly or through any corporation, partnership, subsidiary, division, licensee, affiliate, trade name, or other device, in connection with the manufacturing, labeling, advertising, promotion, offering for

sale, sale, or distribution of any Covered Product or any Covered Assessment, in or affecting commerce, shall not make any representation, in any manner, expressly or by implication, including through the use of a product name, endorsement, depiction, or illustration, other than representations covered under Part I of this order, about the health benefits, performance, or efficacy of any Covered Product or any Covered Assessment, unless the representation is non-misleading, and, at the time of making such representation, respondent possesses and relies 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 II, 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.

III.

IT IS FURTHER ORDERED that respondent, directly or through any corporation, partnership, subsidiary, division, licensee, affiliate, trade name, or other device, in connection with the manufacturing, labeling, advertising, promotion, offering for sale, sale, or distribution of any Covered Product or any Covered Assessment, in or affecting commerce, shall not misrepresent, in any manner, directly or indirectly, expressly or by implication, including through the use of endorsements:

A. The existence, contents, validity, results, or conclusions of any test, study, or research; or

B. That the benefits of any Covered Product or Covered Assessment are scientifically proven.

IV.

IT IS FURTHER ORDERED that:

A. Nothing in Parts I through III of this order shall prohibit respondent from making any representation for any product that is specifically permitted in labeling for such product by regulations promulgated by the Food and Drug Administration pursuant to the Nutrition Labeling and Education Act of 1990 or permitted under Sections 303-304 of the Food and Drug Administration Modernization Act of 1997; and

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

V.

IT IS FURTHER ORDERED that respondent, directly or through any corporation, partnership, subsidiary, division, licensee, affiliate, trade name, or other device, in connection with the manufacturing, labeling, advertising, promotion, offering for sale, sale, or distribution of any Covered Product or any Covered Assessment, in or affecting commerce, shall not provide to any person or entity the means and instrumentalities with which to make, directly or by implication, any representations prohibited by Parts I through III of this order. For purposes of this Part, "means and instrumentalities" shall mean any information, document, or article referring or relating to any Covered Product or any Covered Assessment, including, but not limited to, any advertising, labeling, promotional, or purported substantiation materials, for use by licensees or affiliates in their marketing of any Covered Product or any Covered Assessment in or affecting commerce.

VI.

IT IS FURTHER ORDERED that respondent, directly or through any corporation, partnership, subsidiary, division, trade name, or other device, in connection with the manufacturing, advertising, labeling, promotion, offering for sale, sale, or distribution of any product or service, in or affecting commerce, shall take steps sufficient to ensure compliance with Parts I through III of this order. Such steps shall include, at a minimum:

A. Establishing, implementing, and thereafter maintaining a system to monitor and review its affiliates' representations and disclosures to ensure compliance with Parts I through III of this order. The system shall be implemented as follows:

1. No later than thirty (30) days after the date of service of this order, and, on a semi-annual basis thereafter, respondent shall determine those affiliates that generate the most sales for respondent. For respondent's top fifty (50) revenue-generating affiliates, respondent shall:

   a. Monitor and review each affiliate's web sites on at least a monthly basis at times not disclosed in advance to its affiliates and in a manner reasonably calculated not to disclose the source of the monitoring activity at the time it is being conducted; and

   b. Conduct online monitoring and review of the Internet on at least a monthly basis, including, but not limited to, social networks such as Facebook, microsites such as Twitter, and video sites such as YouTube, for any representations by such affiliates.

2. For the remainder of respondent's affiliates, no later than thirty (30) days after the date of service of this order, and, on a semi-annual basis

thereafter, respondent shall select a random sample of fifty (50) affiliates. Respondent shall:

a. Monitor and review each of these randomly selected affiliates' web sites on at least a monthly basis at times not disclosed in advance to its affiliates and in a manner reasonably calculated not to disclose the source of the monitoring activity at the time it is being conducted; and

b. Conduct online monitoring and review of the Internet on at least a monthly basis, including, but not limited to, social networks such as Facebook, microsites such as Twitter, and video sites such as YouTube, for any representations by such affiliates.

B. Within seven (7) days of reasonably concluding that an affiliate has made representations that the affiliate knew or should have known violated Parts I, II, or III of this order, respondent shall terminate the affiliate from any affiliate program and cease payment to the affiliate; *provided, however*, that nothing in this subpart shall prevent respondent from honoring respondent's payment obligation to an affiliate pursuant to a contract executed by the affiliate and respondent prior to the date of service of the order; and

C. Creating, and thereafter, maintaining, and within fourteen (14) days of receipt of a written request from a representative of the Federal Trade Commission, making available for inspection and copying, reports sufficient to show compliance with this Part of the order.

VII.

IT IS FURTHER ORDERED that respondent, directly or through any corporation, partnership, subsidiary, division, licensee, affiliate, trade name, or other device, in connection with

the manufacturing, advertising, labeling, promotion, offering for sale, sale, or distribution of any product or service, in or affecting commerce, shall not misrepresent in any manner, expressly or by implication, the extent to which it maintains and protects the privacy, confidentiality, security, or integrity of Personal Information collected from or about consumers.

VIII.

IT IS FURTHER ORDERED that respondent, directly or through any corporation, partnership, subsidiary, division, trade name, or other device, shall, no later than the date of service of this order, establish and implement, and thereafter maintain, a comprehensive information security program that is reasonably designed to protect the security, confidentiality, and integrity of Personal Information collected from or about consumers. Such program, the content and implementation of which must be fully documented in writing, shall contain administrative, technical, and physical safeguards appropriate to respondent's size and complexity, the nature and scope of respondent's activities, and the sensitivity of the Personal Information respondent collects 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 received from respondent, and requiring service providers by contract to implement and maintain appropriate safeguards; and

E. The evaluation and adjustment of respondent's information security program in light of the results of the testing and monitoring required by 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.

IX.

IT IS FURTHER ORDERED that, in connection with its compliance with Part VIII of this order, respondent shall obtain initial and biennial assessments and reports ("Assessments") from a qualified, objective, independent third-party professional who uses procedures and standards generally accepted in the profession. Professionals qualified to prepare such assessments shall be: a person qualified as a Certified Information System Security Professional (CISSP) or as a Certified Information Systems Auditor (CISA); a person holding Global Information Assurance Certification (GIAC) from the SysAdmin, Audit, Network, Security (SANS) Institute; or a qualified person or organization approved by the Associate Director for Enforcement, Bureau of Consumer Protection, Federal Trade Commission, Washington, D.C. 20580. The reporting period for the Assessments shall cover: (1) the first one hundred and eighty

(180) days after service of the order for the initial Assessment, and (2) each two (2) year period thereafter for twenty (20) years after service of the order for the biennial Assessments. Each Assessment shall:

A. Set forth the specific administrative, technical, and physical safeguards that respondent has implemented and maintained during the reporting period;

B. Explain how such safeguards are appropriate to respondent's size and complexity, the nature and scope of its activities, and the sensitivity of the Personal Information collected from or about consumers;

C. Explain how the safeguards that have been implemented meet or exceed the protections required by Part VIII 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. The respondent shall provide its 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 in writing, the initial Assessment, and any subsequent Assessments requested, shall be 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, D.C. 20580. The subject line must begin: *In the Matter of GeneLink, Inc.*, FTC File No. 112 3095. *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.

X.

IT IS FURTHER ORDERED that respondent GeneLink, Inc., and its successors and assigns, shall deliver a copy of this order to all current and future principals, officers, directors, Scientific Advisory Board members, and licensees, and to employees 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. Respondent GeneLink, Inc., and its successors and assigns, shall deliver this order to current personnel within thirty (30) days after the date of service of this order, and to future personnel within thirty (30) days after the person assumes such position or responsibilities.

XI.

IT IS FURTHER ORDERED that respondent GeneLink, Inc., and its successors and assigns, shall maintain and, upon request, make available to a representative to the Commission for inspection and copying:

A. For a period of three (3) years after the date of preparation of each Assessment required under Part IX 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 VIII and IX of this order, for the compliance period covered by such Assessment;

B. Unless covered by Part XI.A, for a period of 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:

1. All advertisements and promotional materials containing the representation, including, but not limited to, all marketing and training materials distributed to licensees and affiliates;

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

3. All tests, reports, studies, surveys, demonstrations, or other evidence in that respondent's 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.

XII.

IT IS FURTHER ORDERED that respondent GeneLink, 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, 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 GeneLink, Inc., and its successors and assigns, learns less than thirty (30) days prior to the date such action is to take place, respondent GeneLink, Inc., and its successors and assigns, 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, D.C. 20580. The subject line must begin: *In the Matter of GeneLink, Inc.*, FTC File No. 112 3095.

XIII.

IT IS FURTHER ORDERED that respondent GeneLink, Inc., and its successors and assigns, within sixty (60) days after 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.

XIV.

This order will terminate on May 8, 2034, 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 Ohlhausen dissenting, and Commissioner McSweeny not participating.

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

This matter involves the advertising and promotion of purported genetically customized nutritional supplements and skin repair serum products, which GeneLink and its co-respondent and former subsidiary, foru™ International Corporation, formerly known as GeneWize Life Sciences, Inc. ("foru™"), sold through a multi-level marketing ("MLM") network. According to the FTC complaint, GeneLink and foru™ represented that genetic disadvantages identified through the companies' DNA assessments are scientifically proven to be mitigated by or compensated for with the companies' nutritional supplements. The complaint alleges that this claim is false and thus violates the FTC Act. The FTC complaint also charges that the companies represented that these custom-blended nutritional supplements: (1) effectively compensate for genetic disadvantages identified by respondents' DNA assessments, thereby reducing an individual's

risk of impaired health or illness, and (2) treat or mitigate diabetes, heart disease, arthritis, and insomnia. The complaint alleges that these claims are unsubstantiated and thus violate the FTC Act.

With regard to the purported genetically customized skin repair serum products, the FTC complaint charges that the companies represented that the products are scientifically proven to reduce the appearance of wrinkles and improve skin firmness; and enhance or diminish aging predispositions, including collagen breakdown, sun damage, and oxidative stress. The complaint alleges that these claims are false and thus violate the FTC Act.

Additionally, the complaint alleges that the companies provided advertisements and promotional materials to their MLM affiliates for use in the marketing and sale of their genetically customized nutritional supplements and skin repair serum products. The complaint alleges that the companies thereby provided their affiliates with means and instrumentalities to further the deceptive and misleading acts and practices at issue.

Finally, the FTC complaint alleges that the companies' acts and practices related to data security were unfair and deceptive. The companies collected personal information, including names, addresses, email addresses, telephone numbers, dates of birth, Social Security numbers, bank account numbers, credit card account numbers, and genetic information. They represented to consumers that they implemented reasonable and appropriate measures to secure consumers' personal information. The complaint alleges the companies failed to provide reasonable and appropriate security for consumers' personal information. According to the complaint, among other things, the companies:

(1) Failed to implement reasonable policies and procedures to protect the security of consumers' personal information collected and maintained by respondents;

(2) Failed to require by contract that service providers implement and maintain appropriate safeguards for consumers' personal information;

(3) Failed to provide reasonable oversight of service providers, for instance by requiring that service providers implement simple, low-cost, and readily available defenses to protect consumers' personal information;

(4) Created unnecessary risks to personal information by: (a) maintaining consumers' personal information in clear text; (b) providing respondents' employees, regardless of business need, with access to consumers' complete personal information; (c) providing service providers with access to consumers' complete personal information, rather than, for example, to fictitious data sets, to develop new applications; (d) failing to perform assessments to identify reasonably foreseeable risks to the security, integrity, and confidentiality of consumers' personal information on respondents' network; and (e) providing a service provider that needed only certain categories of information for its business purposes with access to consumers' complete personal information; and

(5) Did not use readily available security measures to limit wireless access to their network.

The complaint further alleges respondents' failure to provide reasonable oversight of service providers and respondents' failure to limit employees' access to consumers' personal information resulted in a vulnerability that, until respondents were alerted by an affiliate, provided that affiliate with the ability to access the personal information of every foru™ customer and affiliate in respondents' customer relationship management database. The personal information that could have been accessed included consumers' names, addresses, email addresses, telephone numbers, dates of birth, and Social Security numbers. The complaint alleges that respondents' practices were likely to cause substantial injury to consumers, were not reasonably avoidable by consumers, and were not outweighed by countervailing benefits to consumers or competition.

The proposed consent order contains provisions designed to prevent GeneLink from engaging in similar acts or practices in the future. The order covers representations made in connection with

the manufacturing, labeling, advertising, promotion, offering for sale, sale, or distribution of any Covered Product, in or affecting commerce. First, the order defines Covered Product as any drug, food, or cosmetic that is: (a) customized or personalized for a consumer based on that consumer's DNA or other genetic assessment, including, but not limited to, the nutritional supplement and skin repair serum products at issue; or (b) promoted to modulate the effect of genes. Second, it defines Essentially Equivalent Product to mean a product that contains the identical ingredients, except for inactives, in the same form, dosage, and route of administration as the Covered Product; provided that the Covered Product may contain additional ingredients if reliable scientific evidence generally accepted by experts in the field demonstrates that the amount and combination of additional ingredients is unlikely to impede or inhibit the effectiveness of the ingredients in the Essentially Equivalent Product. Third, it defines adequate and well-controlled human clinical study to mean a human clinical study that is randomized and adequately controlled; utilizes valid end points generally recognized by experts in the relevant disease field; yields statistically significant between-group results; and is conducted by persons qualified by training and experience to conduct such a study. This definition requires that the study be double-blind and placebo-controlled; however, this definition provides an exception for any study of a conventional food if the respondent can demonstrate that placebo control or blinding cannot be effectively implemented given the nature of the intervention. Fourth, it defines Covered Assessment as any genetic test or assessment, including but not limited to, the companies' current DNA assessments. Finally, the order defines Licensee as a person or entity, including a sublicensee (*e.g.*, foru™) with whom respondent or its licensee has a business agreement. With respect to information security, the proposed order closely follows the Commission's previous data security orders.

Part I of the consent order is designed to address GeneLink's specific claims about diseases and serious health conditions by prohibiting the company from making any representation that any Covered Product is effective in the diagnosis, cure, mitigation, treatment, or prevention of any disease, including any representation that such product will treat, prevent, mitigate, or

reduce the risk of diabetes, heart disease, arthritis, or insomnia, unless such representation is non-misleading and, at the time the representation is made, GeneLink possesses and relies upon competent and reliable scientific evidence, at least two adequate and well-controlled human clinical studies of the Covered Product, or of an Essentially Equivalent Product, conducted by different researchers, independently of each other, that conform to acceptable designs and protocols and whose results, when considered in light of the entire body of relevant and reliable scientific evidence, are sufficient to substantiate that the representation is true. Further, claims that a Covered Product effectively treats or prevents a disease in persons with a particular genetic variation, must be conducted on subjects with that genetic variation because persons with the particular genetic variation may respond differently to the Covered Product than do persons without the variation. The substantiation standard imposed under this Part is reasonably necessary to ensure that any future claims about diseases and serious health conditions made by the named respondents are not deceptive; this standard does not necessarily apply to firms not under order.

Part II of the consent order prohibits GeneLink from making any representation about the health benefits, performance, or efficacy of any Covered Product or any Covered Assessment, unless the representation is non-misleading, and proposed respondents rely on 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 claim is true.

Part III of the consent order addresses claims regarding scientific research. It prohibits GeneLink, with regard to any Covered Product or any Covered Assessment, from misrepresenting the existence, contents, validity, results, or conclusions of any test, study, or research. This Part also prohibits GeneLink from representing that the benefits of any Covered Product or any Covered Assessment are scientifically proven.

Part IV of the consent order provides that nothing in the order shall prohibit GeneLink from making any representation for any product that is specifically permitted in labeling for such product by regulations promulgated by the FDA pursuant to the Nutrition Labeling and Education Act of 1990, or that is permitted under sections 303-304 of the Food and Drug Administration Modernization Act of 1997, which, under certain circumstances, permit claims about health and nutrient content as long as those claims are based on current, published, authoritative statements from certain federal scientific bodies (*e.g.*, National Institutes of Health, Centers for Disease Control) or from the National Academy of Sciences.

Part V of the consent order prohibits GeneLink from providing any person or entity with means and instrumentalities that contain any representations prohibited under Parts I through III of the order.

Part VI of the consent order requires GeneLink to establish, implement, and maintain a program to monitor its affiliates' compliance with Parts I through III of the proposed order. In particular, for GeneLink's top 50 revenue-generating affiliates, on at least a monthly basis, the company must monitor and review such affiliates' websites and also conduct online monitoring and review of the Internet for any representations by such affiliates. This Part also requires GeneLink to terminate and withhold payment from an affiliate within seven days of reasonably concluding that the affiliate made representations that the affiliate knew or should have known violated Parts I, II, or III of the order. Finally, this Part requires GeneLink to create, maintain, and make available to FTC representatives within 14 days of receipt of a written request, reports sufficient to show compliance with this Part.

Part VII of the consent order prohibits GeneLink from misrepresenting the extent to which they maintain and protect the privacy, confidentiality, security, or integrity of any personal information collected from or about consumers.

Part VIII of the consent order requires GeneLink 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 GeneLink'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 GeneLink 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 GeneLink, 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 IX of the consent order requires GeneLink to obtain biennial independent assessments of their security programs for 20 years.

Part X of the consent order requires dissemination of the order to officers, to Scientific Advisory Board members, to licensees, and to employees having managerial responsibilities with respect to the subject matter of the order.

Part XI of the consent order requires GeneLink to keep, for a prescribed period, copies of all materials relied upon to prepare the assessment and any other materials relating to GeneLink's compliance with Parts VIII and IX, as well as relevant advertisements and promotional materials, including marketing and training materials distributed to licensees and affiliates.

Parts XII and **XIII** of the consent order require GeneLink to notify the Commission of changes in corporate structure that might affect compliance obligations under the order, and to file compliance reports. **Part XIV** 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 their terms in any way.

Statement of Chairwoman Edith Ramirez and Commissioner Julie Brill

We write to explain our support for the remedy imposed against respondents GeneLink, Inc. and foru International Corporation, which we believe to be amply supported by the relevant facts. In this, as in all of the Commission's advertising actions alleging deceptive health claims, the Commission has called for, as proposed relief, a level of substantiation that is grounded in concrete scientific evidence and reasonably tailored to ensure that the conduct giving rise to the violation ceases and does not recur, among other important remedial goals. In our

view, the remedy adopted here accomplishes just that, without imposing undue costs on marketers or consumers more generally.

Respondents market and sell genetically customized nutritional supplements and topical skin products. As described in the complaint, this enforcement action stems from claims made by respondents in promotional materials and through testimonials that their products compensate for consumers' "genetic disadvantages" and cure or treat serious conditions such as diabetes, heart disease, and arthritis. In a newsletter, for example, respondents represented their products had cured "a serious diabetic and cardiac patient," and an affiliate's website stated that the products produced "improvements in everything from blood pressure to eczema to hormonal issues to arthritis."[1] The Commission alleges that respondents lacked adequate substantiation for these claims and that they falsely represented that the products' benefits were scientifically proven.

Disease treatment claims such as these require a rigorous level of substantiation. Based on evidence from genetics and nutritional genomics experts, the Commission has reason to believe that well-controlled human clinical trials (referred to here as "randomized controlled trials" or "RCTs") are needed to substantiate respondents' claims and that the studies relied on by respondents to back up their claims fall far short of this evidence. Because respondents lacked even one valid RCT for their products, it was unnecessary for the Commission to decide, for purposes of assessing liability, the precise number of RCTs needed to substantiate their claims.

In fashioning an appropriate remedy, however, we are requiring that respondents have at least two RCTs before making disease prevention, treatment, and diagnosis claims. We have the discretion to issue orders containing "fencing-in" provisions – "provisions . . . that are broader than the conduct that is declared unlawful." *Telebrands Corp. v. FTC*, 457 F.3d 354, 357 n.5 (4th Cir. 2006) (citation and internal quotation marks omitted). Here, we believe that the two-RCT mandate is appropriate and reasonably crafted to prevent the recurrence of

[1] Compl. Exs. G and H.

respondents' alleged unlawful conduct. This requirement conforms to well-recognized scientific principles favoring replication of study results to establish a causal relationship between exposure to a substance and a health outcome. *See, e.g.*, *Thompson Med. Co.*, 104 F.T.C. 648, 720-21, 825 (1984) (requiring two RCTs to support claims of arthritis pain relief and thereby affirming determination that "[r]eplication is necessary because there is a potential for systematic bias and random error in any clinical trial"), *aff'd*, 791 F.2d 189 (D.C. Cir. 1986).[2] It also provides clear rules for respondents, facilitating the setting of future research and marketing agendas, and preserves law enforcement resources by minimizing future argument over the quantity and quality of substantiation needed for the most serious health claims about respondents' products. Moreover, the deceptive claims alleged in the complaint are the type of significant violations of law for which fencing-in relief is more than justified as an additional safeguard against potential recidivism. *See, e.g.*, *id.*at 834 (ruling that deceptive health claims about topical analgesic for arthritis pain warranted fencing-in, and noting that the seriousness of the violations was "affected by the fact that consumers could not readily judge the truth or falsity of the claims").

While not taking issue with respondents' liability as alleged in the Commission's complaint, Commissioner Ohlhausen objects to the Commission's decision to require, as a remedial matter, that respondents have at least two RCTs before representing that their genetic products can cure, treat, diagnose, or prevent a disease. In addition to arguing that the two-RCT requirement is "unduly high," Commissioner Ohlhausen expresses concern that these and other recent Commission orders may lead advertisers in general to believe that they too must invariably have two RCTs to substantiate health and disease claims for a variety of products, leading them to forgo otherwise

[2] *See also* GEOFFREY MARCZYK ET AL., ESSENTIALS OF RESEARCH DESIGN AND METHODOLOGY 15-16 (2005) ("The importance of replication in research cannot be overstated. Replication serves several integral purposes, including establishing the reliability (*i.e.*, consistency) of the research study's findings and determining . . . whether the results of the original study are *generalizable* to other groups of research participants.").

adequately substantiated claims and depriving consumers of potentially useful information.[3] We respectfully disagree.

There is nothing in our action today that amounts to the imposition of a "de facto two-RCT standard on health- and disease-related claims."[4] In this and other recent enforcement actions, the Commission has consistently adhered to its longstanding view that the proper level of substantiation for establishing liability is a case-specific factual determination as to what constitutes competent and reliable scientific evidence for the advertising claims at issue.[5] The same fact-specific approach has guided the Commission's remedial standards. Recent Commission consent orders concerning different types of health claims have variously required two RCTs,[6] one RCT,[7] or more

[3] Statement of Commissioner Maureen K. Ohlhausen, Dissenting in Part and Concurring in Part [hereinafter Ohlhausen Statement] at 1. In her Statement, Commissioner Ohlhausen also references various weight-loss related enforcement actions announced today by the Commission, including *FTC v. Sensa Products, LLC*. Her objections, however, center on the remedy imposed in this matter.

[4] Ohlhausen Statement at 3.

[5] *See, e.g.*, *Bristol Meyers Co.*, 102 F.T.C. 21, 332-38 (1983), *aff'd*, 738 F.2d 554 (2d Cir. 1984); FTC, DIETARY SUPPLEMENTS: AN ADVERTISING GUIDE FOR INDUSTRY 10 (Apr. 2001) [hereinafter DIETARY SUPPLEMENTS ADVERTISING GUIDE] ("When no specific claim about the level of support is made, the evidence needed depends on the nature of the claim. A guiding principle for determining the amount and type of evidence that will be sufficient is what experts in the relevant area of study would generally consider to be adequate.").

[6] *See, e.g.*, *FTC v. Skechers U.S.A., Inc.*, No. 1:12-cv-01214-JG (N.D. Ohio July 12, 2012) (prohibiting, as a remedial matter, weight loss claims without two RCTs); *FTC v. Labra*, No. 11 C 2485 (N.D. Ill. Jan. 11, 2012) (same); *FTC v. Iovate Health Scis.USA, Inc.*, No. 10-CV-587 (W.D.N.Y. July 29, 2010) (same); *Nestlé Healthcare Nutrition, Inc.*, 151 F.T.C. 1 (2011) (requiring two RCTs for claims that any probiotic drink or certain nutritionally complete drinks reduce the duration of acute diarrhea in children or absences from daycare or school due to illness).

[7] *See, e.g.*, *FTC v. Skechers U.S.A., Inc.*, No. 1:12-cv-01214-JG (N.D. Ohio July 12, 2012) (prohibiting muscle strengthening claims for any footwear product without one RCT); *FTC v. Reebok Int'l Ltd.*, No. 1:11-cv-02046-DCN (N.D. Ohio Sept. 29, 2011) (same).

generally defined "competent and reliable scientific evidence."[8] Against this backdrop, we are not persuaded that by requiring two RCTs as a remedial matter here, the Commission will create a misperception among advertisers about the substantiation standards that govern liability for deceptive advertising.[9] However, to the extent other marketers look to our orders for signals as to the type of backing required for disease treatment claims, we prefer that they understand that serious claims like those made by respondents must have hard science behind them.

We also disagree that the proposed remedy will deny consumers access to useful information about new areas of science. The value of information naturally depends on its accuracy.[10] As the D.C. Circuit has emphasized, "misleading advertising does not serve, and, in fact, disserves, th[e] interest"

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[8] *See, e.g.*, *NBTY, Inc.*, 151 F.T.C. 201 (2011) (requiring marketer of vitamins to possess "competent and reliable scientific evidence" for any claim about the health benefits, performance, or efficacy of any product).

[9] Moreover, as Commissioner Ohlhausen notes, Ohlhausen Statement at 2 n.7, there may be some instances in which the medical community would not require RCTs to demonstrate that a substance treats, prevents, or reduces the risk of a disease. *See, e.g.*, DIETARY SUPPLEMENTS ADVERTISING GUIDE, *supra* note 5, at 11 (explaining that an appropriately qualified claim based on epidemiological evidence would be permitted where "[a] clinical intervention trial would be very difficult and costly to conduct," "experts in the field generally consider epidemiological evidence to be adequate" and there is no "stronger body of contrary evidence"). But, contrary to Commissioner Ohlhausen's contention, the link between folic acid and neural tube birth defects was substantiated using a combination of RCTs and observational epidemiological evidence, as indicated by the articles she cites. *See, e.g.*, Walter C. Willett, *Folic Acid and Neural Tube Defect: Can't We Come to Closure?*, 82 AM. J. PUB. HEALTH 666, 667 (1992).

[10] In some instances, "emerging" scientific evidence has been subsequently contradicted by further research, leading to consumer confusion and potential physical and financial harm. *See, e.g.*, Eric A. Klein et al., *Vitamin E and the Risk of Prostate Cancer, The Selenium and Vitamin E Cancer Prevention Trial (SELECT)*, 306 J. AM. MED. ASS'N 1549, 1551 (2011) (reporting that a 2008 randomized, placebo-controlled prospective clinical trial of over 35,000 men contradicted "considerable preclinical and epidemiological evidence that selenium and vitamin E may reduce prostate cancer risk," and that follow-up observational data from 2011 showed a statistically significant *increase* in prostate cancer in the vitamin E group over placebo).

of "consumers and society . . . in the free flow of commercial information." *FTC v. Brown & Williamson Tobacco Corp.*, 778 F.2d 35, 43 (D.C. Cir. 1985) (citation and internal quotation marks omitted). If respondents wish to rely on emerging science, they can qualify their claims accordingly. Properly qualified claims are lawful and permissible under our proposed orders. *See* Proposed Consent Orders, Part III.

The fact that the ingredients in respondents' products are safe also does not alter our conclusion. Consumers who rely on respondents' claims may forgo important diet and lifestyle changes that are known to reduce the risk of diabetes, heart disease, or arthritis. Or they may forgo treatments that, unlike respondents' products, have been demonstrated to be effective. In addition, respondents charge a premium, over $100 per month, for their customized products. Consumers, therefore, may be deceived both to their medical and economic detriment when a safe product provides an ineffective treatment. *See FTC v. QT, Inc.*, 512 F.3d 858, 863 (7th Cir. 2008) (safe but deceptively advertised treatment "will lead some consumers to avoid treatments that cost less and do more; the lies will lead others to pay too much for [treatment] or otherwise interfere with the matching of remedies to medical conditions"); *Pfizer Inc.*, 81 F.T.C. 23, 62 (1972) ("A consumer should not be compelled to enter into an economic gamble to determine whether a product will or will not perform as represented."). Unsubstantiated disease claims also harm honest competitors that expend considerable resources on studies or analyses of the existing science and conform their advertising claims accordingly. Allowing companies to rely on "emerging" evidence to support disease claims merely because the products in question are safe would risk a "race to the bottom" – the proliferation of progressively more egregious disease claims, which would harm both legitimate competitors and consumers in the process.

Finally, Commissioner Ohlhausen argues that requiring the RCTs to be conducted by different researchers working independently of each other imposes undue burdens in the absence of evidence that a defendant has fabricated or interfered

with a study or its results.[1] This requirement is an important safeguard that lessens the likelihood that researcher bias will affect the outcome of a study and helps ensure that the results are replicable.[2]

In short, we believe the relief obtained by the Commission in this settlement is warranted and strikes the right balance between the need for accuracy in health-related advertising claims and the burden placed on respondents.

STATEMENT OF COMMISSIONER MAUREEN K. OHLHAUSEN DISSENTING IN PART AND CONCURRING IN PART

I strongly support the Commission's enforcement efforts against false and misleading advertisements and therefore have voted in favor of the consent agreements with Sensa Products, LLC; HCG Diet Direct, LLC; L'Occitane, Inc.; and LeanSpa, LLC, despite having some concerns about the scope of the relief in several of these weight-loss related matters. I voted against the consent agreements in the matter of GeneLink, Inc. and foru International Corporation, however, because they impose an unduly high standard of at least two randomized controlled trials

[1] Ohlhausen Statement at 2-3.

[2] Commissioner Ohlhausen also objects to the Part I requirement that testing be conducted on the product about which the advertising claim is made or an "essentially equivalent product," arguing that the order should authorize "claims regarding individual ingredients in combined products as long as claims for each ingredient are properly substantiated and there are no known interactions." Ohlhausen Statement at 3. In fact, the orders permit that very thing. If there is reliable evidence that the additional ingredients will not interact with the tested product in a way that impacts efficacy, the orders do not require testing of the combined product. *See* Proposed Consent Orders at 3 (defining "Essentially Equivalent Product" to permit additional ingredients, beyond those in the tested product, if "reliable scientific evidence generally accepted by experts in the field demonstrates that the amount and combination of additional ingredients [in the respondent's product] is unlikely to impede or inhibit the effectiveness of the ingredients in the [tested product]").

(or RCTs) to substantiate *any* disease-related claims, not just weight-loss claims. Adopting a one-size-fits-all approach to substantiation by imposing such rigorous and possibly costly requirements for such a broad category of health- and disease-related claims[3] may, in many instances, prevent useful information from reaching consumers in the marketplace and ultimately make consumers worse off.[4]

The Commission has traditionally applied the *Pfizer*[5] factors to determine the appropriate level of substantiation required for a specific advertising claim. These factors examine the nature of the claim and the type of product it covers, the consequences of a false claim, the benefits of a truthful claim, the cost of developing the required substantiation for the claim, and the amount of substantiation experts in the field believe is reasonable for such a claim.[6] One of the goals of the *Pfizer* analysis is to balance the value of greater certainty of information about a product's claimed attributes with the risks of both the product itself and the suppression of potentially useful information about it. Under such an analysis, the burden for substantiation for health- or disease-related claims about a safe product, such as a food, for example, should be lower than the burdens imposed on

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[3] This provision may apply quite broadly in practice given the Commission majority's conclusion in our *POM Wonderful* decision that many of the claims involving the continued healthy functioning of the body also conveyed implied disease-related claims. *See POM Wonderful, LLC*, No. 9344, 2013 WL 268926 (F.T.C. Jan. 16, 2013).

[4] To be clear, however, I am not advocating in favor of permitting "unsubstantiated disease claims," as suggested in the statement of Chairwoman Ramirez and Commissioner Brill. Rather, I am suggesting that consumers would on balance be better off if we clarified that our requirements permit a variety of health- or disease-related claims about safe products, such as foods or vitamins, to be substantiated by competent and reliable scientific evidence that might not comprise two RCTs.

[5] *Pfizer, Inc.*, 81 F.T.C. 23 (1972).

[6] *Id.* at 91-93; *see also FTC Policy Statement Regarding Advertising Substantiation*, 104 F.T.C. 839 (1984) (appended to *Thompson Med. Co.*, 104 F.T.C. 648, 839 (1984)).

drugs and biologics because consumers face lower risks when consuming the safe product.[7]

Recently, however, Commission orders, including the ones in the matter of GeneLink and foru International, seem to have adopted two RCTs as a standard requirement for health- and disease-related claims for a wide array of products.[8] RCTs can be difficult to conduct and are often costly and time-consuming relative to other types of testing, particularly for diseases that develop over a long period of time or complex health conditions. Requiring RCTs may be appropriate in some circumstances, such as where use of a product carries some significant risk, or where the costs of conducting RCTs may be relatively low, such as for conditions whose development or amelioration can be observed over a short time period. Thus, I am willing to support the order requirement of two RCTs for short-term weight loss claims in the Sensa, HCG Diet Direct, L'Occitane, and LeanSpa matters because such studies can be conducted in a relatively short amount of time at a lower cost than for many other health claims. My concern with GeneLink and foru International and the series of similar orders is that they might be read to imply that two RCTs are required to substantiate any health- or disease-related claims, even for relatively-safe products. It seems likely that producers may forgo making such claims about these kinds of

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[7] The FDA designates most food ingredients as GRAS (generally recognized as safe). 21 C.F.R. § 170.30. Vitamins and minerals are treated as foods by the FDA and are also GRAS. *See* FDA Guidance for Industry: Frequently Asked Questions about GRAS (Dec. 2004), *available at* http://www.fda.gov/Food/GuidanceRegulation/GuidanceDocumentsRegulatoryInformation/IngredientsAdditivesGRASPackaging/ucm061846.htm#Q1. As a result, food ingredients, vitamins, and minerals can be combined and sold to the public without direct evidence on the particular combination realized in the new product. Many products are made up of several common generic ingredients, for which there is little financial incentive to test individually or to retest in each particular combination.

[8] The orders in this matter include as a Covered Product any food, drug, or cosmetic that is genetically customized or personalized for a consumer or that is promoted to modulate the effect of genes. Other cases requiring two RCTs are *POM Wonderful LLC*, Docket No. 9344 (F.T.C. Jan. 10, 2013) (fruit juice); *Dannon Co., Inc.*, 151 F.T.C. 62 (2011) (yogurt); *Nestlé Healthcare Nutrition, Inc.*, 151 F.T.C. 1 (2011) (food); *FTC v. Iovate Health Sci. USA, Inc.*, No. 10-CV-587 (W.D.N.Y. July 29, 2010) (dietary supplement).

products, even if they may otherwise be adequately supported by evidence that does not comprise two RCTs.[9]

Although raising the requirement for both the number and the rigor of studies required for substantiation for all health- or disease-related claims may increase confidence in those claims, the correspondingly increased burdens in time and money in conducting such studies may suppress information that would, on balance, benefit consumers. If we demand too high a level of substantiation in pursuit of certainty, we risk losing the benefits to consumers of having access to information about emerging areas of science and the corresponding pressure on firms to compete on the health features of their products. In my view, the Commission should apply the *Pfizer* balancing test in a more finely calibrated manner than they have in the GeneLink and foru International orders to avoid imposing "unduly burdensome restrictions that might chill information useful to consumers in making purchasing decisions."[10]

In addition, based on the same concerns about imposing unnecessarily burdensome and costly obligations, I do not support a general requirement that all products be tested by different researchers working independently without an indication that the defendant fabricated or otherwise interfered with a study or its results. [11] Where defendants have fabricated

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[9] Notably, the medical community does not always require RCTs to demonstrate the beneficial effects of medical and other health-related innovations. For example, the recommendation that women of childbearing age take a folic acid supplement to reduce the risk of neural tube birth defects was made without RCT evidence on the relevant population. *See* Walter C. Willett, "Folic Acid and Neural Tube Defect: Can't We Come to Closure?" *American Journal of Public Health*, May 1992, Vol. 82, No. 5; Krista S. Crider, Lynn B. Bailey and Robert J. Berry, "Folic Acid Food Fortification—Its History, Effect, Concerns, and Future Directions," *Nutrients* 2011, Vol. 3, 370-384.

[10] 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.

[11] The FDA does not require independent testing for clinical investigational studies of medical products, including human drug and biological products or medical devices, and it permits sponsors to use a variety of approaches to fulfill

results, as our complaint against Sensa alleges, a requirement of independent testing may be appropriate, but a simple failure to have adequate substantiation should not automatically trigger such an obligation. In other cases, where there is some concern about a sponsor or researcher biasing a study, our orders may address this in a less burdensome way by requiring the producer making the disease-related claims to provide the underlying testing data to substantiate its claims, which we can examine for reliability. Similarly, the requirement to test an "essentially equivalent product," which appears to be more rigorous than FDA requirements for food and supplement products, can significantly and unnecessarily increase the costs of substantiation, again potentially depriving consumers of useful information. Instead, Commission orders should clearly allow claims regarding individual ingredients in combined products as long as claims for each ingredient are properly substantiated and there are no known relevant interactions.[12]

It is my hope and recommendation that as we consider future cases involving health- and disease-related claims, the Commission and its staff engage in a further dialogue about our substantiation requirements to discern how best to assess the potential costs and benefits of allowing different types of evidence that might provide a reasonable basis to substantiate such claims. Although I am willing to support liability for

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their responsibilities for monitoring. *See* FDA Guidance for Industry Oversight of Clinical Investigations—A Risk-Based Approach to Monitoring (Aug. 2013), *available at* http://www.fda.gov/downloads/Drugs/GuidanceComplianceRegulatoryInformation/Guidances/UCM269919.pdf.

[12] Although the statement by Chairwoman Ramirez and Commissioner Brill asserts that the orders in GeneLink and foru International permit claims for individual ingredients in combined products as long as the claims for each ingredient are properly substantiated and there are no known interactions, the orders actually require that "reliable scientific evidence generally accepted by experts in the field demonstrate that the amount and *combination of additional ingredients* is unlikely to impede or inhibit the effectiveness of the ingredients in the Essentially Equivalent Product." Decision and Order at 2, *In the Matter of GeneLink, Inc.* FTC File No. 112 3095 (emphasis added). My point is that the FDA does not require direct evidence regarding *combinations of individual ingredients deemed GRAS* but the order on its face requires scientific evidence demonstrating the effect of such combinations.

failures to have adequate substantiation for health- and disease-related claims under certain circumstances, I am not willing to support a de facto two-RCT standard on health- and disease-related claims for food or other relatively-safe products.

Statement of Commissioner Joshua D. Wright

Today the Commission announces five settlements involving the deceptive marketing of a variety of nutritional and dietary supplements, skincare products, and weight-loss remedies. While the course of business conduct, type of product and particular advertising claim at issue in each case differs, all share one common characteristic – the Commission has alleged that, in the course of advertising their products, each of these defendants has made false or unsubstantiated claims about the treatment of certain medical or health conditions.

Cases that challenge false or unsubstantiated claims – especially those involving serious medical conditions – are an important component of our agency's mission to protect consumers from economic injury. Indeed, the aggregate consumer injury in these particular matters is estimated to be $420 million and these settlement agreements will return approximately $33 million to consumers. I fully support the Commission's efforts to deter deceptive advertising and voted in favor of authorizing these particular settlements.

In crafting remedial relief in these cases, the Commission inevitably faces a tradeoff between deterring deceptive advertising and preserving the benefits to competition and consumers from truthful claims. Tailoring remedial relief – including the level of substantiation required – to the specific claims at issue is in the best interests of consumers.[1] I write today to express some of my views on this issue.

[1] The Commission's determination of whether an advertiser has adequate substantiation in the first instance depends upon "a number of factors relevant

Each of the consent agreements announced today includes injunctive relief provisions requiring the settling parties to satisfy a standard of "competent and reliable scientific evidence" before again making the claims at issue. Each consent agreement further defines "competent and reliable scientific evidence" as requiring, among other things, two adequate and well-controlled human clinical studies (randomized controlled trials or RCTs) of the product. I encourage the Commission to explore more fully whether the articulation and scope of injunctive relief in these and similar settlements strikes the right balance between deterring deceptive advertising and preserving for consumers the benefits of truthful claims. The optimal amount and type of evidence to substantiate a future claim will vary from case to case. Similarly, a fact-specific inquiry may justify specially crafted injunctive relief in certain cases, such as bans, performance bonds or document retention requirements for underlying study data. I look forward to working with my fellow Commissioners to continue to examine and evaluate our formulation of the competent and reliable scientific evidence standard, as well as the ancillary injunctive provisions in consent agreements, in order to best protect consumers from the costs imposed upon them by deceptive advertising while encouraging competition and truthful advertising that benefits consumers.

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to the benefits and costs of substantiating a particular claim. These factors include: 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." FTC Policy Statement Regarding Advertising Substantiation, appended to *Thompson Medical Co*., 104 F.T.C. 648, 839 (1984), *aff'd*, 791 F.2d 189 (D.C. Cir. 1986), *cert. denied*, 479 U.S. 1086 (1987). Formulating the required level of substantiation for injunctive relief should necessarily be grounded in the factors set forth in this policy statement, although additional considerations might also be relevant.

Complaint

IN THE MATTER OF

FORU™ INTERNATIONAL CORPORATION
F/K/A
GENEWIZE LIFE SCIENCES, INC.

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

Docket No. C-4457; File No. 112 3095
Complaint, May 8, 2014 – Decision, May 8, 2014

This consent order addresses foru™ International Corporation f/k/a GeneWize Life Sciences, Inc.'s advertising and promotion of purported genetically customized nutritional supplements and skin repair serum products, which foru™ sold through a multi-level marketing network. The complaint alleges that foru™ represented that genetic disadvantages identified through the companies' DNA assessments are scientifically proven to be mitigated by or compensated for with the companies' nutritional supplements. The complaint further alleges that these custom-blended nutritional supplements: (1) effectively compensate for genetic disadvantages identified by respondents' DNA assessments, thereby reducing an individual's risk of impaired health or illness, and (2) treat or mitigate diabetes, heart disease, arthritis, and insomnia. Additionally, the complaint alleges that foru™ failed to provide reasonable and appropriate security for consumers' personal information. The consent order requires foru™ 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 order also prohibits foru™ from making any representation about the health benefits, performance, or efficacy of any Covered Product or any Covered Assessment, unless the representation is non-misleading, and respondent relies on 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 claim is true.

Participants

For the *Commission*: *Megan Cox, Keith Fentonmiller, Carolyn L. Hann, Mary L. Johnson,* and *Laura Riposo VanDruff.*

For the *Respondent*: *Holly Bayne, The Law Office of Bayne & Associates*; and *David V. Kirby, O'Connor & Kirby.*

COMPLAINT

The Federal Trade Commission, having reason to believe that GeneLink, Inc., a corporation, and foru™ International Corporation, formerly known as GeneWize Life Sciences, Inc. ("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 GeneLink, Inc. ("GeneLink"), also doing business as GeneLink Biosciences, Inc., is a publicly held Pennsylvania corporation with its principal office or place of business at 8250 Exchange Drive, Suite 120, Orlando, Florida 32809.

2. Respondent foru™ International Corporation ("foru™"), formerly known as GeneWize Life Sciences, Inc., is a Delaware corporation with its principal office or place of business at 1231 Greenway Drive, Suite 200, Irving, Texas 75038.

3. Respondents have developed, advertised, labeled, offered for sale, and sold through a multi-level marketing system utilizing affiliates and licensees, nutritional supplements and skincare products, including a line of customized products sold under several names such as LifeMap ME DNA Customized Nutritional Supplements, GeneWize Customized Nutritional Supplements, LifeMap ME DNA Customized Skin Repair Serum, and GeneWize Customized Skin Repair Serum.

4. Respondents purport to customize their nutritional supplements and skincare products to each consumer's genetic disadvantages. Using an "at home" cheek swab kit, each consumer submits a cheek swab to respondents. Respondents then send the swab sample to a third-party laboratory for analysis of genetic variations called single nucleotide polymorphisms ("SNPs"). Based on the laboratory test results, respondents prepare a DNA assessment that recommends specific levels of nutritional support based on each SNP analyzed.

5. Respondents' LifeMap Healthy Aging Assessment analyzes 12 SNPs that purportedly affect nutritional health and

aging, and their LifeMap Skin Health Assessment, formerly known as the Dermagenetic SNP Assessment, analyzes six SNPs that purportedly affect skin health and aging (collectively, "DNA Assessments"). According to respondents, each SNP "predicts biochemical processes that are associated with significant physiological disadvantages, . . . the negative potential [of which] has been scientifically proven to be modulated by nutritional supplementation." Compl. Ex. A.

6. Based on the DNA Assessments, respondents offer dietary supplements and skincare products that are purportedly customized to each consumer's unique genetic profile.

7. In their business practices, respondents obtain consumers' genetic information. Since 2008, respondents have collected genetic information from nearly 30,000 consumers.

8. Respondents' nutritional supplements are "drugs" or "food" within the meaning of Sections 12 and 15 of the Federal Trade Commission Act ("FTC Act").

9. Respondents' skincare products are "drugs" or "cosmetics" within the meaning of Sections 12 and 15 of the FTC Act.

10. 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.

Advertising and Marketing

11. Respondents have developed and disseminated or caused to be disseminated advertisements, packaging, and promotional materials for respondents' genetically customized nutritional supplements and skincare products including, but not limited to, Exhibits A through I. These materials contain the following statements and depictions:

A. LifeMap ME DNA Customized Nutritional Supplement Pamphlet (Ex. A)

Healthy Aging is Now as Close as Your **DNA!**
Genetically Customized Nutritional Supplements
Made Exclusively for You.

* * *

Why These Aging Genes?
Although human DNA contains several million natural genetic variations (called SNPs), GeneLink scientists used the following criteria to choose the SNPs for the GeneWize Healthy Aging DNA Assessment:

1. **Valid**: The existence of the SNP is supported by solid, credible, scientific evidence.
2. **Important**: A SNP predicts biochemical processes that are associated with significant physiological disadvantages.
3. **Frequent**: [T]he SNP is relatively common among the general population.
4. **Actionable**: A SNP's negative potential has been scientifically proven to be modulated by nutritional supplementation.

B. The New Wellness Frontier Brochure (Ex. B)

By analyzing and understanding your unique genetic strengths and weaknesses, you can eliminate the guesswork and "genetically guide" the optimal nutritional supplement or skincare formulation to match your LifeMap Healthy Aging Assessment™.

. . . Research shows that we can measure SNPs and have the ability to impact the expression of our genes through proper nutritional support.

* * *

What will I feel after taking my LifeMap ME Formula?
Since everyone's body is different, you'll likely receive unique benefits from your product. Some of the benefits you may notice and some you may not. Some of the most common benefits people report include:

- Ability to fall asleep faster
- Longer, deeper sleep . . .

You may or may not experience these same results. Your body is unique and so is your formula. It makes sense that your results will be unique too.

C. Your Genetic Compass Brochure (Ex. C)

GENETICALLY GUIDED PERSONALIZATION OF NUTRIENT AND SKIN CARE FORMULATIONS.
The Nutragenetic and Dermagenetic SNP assessments [*i.e.*, the DNA Assessments] examine a variety of genes which are responsible for making proteins that play a very important role in our overall health. These include oxidative stress, heart and circulatory health, immune health, bone health, pulmary [sic] health, eye/vision health, defense against environmental pollutants, collagen breakdown, photoaging, skin slacking & wrinkling and mild irritation.

KEY POINT *If the Nutragenetic and Dermagenetic SNP test predicts that you might not be as efficient as possible in any given health area, you may be able to do something about it. For every SNP tested, there are potentially compensating and enhancing nutrients that can put you on a better path toward optimal health.*

* * *

There are millions of SNPs. However, only certain subsets are associated with increased risk for disease

and physiologic health conditions. . . . GeneLink selects only those SNPs which can be addressed using nutrients or formulations or lifestyle modifications.

D. Welcome to genewize [sic]: Making Wellness Personal Brochure (Ex. D)

What Are Your Options to Improve Health and Wellbeing?

- Eating healthier?
- Pharmaceuticals?
- Exercise?
- Guessing at supplements?
- Genetically guided nutrition!

Do you have a plan to capitalize on this new science?

*** * ***

GeneWize . . . Connecting the Dots

- Over 14 Years R&D Prior To Launch
- Developed significant DNA tests for SNPs on "Heavy Lifters"
- Developed "SNP Boosts" to mitigate, compensate, or bypass SNP effects
- Powerful health and wellness benefits!

***ONLY* comprehensive genetically guided products!**

A View Into Your Patient or Customer . . .

- Patented DNA Collection Kit
- Sophisticated Assessment
- Confidentiality
- Pinpoint Genetic Predispositions
- Personalized Formula

Over 500,000 Possibilities

With a simple cheek swab . . . .

We Assess . . . Others Guess . . .

E. Cover Letter to GeneWize Fulfillment Package (Ex. E)

LifeMap Essentials™
Your Foundation for Optimal Wellness

Welcome and congratulations for taking an important next step toward healthy aging with the most advanced and scientifically proven nutritional supplement programs available – the **LifeMap Nutrition™ System**, which consists of the following:

1. The **LifeMap DNA collection kit** (provided by GeneLink, Inc.)
2. The **LifeMap Essentials™** formula (A non-custom foundation supplement to be taken while awaiting your Healthy Aging Report & DNA guided LifeMap Custom formula)
3. The **LifeMap DNA Healthy Aging Report™** (results in about 4 weeks after mailing your DNA collection kit)
4. The **LifeMap Custom™** formula (A totally customized formula based on your DNA)

F. GeneWize Official Website, mygenewize.com (Ex. F)

LifeMap Nutrition™ System Testimonials

Seeing is believing but I can't believe what [I] am seeing!

. . . [T]he best of all is the lack of pain on my knees and hips when running. Running was my passion but severe knee and hip pain kept me from it the last 10

years. LifeMap is renewing me in ways I never thought possible. . . .

Loving life, Margarita Nido Stewart

* * *

GeneWize has changed my health and my life!

I'm in my 5th month on the LifeMap Custom supplements and I'm amazed by my personal results. So far I've experienced great sleep, great energy, great skin, and much more. Plus, I continually notice even more positive changes: prior to taking the LifeMap supplements, my memory wasn't the greatest – but now I feel much sharper mentally! This is very important to me because my Mother had Alzheimer's. . . .

Roberta Johnson, GeneWize Affiliate, Miami, Florida

* * *

Thanks for the Memories

. . . I do have certain health challenges and when I started taking my LifeMap Product, after about a week and a half I was amazed to feel tremendous results! Before, I was getting only about three hours of sleep, now I can finally sleep! My concentration & memory also seem to be improving! . . .

Lina M. Oliver
* * *

LifeMap Nutrition Meets Karaoke!

After taking the LifeMap Product for only two weeks I have a lot more energy and my dry skin has improved dramatically. . . . I also began to see something amazing happen: I went from getting very little sleep

at night to now sleeping like a baby! I've been waking up feeling so refreshed that I want to jump up and down on my bed like a child . . . . I'm feeling so happy I've been out singing Karaoke and having a blast.

You couldn't pay me to stop taking the LifeMap Nutrition™. I have the energy to pursue my dreams of being a singer, and much more! . . .

Talina Oblander

*** * ***

Wife Says, "Send me my LifeMap Nutrition too."

I have been taking the LifeMap Nutrition™ supplement now for two months.

Although I wanted my wife to try the program too, she just wouldn't budge. She said she'd have to wait to see how I felt first. Well, I'm now sleeping through the night for the first time in twelve years. . . .

Ernest Smith

* * *

Another Sleep Story. It's Making Us Sleepy

I've always had a problem with sleeping through the night. Within two days of taking the LifeMap product I immediately noticed I was finding the special peace a full seven to eight hours of sleep offers. Problem solved! GeneWize has revolutionized my life and I bless all the company every day for it's [sic] incredible science. . . .

Kent Riedesel

G. GeneWize e-lift newsletter: Monthly E-News Exclusively for GeneWize Affiliates (Ex. G)

Spotlighting Top Leader
Chief Alexander Taku:
My Visionary Source Of Success In GeneWize

. . . I decided to enroll in GeneWize and know my DNA . . . six months ago. . . . My health condition prior to this occasion was life-threatening. . . . I was a serious diabetic and cardiac patient. . . . One would never have imagined . . . that a company would come up with free DNA assessments for all! . . . Six months on the products has produced wonderful results. My blood sugar has stabilized at 80/130 and my diabetic problem is over, while a recent medical report has revealed the reduction of my heart to normal size. . . . For the last six months, I have only been taking my free GeneWize nutritional supplements. . . .

H. GeneWize Affiliate Website, thegenecollective.com (Ex. H)

Zero limits
Gene Team

* * *

I've been fielding a lot of questions about just what Genewize [sic] has done for people.
I myself can report deeper sleep and healthier feeling skin. I've talked with a number of people who have experienced improvements in everything from blood pressure to eczema to hormonal issues to arthritis. The most common observations people note are better sleep and improved energy levels. . .

* * *

I am a Massage Therapist and have had tremendous pain and stiffness in the morning after doing too many

massages for the last few years. I used to take Glucosamine, which did seem to help with the pain and stiffness, but it wasn't total relief. After taking the LifeMap product it hit me one day that I was no longer in pain when I woke in the morning, and the stiffness had disappeared. You see, my Genetic Assessment Report had found that I need maximum support for the car ilage [sic] in my body. Mystery solved! . . . .

Warm Regards, A.R., LMP

* * *

. . . [T]he best of all is he [sic] lack of pain on my knees and hips when running. Running was my passion but severe knee and hip pain kept me from it the last 10 years. LifeMap is renewing me in ways I never thought possible. ?? [sic] Thank you to all those behind the GeneWize Lifemap [sic] Nutrition™ System . . . Now, can you imagine what LifeMap is doing to what we can't see!!!

Loving life, M.N.S.

I. LifeMap ME DNA Skin Repair Serum Pamphlet (Ex. I)

Historic Evolution in Skin Care
Genetically Customized Skin Care Made Exclusively for You.

* * *

What Do Your Genes Know That You Don't?

DNA profiling revolutionized the legal world, and now it's doing the same for skin care. Now the same technology can be used to identify a whole new set of perpetrators. The main suspects? Collagen breakdown, sun damage, sensitivity, and oxidative

stress caused by free radical activity due to environmental polution [sic].

So how do you know how susceptible you are to these aging culprits?

Take a minute to swab inside your cheek. Place your DNA sample inside our bar-coded envelope, and send to our lab. We assess six skin health genes to tell you what skin aging problems you're likely to face as you age.

The information is then used to customize a skin repair serum using a combination of active ingredients selected to compensate for particular deficiencies in areas of skin aging, wrinkling, collagen breakdown, irritation and the skin's ability to defend against environmental stresses.

* * *

How Does it Work?

* * *

The patented, non-invasive simple swab allows you to peek into your predispositions to discover what your genes have to say about your skin aging future.

* * *

Clinically Proven Results

An eight-week, double blind, randomized and controlled clinical study compared the performance of placebo skin care versus the performance of the "genetically-customized" skin care formula containing active ingredients designed for each participant. For those using the genetically-customized formulation, 62% reported substantial reduction in the appearance of wrinkles after 14 days of treatment. After 56 days, the number of participants reporting reduction in the appearance of wrinkles rose to 70%. Similarly, after

14 days, 56% of the participants indicated improved skin firmness and after eight weeks of treatment those with improvements in skin firmness rose to 70%.

* * *

LifeMap ME DNA Skin Repair Ingredient List
Thanks to the custom nature of our product, the ingredient list will represent the latest breakthrough ingredients which have been clinically proven to enhance or diminish aging predispositions.

12. Through the means described in Paragraph 11, respondents have represented, expressly or by implication, that genetic disadvantages identified through respondents' DNA Assessments are scientifically proven to be mitigated or compensated for with nutritional supplementation.

13. In truth and in fact, genetic disadvantages identified through respondents' DNA Assessments are not scientifically proven to be mitigated or compensated for with nutritional supplementation. Therefore, the representation set forth in Paragraph 12 was, and is, false or misleading.

14. Through the means described in Paragraph 11, respondents have represented, expressly or by implication, that their custom-blended nutritional supplements effectively compensate for genetic disadvantages identified by respondents' DNA Assessments, thereby reducing an individual's risk of impaired health or illness.

15. Through the means described in Paragraph 11, respondents have represented, expressly or by implication, that they possessed and relied upon a reasonable basis that substantiated the representation set forth in Paragraph 14 at the time the representation was made.

16. In truth and in fact, respondents did not possess and rely upon a reasonable basis that substantiated the representation set forth in Paragraph 14, at the time the representation was made.

Therefore, the representation set forth in Paragraph 15 was, and is, false or misleading.

17. Through the use of testimonials, as described in Paragraph 11, respondents have represented, expressly or by implication, that their custom-blended nutritional supplements treat or mitigate diabetes, heart disease, arthritis, and insomnia, among other ailments.

18. Through the means described in Paragraph 11, respondents have represented, expressly or by implication, that they possessed and relied upon a reasonable basis that substantiated the representations set forth in Paragraph 17 at the time the representations were made.

19. In truth and in fact, respondents did not possess and rely upon a reasonable basis that substantiated the representations set forth in Paragraph 17, at the time the representations were made. Therefore, the representation set forth in Paragraph 18 was, and is, false or misleading.

20. Through the means described in Paragraph 11, including, but not necessarily limited to, the statements and depictions contained in the materials attached as Exhibit I, respondents have represented, expressly or by implication, that their genetically customized skin repair serum is scientifically proven to: (a) reduce the appearance of wrinkles and improve skin firmness; and (b) enhance or diminish aging predispositions, including collagen breakdown, sun damage, and oxidative stress.

21. In truth and in fact, respondents' genetically customized skin repair serum is not scientifically proven to: (a) reduce the appearance of wrinkles and improve skin firmness; or (b) enhance or diminish aging predispositions, including collagen breakdown, sun damage, and oxidative stress. Therefore, the representations set forth in Paragraph 20 were, and are, false or misleading.

22. Respondents have provided advertisements and promotional materials to affiliates for use in their marketing and sale of respondents' genetically customized nutritional

supplements and skincare products, including the attached Exhibits A and G.

23. Through the means described in Paragraph 22, respondents have provided means and instrumentalities to respondents' affiliates in furtherance of the deceptive and misleading acts or practices alleged in Paragraphs 12 through 21.

Data Security

24. Through sales of purported genetically customized nutritional supplements and skincare products, respondents obtain consumers' personal information, including, but not limited to, consumers' names, addresses, email addresses, telephone numbers, dates of birth, Social Security numbers, bank account numbers, credit card account numbers, and genetic information.

25. Respondents use third parties to receive, process, or maintain this personal information ("service providers"), and respondents store consumers' personal information on their corporate network.

26. Respondents permit service providers to access consumers' personal information so that service providers may, among other services, develop and maintain respondents' customer relationship management database, fulfill customers' orders, and develop related applications.

27. Misuse of the types of personal information respondents collect – including Social Security numbers, dates of birth, and genetic information – can facilitate identity theft, privacy harms, and other consumer injuries.

28. Since at least November 2008, respondents have disseminated or caused to be disseminated to consumers privacy policies and statements, including, but not limited to, a Privacy Protection Policy (Exhibit J). This policy contains the following statements:

GeneWize Life Sciences, Inc. Privacy Protection Policy (Exhibit J)

GeneWize Life Sciences respects the privacy of every individual and has taken every precaution to create a process that allows individuals to maintain the highest level of privacy. All information provided by the individual taking the assessment is kept on a secure server . . . .

* * *

We send Personal Customer Information to third-party subcontractors and agents that work on our behalf to provide certain services. These third parties do not have the right to use the Personal Customer Information beyond what is necessary to assist us or fulfill your order. They are contractually obligated to maintain the confidentiality and security of the Personal Customer Information and are restricted from using such information in any way not expressly authorized by GENEWIZE.

29. Respondents have engaged in a number of practices that, taken together, failed to provide reasonable and appropriate security for consumers' personal information. Among other things, respondents:

a. Failed to implement reasonable policies and procedures to protect the security of consumers' personal information collected and maintained by respondents;

b. Failed to require by contract that service providers implement and maintain appropriate safeguards for consumers' personal information;

c. Failed to provide reasonable oversight of service providers, for instance by requiring that service providers implement simple, low-cost, and readily

available defenses to protect consumers' personal information;

d. Created unnecessary risks to personal information by:

i. maintaining consumers' personal information, including consumers' names, addresses, email addresses, telephone numbers, dates of birth, Social Security numbers, and bank account numbers, in clear text;

ii. providing respondents' employees, regardless of business need, with access to consumers' complete personal information;

iii. providing service providers with access to consumers' complete personal information, rather than, for example, to fictitious data sets, to develop new applications;

iv. failing to perform assessments to identify reasonably foreseeable risks to the security, integrity, and confidentiality of consumers' personal information on respondents' network; and

v. providing a service provider that needed only certain categories of information for its business purposes with access to consumers' complete personal information; and

e. Did not use readily available security measures to limit wireless access to their network.

30. In March 2012, respondents' failure to provide reasonable oversight of service providers and respondents' failure to limit employees' access to consumers' personal information resulted in a vulnerability that, until respondents were alerted by an affiliate, provided that affiliate with the ability to access the personal information of every foru™ (then known as GeneWize) customer and affiliate in respondents' customer relationship management database. The personal information that could have been accessed

included consumers' names, addresses, email addresses, telephone numbers, dates of birth, and Social Security numbers.

31. Through the means described in Paragraph 28, respondents have represented, expressly or by implication, that they implement reasonable and appropriate measures to secure consumers' personal information.

32. In truth and in fact, as set forth in Paragraph 29, respondents have not implemented reasonable and appropriate measures to protect consumers' personal information from unauthorized access. Therefore, the representation set forth in Paragraph 31 was, and is, false or misleading.

33. As set forth in Paragraph 29, respondents failed to employ reasonable and appropriate measures to prevent unauthorized access to consumers' personal information. Respondents' practices are likely to cause substantial injury to consumers that is not reasonably avoidable by consumers themselves and is not outweighed by countervailing benefits to consumers or competition. This practice was, and is, an unfair act or practice.

34. 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 FTC Act.

THEREFORE, the Federal Trade Commission, this eighth day of May, 2014, has issued this complaint against respondents.

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

Complaint

Exhibit A

Key Aging Genes and Proprietary Blend

Unique inherited capabilities for environmental defense and resistance to skin damage are determined by tiny differences in DNA, called SNPs (pronounced "snips"), which is the scientific abbreviation for Single Nucleotide Polymorphisms. This twelve "SNPs" we measure have been scientifically shown to be the "heavy lifters" in nutrition. We measure these twelve genetic variations through double-strand DNA assessment and answer what we find with ingredients which have also been scientifically shown to enhance or diminish aging predispositions. The SNPs we measure and the ingredients used per SNP are the following:

APOB: The primary component in forming low-density lipoproteins (LDL) cholesterol. High levels of APOB and LDL can lead to the formation of plaque that can cause vascular disease (atherosclerosis) which in turn can lead to heart disease. Oxyphyte® Green Tea extract [Camellia sinensis] standardized to 90% polyphenols, Pomegranate extract [(Punica granatum) standardized to 40% ellagic acid], Artichoke extract [Cynara scolymus] standardized to 4% chlorogenic acid/5% caffeoylquinic acid, Oxyphyte® Grape Skin extract [Vitis vinifera] standardized to 10% resveratrol.

CYP1B2: Helps to maintain blood pressure in normal ranges, essential for a healthy heart. Potassium (as Potassium Citrate), Oxyphyte® Green Tea extract [Camellia sinensis] standardized to 90% polyphenols, Tomato powder [Solanum lycopersicum] standardized to 0.6% lycopene, Oxyphyte® White Tea extract [Camellia sinensis] standardized to 90% polyphenols, Magnesium (as Magnesium Citrate), Acerola Cherry Extract [Malpighia glabra] standardized to 17% Vitamin C), Garlic powder (Allium sativum).

GPX1: Protects against oxidative stress by eliminating hydrogen peroxide, reactive oxygen species, free radicals. **Proprietary Blend:** Citrus Bioflavonoids powder (Citrus limonium, Citrus paradisi and Citrus sinensis), Milk Thistle extract [Silybum marianum] standardized to 80% silymarin, Astragalus Root powder [Astragalus membranaceus], Ginkgo Biloba extract [(Ginkgo biloba) standardized to 24% flavoglycosides/6% terpene Lactones], Oxyphyte® Grape Skin extract [(Vitis vinifera) standardized to 10% resveratrol], Oxyphyte® Green Tea extract [Camellia sinensis] standardized to 90% polyphenols], Organic Black Currant extract [Ribes nigrum)] standardized to 2% polyphenols], Turmeric extract [Curcuma longa] standardized to 95% curcumin], Garlic Powder (Allium sativum), Selenium (as Selenium Amino Acid Chelate).

MTRR: Helps keep homocysteine in check, to preserve cardiovascular health. Trimethylglycine, Zinc (as Zinc Amino Acid Chelate), Dong Quai extract [Angelica sinensis] standardized to 1.0% Ligustilide], Vitamin B3 (as Niacinamide), Vitamin B2 (as Riboflavin), Vitamin B12 (as Cyanocobalamin), Vitamin B6 (as Pyridoxine Hydrochloride), Folate (as folic acid).

NQO1: Determines which form of CoQ10 (ubiquinol or ubiquinone) your body needs to help fight free radicals. Ubiquinol Liquid

POLH: Plays a major role in an anti-cancer/tumor component of DNA damage response (DDR). **Proprietary Blend:** Milk Thistle extract [Silybum marianum] standardized to 80% silymarin, Mushroom extract (Lentinus edodes), Shiitake Mushroom extract [Lentinula edodes], Maitake Mushroom extract [Grifola frondosa] standardized to 20% polysaccharides], Vitamin E (as d-alpha tocopherol acetate)

SOD2: Protects against oxidative stress by eliminating toxic superoxide free radicals. Spirulina powder (Arthrospira platensis), Oxyphyte® Green Tea extract [Camellia sinensis] standardized to 90% Polyphenols], Oxyphyte® White Tea extract (Camellia sinensis) standardized to 90% Polyphenols], Bilberry extract (Vaccinium myrtillus) standardized to 5% anthocyanins], Vitamin B3 (as Niacinamide).

TNFalpha: Pro-inflammatory. Milk Thistle extract (Silybum marianum) standardized to 80% Silymarin], Oxyphyte® Green Tea extract [Camellia sinensis] standardized to 90% Polyphenols], Pomegranate extract standardized to 95% polyphenols], Ellagic Acid], Oxyphyte® Grape Seed extract [Vitis vinifera] standardized to 95% polyphenols].

VDR: Vitamin D receptor, measures your ability to use Vitamin D. Calcium (as Calcium Carbonate), Vitamin K1 (as phytonadione), Vitamin D3 (as cholecalciferol).

MTHFR: Determines which form of folic acid/folate or L-methylfolate your body needs to help clear homocysteine. Trimethylglycine, Choline Bitartrate, L-methylfolate.

MMP-1: Regulates cell growth and collagen which is the main component in cartilage, ligaments, & bone. Tomato powder [Solanum lycopersicum] standardized to 0.6% lycopene], Oxyphyte® White Tea extract [Camellia sinensis] standardized to 90% polyphenols], Oxyphyte® Grape Seed extract [Vitis vinifera] standardized to 95% polyphenols].

EPHX: Detoxification measures your ability to detoxify pollutants, pesticides, alcohol, tobacco, etc. **Milk** Thistle extract [Silybum marianum] standardized to 80% silymarin Oxyphyte® Green Tea extract [Camellia sinensis] standardized to 90% polyphenols], Broccoli extract [Brassica oleracea] standardized to 2% sulforaphane], Oxyphyte® Grape Seed extract [Vitis vinifera] standardized to 95% polyphenols], Artichoke extract [Cynara scolymus] standardized to 4% chlorogenic acid/5% caffeoylquinic acid], Schisandra Berry powder (Schisandra chinensis), Gotu Kola extract (Centella asiatica).

genewize® Call your GeneWize Affiliate:
www.genewize.com

Exhibit A


genewize
www.genewize.com
What Do Your Genes Know That You Don't?
The fields of biochemistry and genetics have found that our genes actually depend on many nutrients to do their assigned jobs. Each of us has a unique combination of advantaged and disadvantaged genes that can affect our nutritional needs. If we know which genes are disadvantaged, we can consume specific nutrients targeted to help compensate.
What may have sounded like science fiction a few years ago has now become a reality thanks to recent advances in genomics and nutritional science.
Today, the DNA technology that revolutionized the legal system, can now be used to identify a whole new set of perpetrators... The main suspects? Oxidative stress. Environmental pollutants. Collagen breakdown. Lack of antioxidant-rich foods in our diets.
So how do you know how susceptible you are to these aging culprits?
Take a minute to swab inside your cheek. Place your DNA sample inside our bar-coded envelope, and send it to our Lab. We assess twelve healthy aging genes to tell you what aging problems you're likely to face.
The information is then used to customize a nutritional supplement using a blend of phytonutrients and antioxidants selected to compensate for particular deficiencies in areas of bone and heart health, oxidative stress, lung and breast tissue health, immune health, eye health, joint health, skin health, brain and cognitive health and your ability to detoxify pollutants.
Why These Aging Genes?
Although human DNA contains several million natural genetic variations (called SNPs), GeneLink scientists used the following criteria to choose the SNPs for the GeneWize Healthy Aging DNA Assessment:
1. Valid: The existence of the SNP is supported by solid, credible, scientific evidence.
2. Important: A SNP predicts biochemical processes that are associated with significant physiological disadvantages.
3. Frequent: the SNP is relatively common among the general population.
4. Actionable: A SNP's negative potential has been scientifically proven to be modulated by nutritional supplementation.
LifeMap me DNA Customized Formulation ORAC Values
• The USDA recommends consuming a minimum of 3,000 - to 5,000 Oxygen Radical Absorbance Capacity (ORAC) units per day.
• Studies have shown that eating foods with high ORAC score will raise the antioxidant levels in the blood by around 10 to 25%.
• The ORAC figure suggested by experts is around 5,000 units per day to have a significant effect on plasma and tissue antioxidant levels.
• Eating eight to ten servings of brightly colored fruits and vegetables or dark greens will help achieve this level.
The average LifeMap me Customized Nutritional Supplements will contain approximately 5,200 to 9,000 ORAC units per serving.
Often Asked Questions
Q: How can we be sure lost results are kept private?
A: GeneWize maintains a strict confidentiality policy. All information provided is kept on a secure server and all samples are identified by numerical barcode only. Private information is never shared with a third party and all DNA samples are destroyed after genotyping.
Q: Is this product FDA approved?
A: Because your personal formula is not a pharmaceutical product that requires a prescription, it does not require FDA approval. The FDA does not "approve" any nutritional supplement product. The manufacturer is responsible for ensuring a dietary supplement is safe before its marketed. All our ingredients are classified as GRAS (Generally regarded as safe).
LifeMap me DNA Nutritional Supplement Ingredient List
The ingredients used here been shown to have a positive effect on biochemical pathways in the body, as validated by independent third-party research.
Nutritional Essentials Proprietary Blend Formula: Cats Claw Extract (Uncaria tomentosa) Fructooligosaccharides, Flax seed powder (Linum usitatissimum), Acerola Cherry Extract (Malpighia glabra) standardized to 17% Vitamin C), Oxylyte® Ultra Blend (White tea extract (Camellia sinensis) standardized to 98% polyphenols, Apple extract (Malus pumila) standardized to 75% polyphenols; Rosehip extract (Rosa canina) standardized to 20% polyphenols; Grape seed extract (Vitis vinifera) standardized to 95% polyphenols; Green tea extract (Camellia sinensis) standardized to 50% polyphenols; Mixed Tocopherols (from Dunaliella salina), Strawberry juice powder (Fragaria vesca), Raspberry juice powder (Rubus idaeus), Blueberry juice powder (Vaccinium corymbosum), Cranberry juice powder (Vaccinium macrocarpon), Spinach juice powder (Spinacia oleracea), Tomato juice powder (Solanum lycopersicon), Beetroot juice powder (Beta vulgaris), Carrot juice powder (Daucus carota), Broccoli juice powder (Brassica oleracea), Acai juice powder (Euterpe oleracea), Mangosteen extract (Garcinia mangostana) standardized to 75% polyphenols, Cocoa extract (Theobroma cacao) standardized to 15% polyphenols), Vitamin B5 (as Niacinamide), Zinc, Iron, Vitamin E (as Tocopheryl), Digestive Enzyme Blend (protease, amylase, lipase, cellulase), Vitamin B5 (as Pantothenic acid), Vitamin B2 (as Riboflavin), Vitamin A (as Vitamin A palmitate), Vitamin B1 (as Thiamine mononitrate), Vitamin B6 (as Pyridoxine hydrochloride), Folate (as folic acid), Biotin, Vitamin B12 (as Cyanocobalamin).
LifeMap me
DNA Nutritional Supplement.
Made Exclusively.
The only true custom-created nutritional formula, LifeMap me was developed by the pioneering biosciences company, GeneLink, Inc. and is marketed by independent business owners through GeneWize Life Sciences. This new generation of nutrition is the result of scientists using a greater understanding of how the genetic machinery of our bodies influences the aging process.
genewize
me

Exhibit A

Complaint

Exhibit B

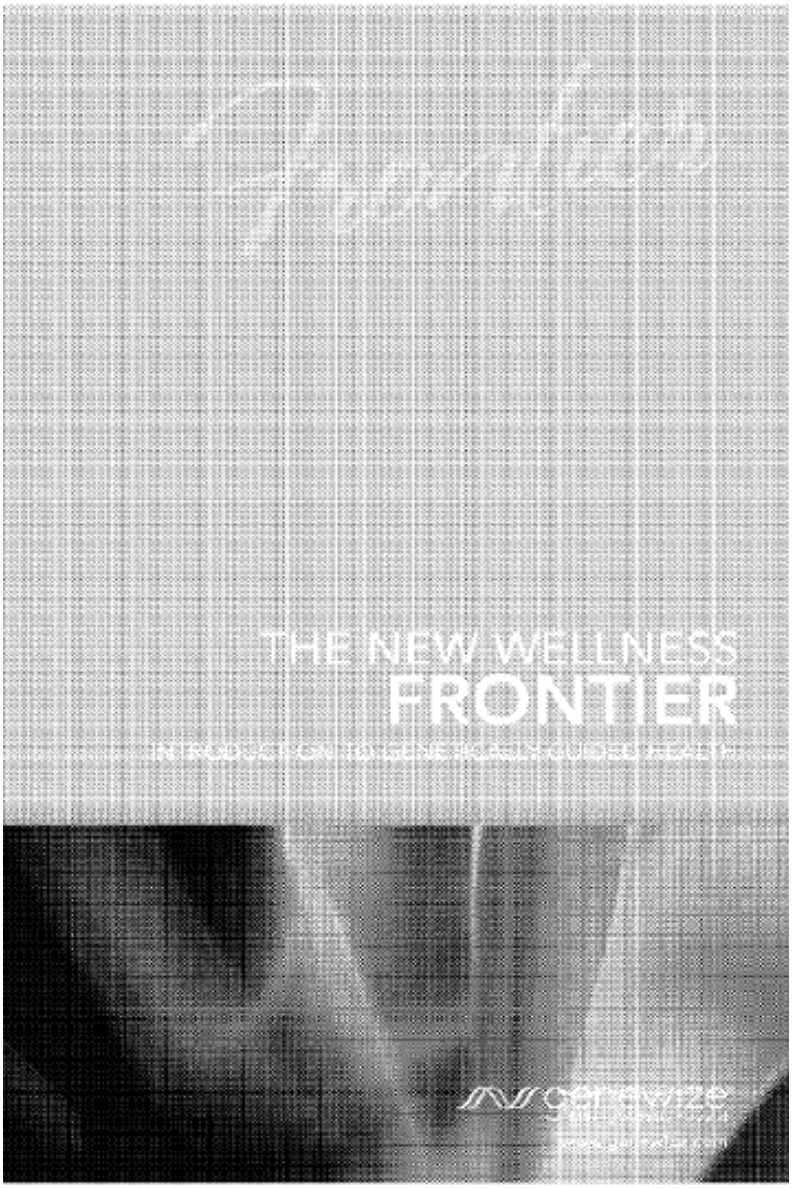
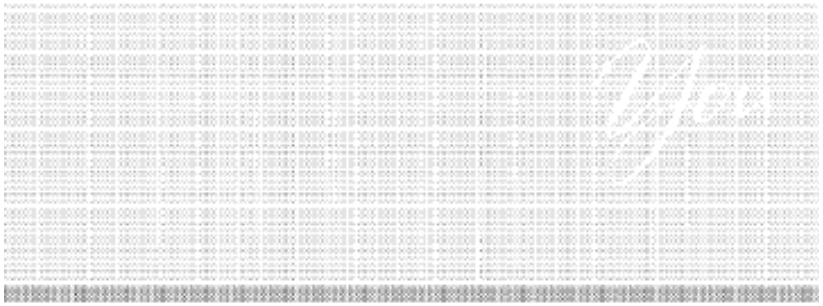


Exhibit B



GENETICS AND PERSONALIZED HEALTH

Recently, scientists have confirmed that each of us has unique, "genetically determined" body chemistries.

Even small variations in your genes can have a significant influence on how well your body responds to food, nutrients, physical activity, environmental stresses and how you may be predisposed to a variety of other important health and physiological conditions.

By analyzing and understanding your unique genetic strengths and weaknesses, you can eliminate the guesswork and "genetically guide" the optimal nutritional supplement or skincare formulation to match your LifeMap Healthy Aging Assessment™.

This is a revolutionary new scientific approach to delivering formulations that fulfill INDIVIDUAL needs, based on confidential genetic testing.

GENETICS TUTORIAL

Within every human cell is an individual's blueprint for life – their DNA. DNA contains the master information that is needed to construct and maintain the human body.

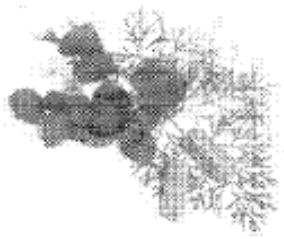
SMALL CHANGES IN DNA THAT IMPACT OUR PHYSIOLOGY

On a strictly DNA basis, humans are surprisingly alike. Despite our apparent differences, the DNA between any two people is 99.1% identical. That 0.9% variation in DNA, however, is hugely important, accounting for most of our physical differences.

Small variations in DNA are called polymorphisms. Skin type is a common human polymorphism. Depending on the order in which the nucleotides in your DNA line up, you could have different skin. Some polymorphisms are so small, they affect the order of just one pair of nucleotides. These are called single nucleotide polymorphisms or SNPs (pronounced "snips"). Research shows that we can measure SNPs and have the ability to impact the expression of our genes through proper nutritional support.

Exhibit B

Complaint



THE LIFEMAP NUTRITION™ SYSTEM HAS THESE FEATURES:

- Pharmaceutical grade manufacturing
- Significant antioxidant support
- Whole foods
- Organic ingredients
- 5,000 to 9,000 ORAC units
- Includes Cat's Claw for its antioxidant activity.
- Less caffeine than ¼ cup of coffee
- Affordable at about $3/day

ENVIRONMENTALLY FRIENDLY, SOCIALLY RESPONSIBLE PACKAGING

GeneWize is an environment-friendly company. Here are some ways we deliver socially responsible nutrition.

- Recycled packaging
- No plastic bottles or boxes
- Reusable daily pouches
- Vegetable-based capsules
- No animal products or testing

COMMON QUESTIONS...

Do I need to take my other supplements?

The LifeMap Nutrition™ System will in many cases replace most multivitamins you are taking and your formula is so rich in antioxidants, you may be able to replace those supplements too. Certain supplements may not be available in the LifeMap Nutrition™ System.

What do you do with my DNA and how do you protect my privacy?

Your privacy is very important to us. We protect you by sending your DNA to our lab with only a bar code so your name is not identified with the sample. Once the analysis is completed your DNA is destroyed and your results are sent to our secure database to create your personalized supplement.

What will I feel after taking my LifeMap Formula?

Since everyone's body is different, you'll likely receive unique benefits from your product. Some of the benefits you may notice and some you may not. Some of the most common benefits people report include:

- Ability to fall asleep faster
- Longer, deeper sleep
- More energy during the day
- Softer skin
- Stronger hair and nails

You may or may not experience these same results. Your body is unique and so is your formula. It makes sense that your results will be unique too.

Exhibit B

Complaint

Exhibit C

Exhibit C

THE **NEW SCIENCE** OF **NUTRAGENETICS** AND **DERMAGENETICS**

Nutragenetics and Dermagenetics are a combination of the sciences of genetics, nutrition and skin care that reveal personalized information regarding an individual's status and provides the basis for selecting a dietary, nutritional and skin care program best suited to achieving the healthiest and longest life possible.

- Nutragenetics and Dermagenetics use SNP testing to identify areas of an individual's genetic make-up that may be functioning less than optimally.
- Nutragenetics and Dermagenetics can help guide individuals in choosing the optimal combination of nutrients and vitamins and topical active ingredients matched to their unique genetic make-up.

For the first time, this revolutionary SNP science is making it possible to personalize and tailor health and skin care products. How is this done?

GENETICALLY GUIDED PERSONALIZATION OF NUTRIENT AND SKIN CARE FORMULATIONS.

The Nutragenetic and Dermagenetic SNP assessments examine a variety of genes which are responsible for making proteins that play a very important role in our overall health. These include oxidative stress, heart and circulatory health, immune health, bone health, pulmary health, eye/vision health, defense against environmental pollutants, collagen breakdown, photoaging, skin slacking & wrinkling and mild irritation.

KEY POINT *If the Nutragenetic and Dermagenetic SNP test predicts that you might not be as efficient as possible in any given health area, you may be able to do something about it. For every SNP tested, there are potentially compensating and enhancing nutrients that can put you on a better path toward optimal health.*

KEY POINT *Due to our busy lifestyles and environmental exposure, most people don't have enough time in everyday life for 5-6 servings of fruits and vegetables as well as a total skin care regime. It is logical then that most everyone should use a basic multivitamin and mineral formulation as well as base topical skin care formulation to cover the major areas of general nutrition and skin fitness, and add additional ingredients based upon your personal genetic SNP test results.*

Exhibit C

GeneLink's statistical results demonstrate that *virtually everyone* tested will require Added Support and/or Maximum Support in at least one or two gene SNP areas.

Why are the SNPs used in GeneLink's profiles selected over millions of others?

There are millions of SNPs. However, only certain subsets are associated with increased risk for disease and physiologic health conditions.

GeneLink selects only 'functional SNPs' which indicate poor enzyme function via epidemiological or biochemical studies.

Additionally, GeneLink selects only those SNPs which can be addressed using nutrients or formulations or lifestyle modifications.

These SNPs physically reside in either the coding region (protein portion) of the gene which can alter enzyme function or they reside in the promoter region which affects the level of expression of the gene in question.

What is the clinical research that ties nutritional supplements and topical skin treatments to support SNP predispositions?

All of the enzymes represented in the SNP profile have been well-studied and there is biochemical evidence in almost every instance that correlates why an enzyme affected by the SNP does not function properly. Additionally, there is leading clinical evidence linking SNPs to nutrition.

Thus, for major enzymatic players of oxidative stress, there is a clear fit with the genetics, epidemiology and biochemistry.

For several of the SNPs, there is a direct link between having the SNP and being able to lower oxidative stress or the potential health risks associated with oxidative stress by the ingestion or application of particular antioxidant nutrients and active ingredients.

For example the SNP for methylenetetrahydrofolate reductase (MTHFR or Heart, Circulatory Health-2), produces an enzyme with decreased affinity (Km) for its direct substrate, 5,10 methylene-THF, which can cause a build up of homocysteine, which is deleterious to heart health. Increasing folic acid (upstream substrate) or the product of the enzyme reaction (5 methyl-THF) can ameliorate the build-up of homocysteine.

For some SNPs there is no definitive clinical evidence available to date that directly links the benefit of a nutrient to the SNP. These studies will come in time. Nevertheless, the fact that the biochemical parameters for all of the SNPs are so well known provides a *rational nutritional approach* to addressing unfavorable physiological conditions, based on scientific knowledge of how the SNP specifically functions.

Who conducted the research and who endorses GeneLink's research?

GeneLink's medical and scientific advisors along with independent academic laboratories and medical centers have conducted nearly 100% of the work. GeneLink's medical and scientific advisors hold positions at major research institutions.

The science and technical information behind GeneLink's technology has been favorably reviewed by the scientific staff department of our various clients and collaborative partners.

Studies have been statistically quantified and involve sophisticated molecular biology, biochemistry and genetic analysis.

C

Exhibit C

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Exhibit D

Exhibit D

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GeneWize...Connecting the Dots
• Over 14 Years R&D Prior To Launch
• Developed significant DNA tests for SNPs on "Heavy Lifters"
• Developed "SNP Boosts" to mitigate, compensate, or bypass SNP effects
• Powerful health and wellness benefits!
ONLY comprehensive genetically guided products!
Exhibit D
GNLK015276
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A View Into Your Patient or Customer...
• Patented DNA Collection Kit
• Sophisticated Assessment
• Confidentiality
• Pinpoint Genetic Predispositions
• Personalized Formula
Over 500,000
Possibilities
With a simple cheek swab...
Exhibit D
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Exhibit E

LifeMap Essentials™
Your Foundation for Optimal Wellness

Welcome and congratulations for taking an important next step toward healthy aging with the most advanced and scientifically proven nutritional supplement programs available – the **LifeMap Nutrition™ System**, which consists of the following:

1. The **LifeMap DNA collection kit** (provided by GeneLink, Inc.)
2. The **LifeMap Essentials™** formula (A non-custom foundation supplement to be taken while awaiting your Healthy Aging Report & DNA guided LifeMap Custom formula)
3. The **LifeMap DNA Healthy Aging Report™** (results in about 4 weeks after mailing your DNA collection kit)
4. The **LifeMap Custom™** formula (A totally customized formula based on your DNA)

Your LifeMap Essentials™ formula is the cornerstone of the LifeMap Nutrition System and forms the 'base foundation' for every individually customized LifeMap Custom product.

LifeMap Essentials is as premium plant based formula, carefully designed to provide the "key essentials" of a proper diet and to help you prepare and maintain optimal nutritional support while you are awaiting the results of your LifeMap Healthy Aging DNA Assessment and your personal DNA-guided LifeMap Custom formula (Please note: the processing time for your DNA assessment & LifeMap Custom formula is about 4 to 8 weeks from the time you mail back your DNA collection kit).

It contains a generous selection of fruits and vegetable powders with the highest phytonutrient content along with important anti-aging "superfruit" extracts such as the Brazilian acai berry, the Himalayan goji berry and the Southeast Asian mangosteen. In addition, your Essentials formula also contains a comprehensive vitamin blend, flax seeds (a source of omega-3 fatty acids) and fructooligosaccharides – a natural prebiotic fiber that promotes enhanced intestinal health for optimal nutrient absorption.

For antioxidant protection, **LifeMap Essentials** contains over 7500 ORAC (Oxygen Radical Absorbance Capacity) units, the equivalent ORAC value of eight (8) servings of fruits and vegetables. For even extra antioxidant protection, we've added OxyPhyte® Ultra, a proprietary blend of antioxidant-rich apple, white tea and rosemary extracts which has proven bioavailability in human clinical studies.

For DNA repair, we've included 350 mg of AC-11®, a patented, advanced, clinically-tested bioactive compound derived from the South American herb *Uncaria tomentosa* (Cat's Claw). AC-11® has been clinically demonstrated systemically to reduce both oxidative damage and non-oxidative damage to DNA caused by stress, viruses or bacteria as well as reduce inflammation and improve immune function in human clinical trials.

Directions for use:

Take five (5) capsules in the AM and five (5) capsules in the PM (with or without food) for a total of ten (10) capsules daily. These vegetarian capsules are specially designed that can be swallowed as you would any capsule or tablet, or if you prefer, can be broken open and mixed with your favorite juice or beverage.

We are truly grateful for you and excited to be a part of your health future.

Sincerely,
The Formulation Scientists at GeneWize Life Sciences

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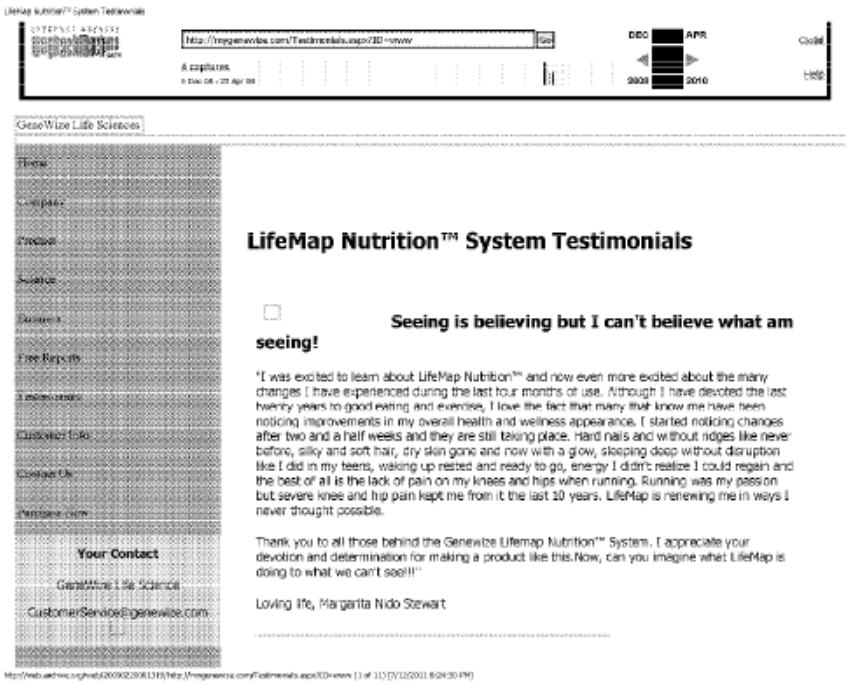

GeneWize Life Sciences

Your Contact

GeneWize Life Sciences

CustomerService@genewize.com

LifeMap Nutrition™ System Testimonials

Seeing is believing but I can't believe what am seeing!

"I was excited to learn about LifeMap Nutrition™ and now even more excited about the many changes I have experienced during the last four months of use. Although I have devoted the last twenty years to good eating and exercise, I love the fact that many that know me have been noticing improvements in my overall health and wellness appearance. I started noticing changes after two and a half weeks and they are still taking place. Hard nails and without ridges like never before, silky and soft hair, dry skin gone and now with a glow, sleeping deep without disruption like I did in my teens, waking up rested and ready to go, energy I didn't realize I could regain and the best of all is the lack of pain on my knees and hips when running. Running was my passion but severe knee and hip pain kept me from it the last 10 years. LifeMap is renewing me in ways I never thought possible.

Thank you to all those behind the Genewize Lifemap Nutrition™ System. I appreciate your devotion and determination for making a product like this.Now, can you imagine what LifeMap is doing to what we can't see!!!"

Loving life, Margarita Nido Stewart

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LifeMap Nutrition™ System Testimonials

1 pages

George Mureşan

Me and My Elbow Feel Great!

"I always took vitamins throughout my NBA Career. After an injury in 1998, my doctor gave me even more vitamins and minerals to take but I got very sick after taking them. I called the doctor, but he couldn't suggest anything other than to tell me to keep on taking the vitamins. I kept on feeling so sick that I decided just to stop taking supplements at all. When I was first introduced to GeneWize in 2008 I was very skeptical, but I decided to give it a try. After about a week of being on the LifeMap Nutrition™ a continual discomfort in my right elbow subsided. I also found I could sleep through the night again and my energy improved. I've been taking the LifeMap Supplements for several months now and just feel great."

Gheorghe Mureşan, Former NBA Player

Partnering with Your Body:
Dialing it in by "Assessing, not Guessing"

"I have been supplementing for years as I have always believed it is necessary for me to partner with my body so it can care for itself and give it all the advantages necessary to maintain health and balance. I have always thought supplements were just that - a way to get my body what it needs so it can do its job. Once I looked through my assessment, I found that I was taking some supplements that I really didn't need and NOT taking ones I did need. The time, effort and money that the LifeMap customized supplement saves me every month is staggering. To try and put a product like this together on my own would cost a fortune and honestly, who has the time?"

" The results have been really substantial. I have always been a pretty good sleeper, or so I thought. The profound shift in the depth and quality of sleep I get now is amazing and I no longer have those afternoon lulls of energy. I can't imagine ever going back to generic, mass marketed off the shelf supplements. The GeneWize product is truly fantastic!"

Keith O'Brien, Independent Founding Affiliate

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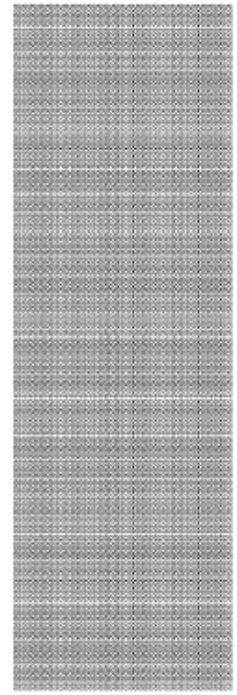

LifeMap Nutrition™ System Testimonials

GeneWize has changed my health and my life!

"I'm in my 5th month on the LifeMap Custom supplements and I'm amazed by my personal results. So far I've experienced great sleep, great energy, great skin, and much more. Plus, I continually notice even more positive changes: prior to taking the LifeMap supplements, my memory wasn't the greatest - but now I feel much sharper mentally! This is very important to me because my Mother had Alzheimer's."

" The Healthy Aging DNA Assessment provided me with such valuable information. At 52, some of my assessment results weren't a surprise, but I wasn't expecting to learn I had a double SNP in my detox gene. In our toxic world, this is valuable information we could use when we're very young- the younger the better!"

"With all of great benefits I'm experiencing, I know the LifeMap Custom supplements are supplying me with the 'right fuel' and a much needed tune up! GeneWize has changed my health and my life for the better!"

Roberta Johnson, GeneWize Affiliate, Miami, Florida

How To Get the LifeMap Edge

Greg Minor

"Taking care of your body is essential. With GeneWize's LifeMap Nutrition™ System and products, I am not only taking care of my body, I have an edge. I feel great knowing that I am giving my body exactly what it needs."

Greg Minor
Former NBA Player for the Boston Celtics

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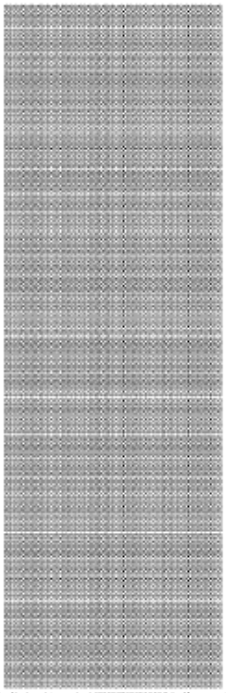
LifeMap Nutrition® System Testimonials



after removing the acrylics, but it only took three months.

One other thing is I had a health assessment done last week with a Certified Natural Health Professional and she told me my GeneWize supplements actually make me stronger than if I wasn't taking them. I love our products and I am so grateful to be a part of our company.

Thank you GeneWize!

Jillian Montes De Oca

More Sleep, Less Starbucks

When I received my customized report I was surprised to see that (genetically speaking) I did not require any added support for the SNPs that affect cholesterol. I may have been wasting money buying supplements that my body doesn't actually need! I love that I now know in which areas I need genetic support, and it is so satisfying taking my LifeMap supplements with confidence that I'm doing the best thing for my body.

After taking the LifeMap Product for just a week I began noticing that my energy level throughout the day remained so constant. I was no longer experiencing dips in my energy in the mid-afternoon which used to have me looking for caffeine. Within two weeks, I found that I was getting a much better night's sleep--better than I've had since having children! I was falling asleep more easily, and would wake the next morning in the same position as when I'd fallen asleep. I wasn't waking several times throughout the night anymore.

I can only attribute these improvements to my LifeMap supplements because nothing else has changed about my daily routine.

Thank you, Genewize!
Anne Zirkle

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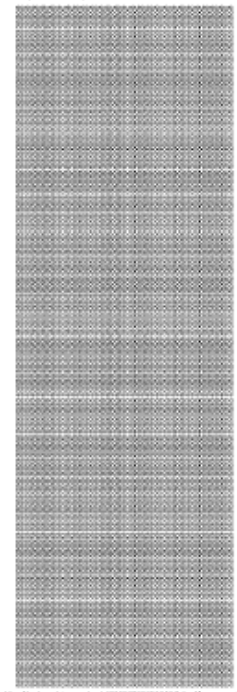

LifeMap Nutrition™ System Testimonials

Randy Keeps it Short and Sweet

After taking the LifeMap Product it made me feel more energetic

Randy Levine

Thanks for the Memories

When I received my customized report, I was very happy to see my DNA Assessment results, especially since I don't know about my parents. So in a way it was also a surprise!

I do have certain health challenges and when I started taking my LifeMap Product, after about a week and a half I was amazed to feel tremendous results! Before, I was getting only about three hours of sleep, now I can finally sleep! My concentration & memory also seem to be improving!

Thanks to all the scientists and doctors that made it possible!

Now is my turn to help people with the LifeMap Nutrition™ Product!

Lina M. Oliver

LifeMap Nutrition Meets Karaoke!

After taking the LifeMap Product for only two weeks I have a lot more energy and my dry skin has improved dramatically. (I noticed these changes within two weeks). I also began to see something amazing happen: I went from getting very little sleep at night to now sleeping like a baby! I've been waking up feeling so refreshed that I want to jump up and down on my bed like a child (I am 27 years old). I'm feeling so happy I've been out singing Karaoke and having a blast.

You couldn't pay me to stop taking the LifeMap Nutrition™. I have the energy to pursue my dreams of being a singer, and much more!

I can't THANK YOU enough GeneWize.

I LOVE YOU! XOXO

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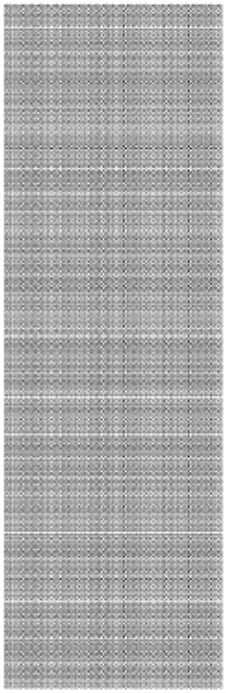
LifeMap Nutrition™ System Testimonials



Talina Oblender

Wife Says, "Send me my LifeMap Nutrition too."

I have been taking the LifeMap Nutrition™ supplement now for two months.

Although I wanted my wife to try the program too, she just wouldn't budge. She said she'd have to wait to see how I felt first. Well, I'm now sleeping through the night for the first time in twelve years.

Oh, by the way, my wife is now waiting to receive her own LifeMap Nutrition™.

Thank You GeneWize!

Ernest Smith

Another Sleep Story. It's Making Us Sleepy

I've always had a problem with sleeping through the night. Within two days of taking the LifeMap product I immediately noticed I was finding the special peace a full seven to eight hours of sleep offers. Problem solved! GeneWize has revolutionized my life and I bless all the company every day for it's incredible science.

Warmest Regards,

Kent Riecksel

Lawn Mower Malaise

My husband and I have been taking our supplements for a month and a half now. We have both noticed differences and it is helping us in so many ways, not only nourishing our bodies and helping get rid of free radicals and all, it seems to be balancing us as well. What I mean by this is basically our moods.

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Exhibit G

e-lift

genewize®
Making Wellness Personal

MONTHLY E-NEWS EXCLUSIVELY FOR GENEWIZE AFFILIATES — January 2010

Only When You're Standing on Higher Ground ...can you reach out and lift others. Someone is looking to you for the vision, the belief, the plan. Use what you gain here to clarify your purpose, fire-up your passion and go all the way to the top.

Principles that Make a Difference

There are two principles that will have a major impact on your enrolling results (for both customers and Affiliates) AND will impact your overall attitude. Taking this a step further, if you don't accept these principles, it's almost impossible to maintain a positive attitude as you build your business. I didn't invent these principles, but over time I've learned to understand and respect their power.

PRINCIPLE ONE: People need (and want) to Like and Trust You
If people don't buy you, they won't buy anything that comes out of your mouth. People must like and trust you if they are going to do business with you (as a customer or as an Affiliate). This is a life lesson – not just a business lesson.

continued on page 2

Contents

Spotlighting Top Leader

Chief Alexander Taku: My Visionary Source Of Success In GeneWize

As a traditional ruler, community leader and philanthropist, at the age of sixty three, I have spent over four decades of my life dealing directly with the life of others. I am an American trained political consultant, and a traditional ruler from Southern Cameroons in Central Africa. I am a community leader and a former member of Parliament in Cameroon. At the end of my studies in the United States, I worked for 19 years as Human Resources Manager at Pecten Cameroon Oil Company, a subsidiary of Shell Oil, USA. I have also served in various positions in community based organizations: as member of the Washington, D.C. Mayor Task Force for International Affairs, Co-founder and Chair of the Continental African Community-Montgomery County; Member, Ethnic Committee and the African Affairs Advisory Board, Montgomery County, Maryland.

I have also recorded 15 years of experience and leadership positions in Network Marketing, the last of which was National Director with 5 Linx Enterprises. During my fifteen years in the Direct Sales Industry, I have not found any company with such a popular product which can improve the lives and health of every human being on earth.

I decided to enroll in GeneWize and know my DNA when Rob Podles presented the opportunity to me six months ago. He assured me of the possibility of processing my DNA and paying for my initial product for less than five hundred dollars. My health condition prior to this occasion was life-threatening. Like my parents and most members of my family, I was a serious diabetic and cardiac patient. My mother died of diabetes while my father died from a massive heart attack! I never dreamed of being able to get my DNA test because it was too expensive for a retired citizen like me. One would never have imagined for one moment that a company would come up with free DNA assessments for all! The next appreciation was the possibility for me to receive my products at no extra cost. Of course, I took the opportunity and immediately signed up four Affiliates and no longer had to pay a dime for my nutritional products. Six months on the products has produced wonderful results. My blood sugar has stabilized at 80/130 and my diabetic problem is over, while a recent medical report has revealed the reduction of my heart to normal size. Generally, I feel very strong. For the last six months, I have only been taking my free GeneWize nutritional supplements.

I salute the decision of the corporate management team to devote one

continued on page 2

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e-lift

genewize

We've heard story after story about how in some cases, Affiliates joined another Affiliate's business just by being asked. "If you're involved," they said, "let's get started."

Start being intentional about learning about other people's needs and you'll begin building a personal brand for yourself that says, "When I think of you, I think of someone that I like and respect."

If you focus on all of the little things that you can do to become more likeable and trustworthy (such as returning calls, keeping commitments, being interested in others, listening carefully, being more joyful, etc.) both your LIFE and your business will become more enjoyable AND fulfilling.

PRINCIPLE TWO: Like it or not, it's a numbers game, even IF people like and trust you.

You must understand that finding people to join your business and/or to purchase your products is a numbers game. The more people you speak to, the more you invite to your presentations the more people will join your team or purchase and experience our products. Yes, you can do a lot of things to increase your results over time, but you must accept and internalize the fact that success is a numbers game.

Before you start making calls and presentations, it's critical to recognize that not everyone will accept your invitation to learn about the products or the business. You will be turned down often, but you cannot allow those who decline your invitation to discourage you. It's absolutely vital that you maintain a positive attitude and move on to the next person.

To Your Good Health and Success

Monte

Monte Taylor
CEO GeneWize Life Sciences

Spotlighting Top Leader Chief Alexander Taku: (continued)

other issue of the Life Map News Letter as the E-lift edition, dedicated to recognizing top performers in the GeneWize community and about the tools that our organization offers to enable and sustain success and wellness in the Direct Sales Business.

I was proud and excited when I received the phone call from Rob Podles, inviting me to prepare this statement as a guest in the program. I also take this opportunity to explain how in the midst of my top leadership positions in other outfits in the Direct Sales Business, I chose GeneWize as the source of my lifetime success and legacy.

The secret of my stable road to success during my six months' affiliation with GeneWize has been hidden in my strong belief in the strength of the customized nutritional product. In fact, the scientific discovery of Human DNA, especially in Wellness, constitutes a landmark in our civilization. Luckily for me, the nutritional and skin care products manifested openly favorably on me. The DNA results clearly reflected my bill of health. The success of the product in reawakening and sharpening my genes to contain and neutralize my health problems has tremendously changed my life. My choice of GeneWize over the other direct sales businesses became obvious, especially, because, we are talking about me, you and us. This business is about our lives and life has no duplicate!!!.

The success of the products on me, coupled with the wonderful effective system placed at my disposal by the company are responsible for my ability to successfully reach out and sign-in several Affiliates in the GeneWize Wellness Empire. My enhanced ability to successfully create a favorable environment accounts for my increasing enrollment of more Affiliates to benefit from the GeneWize Revolution.

My approach has been to keep it simple. I make sure that our product speaks for itself and utilize the system to work for me. The effect of wonderful product, the excellent tools provided in my Website and the unmatched dynamic team in Customer Service, Compliance and the dynamic team of the passionate consumer-friendly Up-line have combined to begin the successful journey of transforming my mighty circle of influence into a huge success of Healthy Wealth. That is why my success cannot be attributed to me alone - it is rightly the result of the best product, the best system, and the best team in the Direct Sales Industry.

The success we are recording today in GeneWize must be rightly attributed to our founders and God's inspiration for their scientific breakthrough and the timing for us to be the standard bearers of the transformation to the Healthy Wealth that GeneWize brings to the World.

Where do I go from here with this mighty opportunity? Sky is the limit. I now feel more than twenty years younger and have begun living my dreams. I now feel, this is the time to build a legacy for my grand children my community, my tribe, my country and the world to remember me as one of those pioneer Affiliates who helped to change the world through the opportunity provided by the GeneWize Life Sciences. This way, I have paved the way for a healthy wealthy life, while helping to assure that I live on many years in health and wellness.

Chief Alexander Taku Fuasonganyi

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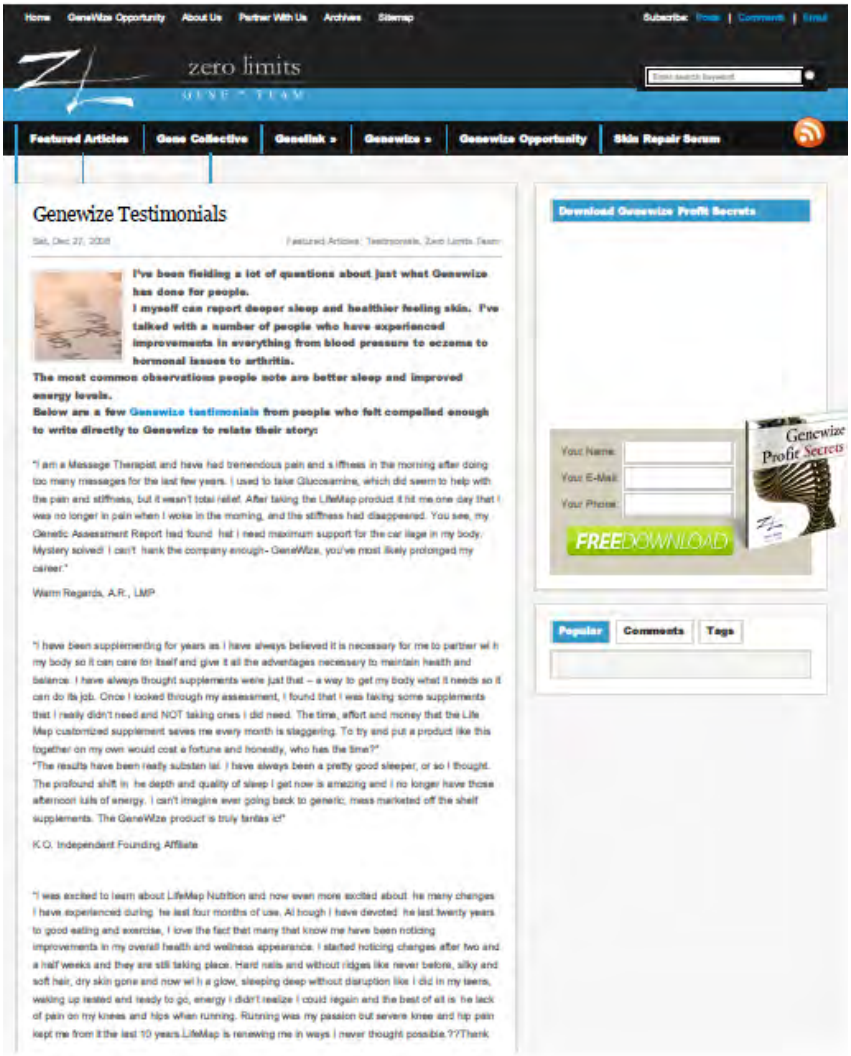

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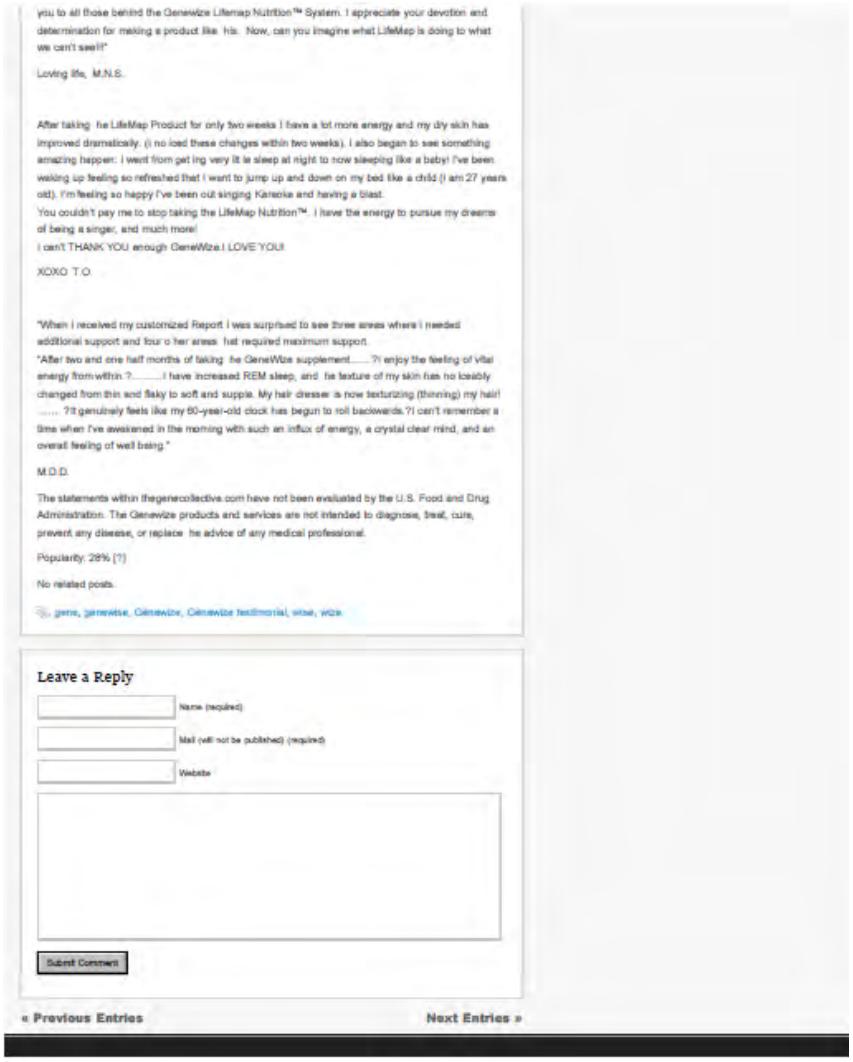

you to all those behind the Genewize Lifemap Nutrition™ System. I appreciate your devotion and determination for making a product like his. Now, can you imagine what LifeMap is doing to what we can't see!!!"

Loving life, M.N.S.

After taking he LifeMap Product for only two weeks I have a lot more energy and my dry skin has improved dramatically. (I no ioed these changes within two weeks). I also began to see something amazing happen: I went from get ing very lit le sleep at night to now sleeping like a baby! I've been waking up feeling so refreshed that I want to jump up and down on my bed like a child (I am 27 years old). I'm feeling so happy I've been out singing Karaoke and having a blast.
You couldn't pay me to stop taking the LifeMap Nutrition™. I have the energy to pursue my dreams of being a singer, and much more!
I can't THANK YOU enough GeneWize.I LOVE YOU!

XOXO T.O.

"When I received my customized Report I was surprised to see three areas where I needed additional support and four o her areas had required maximum support.
"After two and one half months of taking he GeneWize supplement..... ?I enjoy the feeling of vital energy from within.?.....I have increased REM sleep, and he texture of my skin has no iceably changed from thin and flaky to soft and supple. My hair dresser is now texturizing (thinning) my hair! ..... ?It genuinely feels like my 60-year-old clock has begun to roll backwards.?I can't remember a time when I've awakened in the morning with such an influx of energy, a crystal clear mind, and an overall feeling of well being."

M.D.D.

The statements within thegenecollective.com have not been evaluated by the U.S. Food and Drug Administration. The Genewize products and services are not intended to diagnose, treat, cure, prevent any disease, or replace he advice of any medical professional.

Popularity: 28% [?]

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gene, genewise, Genewize, Genewize testimonial, wise, wize

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Name (required)

Mail (will not be published) (required)

Website

Submit Comment

« Previous Entries Next Entries »

Exhibit H

Complaint

Exhibit I

Often Asked Questions

Q: How can we be sure test results are kept private?

A: GeneWize maintains a strict confidentiality policy. All information provided is kept on a secure server and all samples are identified by number/bar code only. Private information is never shared with a third party and all DNA samples are destroyed after genotyping.

Q: Is this product FDA approved?

A: Because your personal formula is not a pharmaceutical product that requires a prescription, it does not require FDA approval. All of the ingredients are generally regarded as safe (Generally Regarded as Safe). Your formula does not contain artificial preservatives, colorants, or petrochemicals.

Q: How long before I begin to see results?

A: Everyone is unique, however most people begin to see visible results within 2 – 3 weeks of regular use of the product.

Q: Why is it important to customize my product? Couldn't I receive the same benefit from an all-in one formulation?

A: Since no two people are exactly alike, it is important that we customize your formula to address your individual skin health needs, as determined by your DNA assessment.

Key Skin Aging Genes and Proprietary Blend

Unique inherited capabilities for environmental defense and resistance to skin damage are determined by tiny differences in DNA, called SNPs (pronounced "snips"). ...hich is the scientific abbreviation for Single Nucleotide Polymorphisms. The six "SNPs" we measure, through cutting-edge DNA assessment, are key genetic "many ...them" related to overall skin aging. These SNPs are listed below, along with our active ingredients, which have been clinically shown to enhance or diminish these aging predispositions:

SOD 2: Defends against oxidative stress by detoxifying superoxide free radicals.

SNPActive™: Aloe (Aloe Barbadensis Leaf Extract), Lecithin (Phospholipids), Glycerin, Olive (Olea Europaea (Olive) Oil unsaponifiables), Eucommia Ulmoides Bark Extract, Saccharomyces Ferment Filtrate, Saccharomyces Ferment Extract

GPX1: Protects against oxidative stress by removing and eliminating hydrogen peroxide free radicals.

SNP Active: Aloe (Aloe Barbadensis Leaf Extract), Lecithin (Phospholipids), Glycerin, Olive (Olea Europaea (Olive) Oil unsaponifiables), Pullulan, Glycine, Panax notoginseng (Sanchi) Root Extract, Saccharomyces Ferment Filtrate, Saccharomyces Ferment Extract

TNF-A: Protects against ...

SNP Active: Aloe (Aloe Barbadensis Leaf Extract), Lecithin (Phospholipids), Glycerin, Olive (Olea Europaea (Olive) Oil unsaponifiables), Olive Leaf extract, Chlorella pyrenoidosa Extract, Green tea (Camellia sinensis) extract, Red algae extract, Green rooibos (Aspalathus linearis) extract

EPHX: Metabolizes toxins, ability to detoxify and protect skin cells against damage from environmental pollutants

SNP Active: Aloe (Aloe Barbadensis Leaf Extract), Lecithin (Phospholipids), Glycerin, Olive (Olea Europaea (Olive) Oil unsaponifiables), Pullulan, Glycine, Panax notoginseng (Sanchi) Root Extract, Saccharomyces Ferment Filtrate, Saccharomyces Ferment Extract

MMP1: Regulates cell growth, collagen breakdown and normal aging.

SNP Active: Aloe (Aloe Barbadensis Leaf Extract), Lecithin (Phospholipids), Glycerin, Olive (Olea Europaea (Olive) Oil unsaponifiables), Extract blend of Withania somnifera, Vitamin E (Panthenol), Polyglutamic Acid, Saccharomyces cerevisiae peptides, Chlorella pyrenoidosa extract, Ascorbic acid

NQO1: Detoxifies environmental toxins and protects skin from oxidative damage

SNP Active: Oats, Rice, Soybean

To place an order, go to www.genewize.com and log in to your account. Or call Customer Service at 888-888-8888.

LifeMap me DNA Skin Repair Serum

Historic Evolution in Skin Care

Genetically Customized Skin Care Made Exclusively for You.

NO NEED TO RE-SWAB

Get Your Skin Aging Report **PLUS 30%** Discount on

our gift to you for being a **GeneWize Supplement AutoShip Client!**

Complaint

www.genewize.com

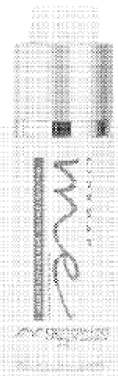
What Do Your Genes Know That You Don't?

[illegible] Now the same technology can be used to identify a whole new set of perpetrators. [illegible] caused by free radical activity due to environmental pollution.

So how do you know how susceptible you are to these aging culprits?

Take a minute to swab inside your cheek. Place your DNA sample inside our [illegible] envelope, and send to our lab. We assess six skin health genes to tell you what skin aging problems you're likely to face as you age.

The information is then used to customize a skin repair serum using a combination of [illegible] aging, wrinkling, collagen breakdown, irritation and the skin's ability to defend against environmental stresses.



LifeMap me DNA Skin Repair Serum. Made Exclusively.

The only true custom-created skin care, LifeMap me was developed by the pioneering biosciences company, GeneLink, Inc. and is marketed by independent business owners through GeneWize Life Sciences. This new generation of skin care is the result of scientists applying a greater understanding of how your genetic machinery can influence the skin aging process.

How Does It Work?

The key area in skin repair is the dermis, a layer of skin sandwiched between the outer epidermis and the deep hypodermis. The dermis contains blood vessels that nourish the skin, and proteins called elastin and collagen that keep it taut. As we age, our bodies struggle to replenish stores of collagen and elastin, and some people are genetically primed to break these down faster than others. The patented, non-invasive simple swab allows you to peek into your predispositions to discover what your genes have to say about your skin aging future.

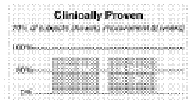
[illegible] genetic assessment, our laboratory blends a combination of active ingredients to create your personal DNA customized formulation. Through a liposomal delivery system similar to the nicotine patch and birth control patch, the ingredients go [illegible] replenish and restore collagen and elastin.

Clinically Proven Results

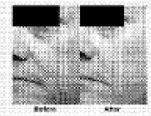
An eight-week, double-blind, randomized and controlled clinical study compared the performance of placebo skin care versus the performance of the "genetically-customized" skin care formula containing [illegible] for each participant. For those using the genetically-customized formulation, [illegible] after 14 days of treatment. After 56 days, the number of participants reporting reduction in the appearance of wrinkles rose to 70%. [illegible]

Why should I use both the LifeMap me (made exclusively) Nutrition & Skin formulas?

- Skin is the largest organ
- The LifeMap me (made exclusively) formulas are the ultimate inside out approach to aging.
- Clinically & Scientifically proven

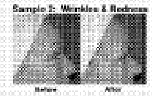


Sample 1: Wrinkles and Lines



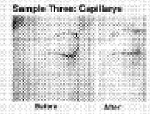
Before After

Sample 2: Wrinkles & Redness



Before After

Sample Three: Capillarys



Before After

LifeMap me DNA Skin Repair Ingredient List

Thanks to the custom nature of our product, the ingredient list will represent the latest breakthrough ingredients which have been clinically proven to enhance or diminish aging predispositions. Our current ingredients in our base formula are essential to skin care health and are in everyone's formula:

Skin Essentials Proprietary Blend Formula: [illegible]

Exhibit I

GNLK004456
CONFIDENTIAL

Complaint

Exhibit J

GeneWize Life Sciences, Inc. ("GENEWIZE") Privacy Protection Policy:

GeneWize Life Sciences respects the privacy of every individual and has taken every precaution to create a process that allows individuals to maintain the highest level of privacy. All information provided by the individual taking the assessment is kept on a secure server and all samples are identified by barcode only. This information is never shared with a third party. After the evaluation is completed and validated, all DNA sample material is destroyed. We will NEVER share any of your personal information with anyone.

- All SNP collection kits, swab and mailing envelopes are bar-coded for tracking and confidentiality.
- After receiving the swabs, the lab confirms and uploads the bar-coded samples for confidentiality, tracking, and control.
- The DNA is extracted from the swab and the lab amplifies the region of the DNA containing the SNP. The technique used to amplify the individual's DNA is called a polymerase chain reaction (PCR).
- The SNP is then detected with a proprietary technology, and a variety of important quality control systems are in place to ensure accuracy and repeatability.
- The results of the detected SNPs are then analyzed and compiled by special software and translated electronically into a confidential report called a LifeMap Identity Aging Assessment™.

1. When you use our site, we receive and collect certain information. The information that we receive and collect depends on what you do when you visit GENEWIZE.

Automatically Collected Information: Some information is automatically received and sometimes collected from you when you visit the GENEWIZE site. We receive and collect the name of the domain and host from which you access the Internet; the Internet protocol (IP) address of the computer you are using; the browser software you use and your operating system; the date and time you access our site; and the Internet address of the web site from which you linked directly to our site. We use this information to monitor the usage of our site. Also, when we send emails to you, we may be able to identify information about your email address, such as whether you can read graphic-rich HTML emails. All of the information we automatically capture provides us with the ability to enhance our customers' search and shopping experiences and to determine aggregate information about our user base and usage patterns.

Information Collected via Cookies. We use cookies to enhance the browsing and shopping experience on the GENEWIZE site. "Cookies" are small files or records that we place on your computer's hard drive to collect information about your activities on GENEWIZE site. The cookies transmit this information back to the computers at GENEWIZE or our third-party

distributors of banners and newsletters; these computers are, generally speaking, the only computers which are authorized to read their information. The information captured makes it possible for us (i) to speed navigation, keep track of items in your shopping cart, and provide you with custom tailored content; (ii) to remember information you gave to us so you don't have to reenter it each time you visit the GENEWIZE site; (iii) to monitor the effectiveness of certain of our marketing campaigns; and (iv) to monitor total number of visitors, pages viewed, and the total number of banners served.

Most people do not know that cookies are being placed on their computers when they visit the GENEWIZE site or most web sites because browsers are typically set to accept cookies. You can choose to have your browser warn you every time a cookie is being sent to you or you can turn off cookie placement. If you refuse cookies, you will not be able to open a GENEWIZE Shopping Cart and therefore will not be able to complete an order with us online. Also, by not using cookies, your overall Internet browsing experience will be affected.

If you would like to obtain more information about the third-party distribution of banners on the GENEWIZE site and to know your choices about having such cookies turned off, please visit www.privacychoices.org. If you turn off the cookies, you will still see banners on our site; however, the banners will not be tailored to your shopping experience.

Information Collected Using Pixel Tags or Clear GIFs. To help us understand the effectiveness of certain of our email marketing efforts, GENEWIZE may use "message format" and "message open" sensing technologies. Both technologies require the use of pixel tags or clear GIFs (also called web beacons). The "message format" sensing technology allows us to recognize whether you have enabled your email program to receive HTML emails. If so, this information is then associated with your email address so that subsequent messages can be sent to you in HTML format. The "message open" sensing technology allows us to recognize whether you have opened our email message. We can only detect this if you have enabled your email program to receive HTML emails.

Information You Actively Submit to GENEWIZE. For most of the browsing services we provide, we neither require nor collect "Personal Customer Information" – your name, email address, billing address, shipping address(es), phone number and credit card information. You can browse the GENEWIZE site and take as much time as you want to view our products and services without having to submit such Personal Customer Information. Even when you use our shopping cart as you browse, there is no need to submit Personal Customer Information.

In the following instance, however, we do need you to actively submit Personal Customer Information: when you want to become an Independent Business Owner (IBO), open an account or complete an order.

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2. How we use and share Personal Customer Information

Occasionally, GENEWIZE uses Personal Customer Information to market products and services. GENEWIZE shares Personal Customer Information that we collect as follows:

Subcontractors. We send Personal Customer Information to third-party subcontractors and agents that work on our behalf to provide certain services. These third parties do not have the right to use the Personal Customer Information beyond what is necessary to assist us or fulfill your order. They are contractually obligated to maintain the confidentiality and security of the Personal

Exhibit J

Complaint

Customer Information and are restricted from using such information in any way not expressly authorized by GENEWIZE.

Service Providers. We send Personal Customer Information to third-party providers of goods and services that you may purchase from time to time on our site (e.g., ISPs). Like subcontractors, these third parties do not have the right to use the Personal Customer Information beyond what is necessary to assist us. They are contractually obligated to maintain the confidentiality and security of the Personal Customer Information and are restricted from using such information in any way not expressly authorized by GENEWIZE.

Membership programs. We may work with certain companies who, in conjunction with their own membership programs or rewards programs, require that we disclose purchasing information about their customers who visit the GENEWIZE site through links from the partner sites, or use the partner's credit card to make purchases on the GENEWIZE site (e.g., to earn commissions for purchases made on the GENEWIZE site through outside links from the partner site, such as phrased pay cards). We disclose only the information required to make these programs work and support your membership with them, which typically includes the name and/or email address of the user as well as the dollar amount of purchases made. We disclose this information to companies under an agreement that requires that they obtain your consent first, usually under the membership or participation rules. If you do not want us to disclose that information to the strategic partner, then you must contact them directly.

Credit card companies. Credit card transactions are handled by a third-party financial institution and their vendors, which receive the credit card number and other personal identifying information only to verify the credit card numbers and process transactions.

Law Enforcement Investigations. GENEWIZE may release Personal Customer Information when we believe, in our good judgment, that such release is reasonably necessary to comply with law, enforce or apply the terms of any of our policies or user agreements, or to protect the rights, property, or safety of GENEWIZE, our users, or others.

3. Communications from GENEWIZE

As a customer, you may receive the following communications from GENEWIZE. Communications related to transactions and account maintenance activities. These communications include without limitation: order confirmations, order update notices, order problem notices, and notices regarding material changes to site policies and account management procedures.

4. Underage customers

Our products and services are marketed for purchase by adults or with the consent of adults. This is why GENEWIZE requires a credit card that has been authorized for use to complete purchases on our site.

5. Changes to Privacy Policy

This privacy policy was last changed on November 15, 2008. GENEWIZE reserves the right to modify or amend this policy at any time by posting the revised privacy policy on our site. The

Exhibit J

changes will only affect the information we collect after the effective date of the change to our privacy policy unless we clearly express otherwise.

6. Questions or comments

If you have any questions regarding our privacy policy, please email at compliance@genewize.com.

For all other inquiries, please contact customerservice@genewize.com.

Exhibit J

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 which the Bureau of Consumer Protection proposed to present to the Commission for its consideration and which, if issued by the Commission, would charge the respondent with violation of the Federal Trade Commission Act, 15 U.S.C. § 45 *et seq.*; and

The respondent, its attorney, and counsel for the Commission having thereafter executed an agreement containing a consent order ("consent agreement"), which includes: a statement by the 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 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 filed thereafter by interested persons pursuant to Commission Rule 2.34, 16 C.F.R. § 2.34, now in further conformity with the procedure prescribed in Commission Rule 2.34, the Commission hereby issues its complaint, makes the following jurisdictional findings and enters the following order:

1. Respondent foru™ International Corporation ("foru"), formerly known as GeneWize Life Sciences, Inc., is a Delaware corporation with its principal office or place of business at 1231 Greenway Drive, Suite 200, Irving, Texas 75038.

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

ORDER

DEFINITIONS

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

A. Unless otherwise specified, "respondent" means foru™ International Corporation, formerly known as GeneWize Life Sciences, Inc., its successors and assigns, and its officers, agents, representatives, and employees.

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

C. "Covered Product" means any drug, food, or cosmetic that is: (a) customized or personalized for a consumer based on that consumer's DNA or SNP (single nucleotide polymorphism) assessment, including, but not limited to, LifeMap ME DNA Customized Nutritional Supplements, GeneWize Nutritional Supplements, LifeMap ME DNA Customized Skin Repair Serum, foru™ Core Plus, GeneWize Customized Skin Repair Serum, and foru™ Skin Repair Serum; or (b) promoted to modulate the effect of genes.

D. "Covered Assessment" means any genetic test or assessment, including, but not limited to, the Healthy Aging Assessment and LifeMap Healthy Aging Assessment.

E. "Essentially Equivalent Product" means a product that contains the identical ingredients, except for inactive

ingredients (*e.g.*, binders, colors, fillers, excipients), in the same form and dosage, and with the same route of administration (*e.g.*, orally, sublingually), as the Covered Product; *provided that* the Covered Product may contain additional ingredients if reliable scientific evidence generally accepted by experts in the field demonstrates that the amount and combination of additional ingredients is unlikely to impede or inhibit the effectiveness of the ingredients in the Essentially Equivalent Product.

F. "Drug" means as defined in Section 15(c) of the FTC Act, 15 U.S.C. § 55(c).

G. "Food" means as defined in Section 15(b) of the FTC Act, 15 U.S.C. § 55(b).

H. "Cosmetic" means as defined in Section 15(e) of the FTC Act, 15 U.S.C. § 55(e).

I. "Adequate and well-controlled human clinical study" means a human clinical study that: is randomized and adequately controlled; utilizes valid end points generally recognized by experts in the relevant disease field; yields statistically significant between-group results; and is conducted by persons qualified by training and experience to conduct such a study. Such study shall be double-blind and placebo-controlled; *provided, however*, that any study of a conventional food need not be placebo-controlled or double-blind if placebo control or blinding cannot be effectively implemented given the nature of the intervention. For the purposes of this proviso, "conventional food" does not include any dietary supplement, any customized or personalized product based on a consumer's DNA or SNP assessment, or any product promoted to modulate the effect of genes. Respondent shall have the burden of proving that placebo-control or blinding cannot be effectively implemented.

J. "Endorsement" means as defined in the Commission's Guides Concerning the Use of Endorsements and Testimonials in Advertising, 16 C.F.R. § 255.0.

K. "Affiliate" means any person or entity who participates in an Affiliate Program.

L. "Affiliate Program" means any arrangement whereby any person or entity: (a) provides respondent with, or refers to respondent, potential or actual customers; or (b) otherwise markets, advertises, or offers for sale any product or service on behalf of respondent.

M. "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 bank account, debit card, or credit card account number; (g) a persistent identifier, such as a customer number held in a "cookie" or processor serial number; or (h) clinical laboratory testing information, including test results. 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.

N. The term "including" in this order means "without limitation."

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

I.

IT IS ORDERED that respondent, directly or through any corporation, partnership, subsidiary, division, licensee, affiliate, 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, mitigate, or reduce the risk of diabetes, heart disease, arthritis, or insomnia, unless the representation is non-misleading and, at the time the representation is made, respondent possesses and relies upon competent and reliable scientific evidence that substantiates that the representation is true. For purposes of this Part I, "competent and reliable scientific evidence" shall consist of at least two adequate and well-controlled human clinical studies of the Covered Product, or of an Essentially Equivalent Product, conducted by different researchers, independently of each other, that conform to acceptable designs and protocols and whose results, when considered in light of the entire body of relevant and reliable scientific evidence, are sufficient to substantiate that the representation is true; *provided that*, if the respondent represents that such product is effective in the diagnosis, cure, mitigation, treatment, prevention, or the reduction of risk of disease for persons with a particular genetic variation or single nucleotide polymorphism ("SNP"), then studies required under this Part I shall be conducted on human subjects with such genetic variation or SNP. Respondent shall have the burden of proving that a product satisfies the definition of an Essentially Equivalent Product.

II.

IT IS FURTHER ORDERED that respondent, directly or through any corporation, partnership, subsidiary, division, licensee, affiliate, trade name, or other device, in connection with the manufacturing, labeling, advertising, promotion, offering for

sale, sale, or distribution of any Covered Product or any Covered Assessment, in or affecting commerce, shall not make any representation, in any manner, expressly or by implication, including through the use of a product name, endorsement, depiction, or illustration, other than representations covered under Part I of this order, about the health benefits, performance, or efficacy of any Covered Product or any Covered Assessment, unless the representation is non-misleading, and, at the time of making such representation, respondent possesses and relies 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 II, 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.

III.

IT IS FURTHER ORDERED that respondent, directly or through any corporation, partnership, subsidiary, division, licensee, affiliate, trade name, or other device, in connection with the manufacturing, labeling, advertising, promotion, offering for sale, sale, or distribution of any Covered Product or any Covered Assessment, in or affecting commerce, shall not misrepresent, in any manner, directly or indirectly, expressly or by implication, including through the use of endorsements:

A. The existence, contents, validity, results, or conclusions of any test, study, or research; or

B. That the benefits of any Covered Product or Covered Assessment are scientifically proven.

IV.

IT IS FURTHER ORDERED that:

A. Nothing in Parts I through III of this order shall prohibit respondent from making any representation for any product that is specifically permitted in labeling for such product by regulations promulgated by the Food and Drug Administration pursuant to the Nutrition Labeling and Education Act of 1990 or permitted under Sections 303-304 of the Food and Drug Administration Modernization Act of 1997; and

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

V.

IT IS FURTHER ORDERED that respondent, directly or through any corporation, partnership, subsidiary, division, licensee, affiliate, trade name, or other device, in connection with the manufacturing, labeling, advertising, promotion, offering for sale, sale, or distribution of any Covered Product or any Covered Assessment, in or affecting commerce, shall not provide to any person or entity the means and instrumentalities with which to make, directly or by implication, any representations prohibited by Parts I through III of this order. For purposes of this Part, "means and instrumentalities" shall mean any information, document, or article referring or relating to any Covered Product or any Covered Assessment, including, but not limited to, any advertising, labeling, promotional, or purported substantiation materials, for use by affiliates in their marketing of any Covered Product or any Covered Assessment in or affecting commerce.

VI.

IT IS FURTHER ORDERED that respondent, directly or through any corporation, partnership, subsidiary, division, trade name, or other device, in connection with the manufacturing, advertising, labeling, promotion, offering for sale, sale, or distribution of any product or service, in or affecting commerce, shall take steps sufficient to ensure compliance with Parts I through III of this order. Such steps shall include, at a minimum:

A. Establishing, implementing, and thereafter maintaining a system to monitor and review its affiliates' representations and disclosures to ensure compliance with Parts I through III of this order. The system shall be implemented as follows:

1. No later than thirty (30) days after the date of service of this order, and, on a semi-annual basis thereafter, respondent shall determine those affiliates that generate the most sales for respondent. For respondent's top fifty (50) revenue-generating affiliates, respondent shall:

   a. Monitor and review each affiliate's web sites on at least a monthly basis at times not disclosed in advance to its affiliates and in a manner reasonably calculated not to disclose the source of the monitoring activity at the time it is being conducted; and

   b. Conduct online monitoring and review of the Internet on at least a monthly basis, including, but not limited to, social networks such as Facebook, microsites such as Twitter, and video sites such as YouTube, for any representations by such affiliates.

2. For the remainder of respondent's affiliates, no later than thirty (30) days after the date of service of this order, and, on a semi-annual basis

thereafter, respondent shall select a random sample of fifty (50) affiliates. Respondent shall:

a. Monitor and review each of these randomly selected affiliates' web sites on at least a monthly basis at times not disclosed in advance to its affiliates and in a manner reasonably calculated not to disclose the source of the monitoring activity at the time it is being conducted; and

b. Conduct online monitoring and review of the Internet on at least a monthly basis, including, but not limited to, social networks such as Facebook, microsites such as Twitter, and video sites such as YouTube, for any representations by such affiliates.

B. Within seven (7) days of reasonably concluding that an affiliate has made representations that the affiliate knew or should have known violated Parts I, II, or III of this order, respondent shall terminate the affiliate from any affiliate program and cease payment to the affiliate; *provided, however*, that nothing in this subpart shall prevent respondent from honoring respondent's payment obligation to an affiliate pursuant to a contract executed by the affiliate and respondent prior to the date of service of the order; and

C. Creating, and thereafter, maintaining, and within fourteen (14) days of receipt of a written request from a representative of the Federal Trade Commission, making available for inspection and copying, reports sufficient to show compliance with this Part of the order.

VII.

IT IS FURTHER ORDERED that respondent, directly or through any corporation, partnership, subsidiary, division, licensee, affiliate, trade name, or other device, in connection with

the manufacturing, advertising, labeling, promotion, offering for sale, sale, or distribution of any product or service, in or affecting commerce, shall not misrepresent in any manner, expressly or by implication, the extent to which it maintains and protects the privacy, confidentiality, security, or integrity of Personal Information collected from or about consumers.

VIII.

IT IS FURTHER ORDERED that respondent, directly or through any corporation, partnership, subsidiary, division, trade name, or other device, shall, no later than the date of service of this order, establish and implement, and thereafter maintain, a comprehensive information security program that is reasonably designed to protect the security, confidentiality, and integrity of Personal Information collected from or about consumers. Such program, the content and implementation of which must be fully documented in writing, shall contain administrative, technical, and physical safeguards appropriate to respondent's size and complexity, the nature and scope of respondent's activities, and the sensitivity of the Personal Information respondent collects 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 received from respondent, and requiring service providers by contract to implement and maintain appropriate safeguards; and

E. The evaluation and adjustment of respondent's information security program in light of the results of the testing and monitoring required by 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.

IX.

IT IS FURTHER ORDERED that, in connection with its compliance with Part VIII of this order, respondent shall obtain initial and biennial assessments and reports ("Assessments") from a qualified, objective, independent third-party professional who uses procedures and standards generally accepted in the profession. Professionals qualified to prepare such assessments shall be: a person qualified as a Certified Information System Security Professional (CISSP) or as a Certified Information Systems Auditor (CISA); a person holding Global Information Assurance Certification (GIAC) from the SysAdmin, Audit, Network, Security (SANS) Institute; or a qualified person or organization approved by the Associate Director for Enforcement, Bureau of Consumer Protection, Federal Trade Commission, Washington, D.C. 20580. The reporting period for the Assessments shall cover: (1) the first one hundred and eighty

(180) days after service of the order for the initial Assessment, and (2) each two (2) year period thereafter for twenty (20) years after service of the order for the biennial Assessments. Each Assessment shall:

A. Set forth the specific administrative, technical, and physical safeguards that respondent has implemented and maintained during the reporting period;

B. Explain how such safeguards are appropriate to respondent's size and complexity, the nature and scope of its activities, and the sensitivity of the Personal Information collected from or about consumers;

C. Explain how the safeguards that have been implemented meet or exceed the protections required by Part VIII 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. The respondent shall provide its 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 in writing, the initial Assessment, and any subsequent Assessments requested, shall be 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, D.C. 20580. The subject line must begin: *In the Matter of foru*^{TM} *International Corporation*, FTC File No. 112 3095. *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.

X.

IT IS FURTHER ORDERED that respondent foru™ International Corporation, and its successors and assigns, shall deliver a copy of this order to all current and future principals, officers, directors, Scientific Advisory Board members, and licensees, and to employees 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. Respondent foru™ International Corporation, and its successors and assigns, shall deliver this order to current personnel within thirty (30) days after the date of service of this order, and to future personnel within thirty (30) days after the person assumes such position or responsibilities.

XI.

IT IS FURTHER ORDERED that respondent foru™ International Corporation, and its successors and assigns, shall maintain and, upon request, make available to a representative to the Commission for inspection and copying:

A. For a period of three (3) years after the date of preparation of each Assessment required under Part IX 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 VIII and IX of this order, for the compliance period covered by such Assessment;

B. Unless covered by Part XI.A, for a period of 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:

1. All advertisements and promotional materials containing the representation, including, but not limited to, all marketing and training materials distributed to licensees and affiliates;

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

3. All tests, reports, studies, surveys, demonstrations, or other evidence in respondent's 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.

XII.

IT IS FURTHER ORDERED that respondent foru™ International Corporation, 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 foru™ International Corporation, and its successors and assigns, learns less than thirty (30) days prior to the date such action is to take place, respondent foru™ International Corporation, and its successors and assigns, 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, D.C. 20580. The subject line must begin: *In the Matter of foru™ International Corporation*, FTC File No. 112 3095.

XIII.

IT IS FURTHER ORDERED that respondent foru™ International Corporation, and its successors and assigns, within sixty (60) days after 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.

XIV.

This order will terminate on May 8, 2034, 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 Ohlhausen dissenting, and Commissioner McSweeny not participating.

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 foru™ International Corporation, formerly known as GeneWize Life Sciences, Inc. ("foru™"). The proposed consent order has been placed on the public record for thirty (30) days for receipt of comments by interested persons. Comments received during this period will become part of the public record. After thirty (30) days, the Commission will again review the agreement and the comments received, and will decide whether it should withdraw from the agreement or make final the agreement's proposed order.

This matter involves the advertising and promotion of purported genetically customized nutritional supplements and skin repair serum products, which foru™ and its co-respondent and former parent, GeneLink, Inc. ("GeneLink"), sold through a multi-level marketing ("MLM") network. According to the FTC complaint, foru™ and GeneLink represented that genetic disadvantages identified through the companies' DNA assessments are scientifically proven to be mitigated by or compensated for with the companies' nutritional supplements. The complaint alleges that this claim is false and thus violates the FTC Act. The FTC complaint also charges that the companies represented that these custom-blended nutritional supplements: (1) effectively compensate for genetic disadvantages identified by

respondents' DNA assessments, thereby reducing an individual's risk of impaired health or illness, and (2) treat or mitigate diabetes, heart disease, arthritis, and insomnia. The complaint alleges that these claims are unsubstantiated and thus violate the FTC Act.

With regard to the purported genetically customized skin repair serum products, the FTC complaint charges that the companies represented that the products are scientifically proven to reduce the appearance of wrinkles and improve skin firmness; and enhance or diminish aging predispositions, including collagen breakdown, sun damage, and oxidative stress. The complaint alleges that these claims are false and thus violate the FTC Act.

Additionally, the complaint alleges that the companies provided advertisements and promotional materials to their MLM affiliates for use in the marketing and sale of their genetically customized nutritional supplements and skin repair serum products. The complaint alleges that the companies thereby provided their affiliates with means and instrumentalities to further the deceptive and misleading acts and practices at issue.

Finally, the FTC complaint alleges that the companies' acts and practices related to data security were unfair and deceptive. The companies collected personal information, including names, addresses, email addresses, telephone numbers, dates of birth, Social Security numbers, bank account numbers, credit card account numbers, and genetic information. They represented to consumers that they implemented reasonable and appropriate measures to secure consumers' personal information. The complaint alleges the companies failed to provide reasonable and appropriate security for consumers' personal information. According to the complaint, among other things, the companies:

(1) Failed to implement reasonable policies and procedures to protect the security of consumers' personal information collected and maintained by respondents;

(2) Failed to require by contract that service providers implement and maintain appropriate safeguards for consumers' personal information;

(3) Failed to provide reasonable oversight of service providers, for instance by requiring that service providers implement simple, low-cost, and readily available defenses to protect consumers' personal information;

(4) Created unnecessary risks to personal information by: (a) maintaining consumers' personal information in clear text; (b) providing respondents' employees, regardless of business need, with access to consumers' complete personal information; (c) providing service providers with access to consumers' complete personal information, rather than, for example, to fictitious data sets, to develop new applications; (d) failing to perform assessments to identify reasonably foreseeable risks to the security, integrity, and confidentiality of consumers' personal information on respondents' network; and (e) providing a service provider that needed only certain categories of information for its business purposes with access to consumers' complete personal information; and

(5) Did not use readily available security measures to limit wireless access to their network.

The complaint further alleges respondents' failure to provide reasonable oversight of service providers and respondents' failure to limit employees' access to consumers' personal information resulted in a vulnerability that, until respondents were alerted by an affiliate, provided that affiliate with the ability to access the personal information of every foru™ customer and affiliate in respondents' customer relationship management database. The personal information that could have been accessed included consumers' names, addresses, email addresses, telephone numbers, dates of birth, and Social Security numbers. The complaint alleges that respondents' practices were likely to cause substantial injury to consumers, were not reasonably avoidable by consumers, and were not outweighed by countervailing benefits to consumers or competition.

The proposed consent order contains provisions designed to prevent foru™ from engaging in similar acts or practices in the future. The order covers representations made in connection with

the manufacturing, labeling, advertising, promotion, offering for sale, sale, or distribution of any Covered Product, in or affecting commerce. First, the order defines Covered Product as any drug, food, or cosmetic that is: (a) customized or personalized for a consumer based on that consumer's DNA or other genetic assessment, including, but not limited to, the nutritional supplement and skin repair serum products at issue; or (b) promoted to modulate the effect of genes. Second, it defines Essentially Equivalent Product to mean a product that contains the identical ingredients, except for inactives, in the same form, dosage, and route of administration as the Covered Product; provided that the Covered Product may contain additional ingredients if reliable scientific evidence generally accepted by experts in the field demonstrates that the amount and combination of additional ingredients is unlikely to impede or inhibit the effectiveness of the ingredients in the Essentially Equivalent Product. Third, it defines adequate and well-controlled human clinical study to mean a human clinical study that is randomized and adequately controlled; utilizes valid end points generally recognized by experts in the relevant disease field; yields statistically significant between-group results; and is conducted by persons qualified by training and experience to conduct such a study. This definition requires that the study be double-blind and placebo-controlled; however, this definition provides an exception for any study of a conventional food if the respondent can demonstrate that placebo control or blinding cannot be effectively implemented given the nature of the intervention. Finally, it defines Covered Assessment as any genetic test or assessment, including but not limited to, the companies' current DNA assessments. With respect to information security, the proposed order closely follows the Commission's previous data security orders.

Part I of the consent order is designed to address foru™'s specific claims about diseases and serious health conditions by prohibiting the company from making any representation that any Covered Product is effective in the diagnosis, cure, mitigation, treatment, or prevention of any disease, including any representation that such product will treat, prevent, mitigate, or reduce the risk of diabetes, heart disease, arthritis, or insomnia, unless such representation is non-misleading and, at the time the

representation is made, foru™ possesses and relies upon competent and reliable scientific evidence, at least two adequate and well-controlled human clinical studies of the Covered Product, or of an Essentially Equivalent Product, conducted by different researchers, independently of each other, that conform to acceptable designs and protocols and whose results, when considered in light of the entire body of relevant and reliable scientific evidence, are sufficient to substantiate that the representation is true. Further, claims that a Covered Product effectively treats or prevents a disease in persons with a particular genetic variation, must be conducted on subjects with that genetic variation because persons with the particular genetic variation may respond differently to the Covered Product than do persons without the variation. The substantiation standard imposed under this Part is reasonably necessary to ensure that any future claims about diseases and serious health conditions made by the named respondents are not deceptive; this standard does not necessarily apply to firms not under order.

Part II of the consent order prohibits foru™ from making any representation about the health benefits, performance, or efficacy of any Covered Product or any Covered Assessment, unless the representation is non-misleading, and proposed respondents rely on 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 claim is true.

Part III of the consent order addresses claims regarding scientific research. It prohibits foru™, with regard to any Covered Product or any Covered Assessment, from misrepresenting the existence, contents, validity, results, or conclusions of any test, study, or research. This Part also prohibits foru™ from representing that the benefits of any Covered Product or any Covered Assessment are scientifically proven.

Part IV of the consent order provides that nothing in the order shall prohibit foru™ from making any representation for any product that is specifically permitted in labeling for such product

by regulations promulgated by the FDA pursuant to the Nutrition Labeling and Education Act of 1990, or that is permitted under sections 303-304 of the Food and Drug Administration Modernization Act of 1997, which, under certain circumstances, permit claims about health and nutrient content as long as those claims are based on current, published, authoritative statements from certain federal scientific bodies (*e.g.*, National Institutes of Health, Centers for Disease Control) or from the National Academy of Sciences.

Part V of the consent order prohibits foru™ from providing any person or entity with means and instrumentalities that contain any representations prohibited under Parts I through III of the order.

Part VI of the consent order requires foru™ to establish, implement, and maintain a program to monitor its affiliates' compliance with Parts I through III of the proposed order. In particular, for foru™'s top 50 revenue-generating affiliates, on at least a monthly basis, the company must monitor and review such affiliates' websites and also conduct online monitoring and review of the Internet for any representations by such affiliates. This Part also requires foru™ to terminate and withhold payment from an affiliate within seven days of reasonably concluding that the affiliate made representations that the affiliate knew or should have known violated Parts I, II, or III of the order. Finally, this Part requires foru™ to create, maintain, and make available to FTC representatives within 14 days of receipt of a written request, reports sufficient to show compliance with this Part.

Part VII of the consent order prohibits foru™ from misrepresenting the extent to which they maintain and protect the privacy, confidentiality, security, or integrity of any personal information collected from or about consumers.

Part VIII of the consent order requires foru™ 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 foru™'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 foru™ 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 foru™, 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 IX of the consent order requires foru™ to obtain biennial independent assessments of their security programs for 20 years.

Part X of the consent order requires dissemination of the order to officers, to Scientific Advisory Board members, to licensees, and to employees having managerial responsibilities with respect to the subject matter of the order.

Part XI of the consent order requires foru™ to keep, for a prescribed period, copies of all materials relied upon to prepare the assessment and any other materials relating to foru™'s compliance with Parts VIII and IX, as well as relevant advertisements and promotional materials, including marketing and training materials distributed to licensees and affiliates.

Parts XII and **XIII** of the consent order require foru™ to notify the Commission of changes in corporate structure that might affect compliance obligations under the order, and to file compliance reports. **Part XIV** 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 their terms in any way.

Statement of Chairwoman Edith Ramirez and Commissioner Julie Brill

We write to explain our support for the remedy imposed against respondents GeneLink, Inc. and foru International Corporation, which we believe to be amply supported by the relevant facts. In this, as in all of the Commission's advertising actions alleging deceptive health claims, the Commission has called for, as proposed relief, a level of substantiation that is grounded in concrete scientific evidence and reasonably tailored to ensure that the conduct giving rise to the violation ceases and does not recur, among other important remedial goals. In our view, the remedy adopted here accomplishes just that, without imposing undue costs on marketers or consumers more generally.

Respondents market and sell genetically customized nutritional supplements and topical skin products. As described in the complaint, this enforcement action stems from claims

made by respondents in promotional materials and through testimonials that their products compensate for consumers' "genetic disadvantages" and cure or treat serious conditions such as diabetes, heart disease, and arthritis. In a newsletter, for example, respondents represented their products had cured "a serious diabetic and cardiac patient," and an affiliate's website stated that the products produced "improvements in everything from blood pressure to eczema to hormonal issues to arthritis."[1] The Commission alleges that respondents lacked adequate substantiation for these claims and that they falsely represented that the products' benefits were scientifically proven.

Disease treatment claims such as these require a rigorous level of substantiation. Based on evidence from genetics and nutritional genomics experts, the Commission has reason to believe that well-controlled human clinical trials (referred to here as "randomized controlled trials" or "RCTs") are needed to substantiate respondents' claims and that the studies relied on by respondents to back up their claims fall far short of this evidence. Because respondents lacked even one valid RCT for their products, it was unnecessary for the Commission to decide, for purposes of assessing liability, the precise number of RCTs needed to substantiate their claims.

In fashioning an appropriate remedy, however, we are requiring that respondents have at least two RCTs before making disease prevention, treatment, and diagnosis claims. We have the discretion to issue orders containing "fencing-in" provisions – "provisions . . . that are broader than the conduct that is declared unlawful." *Telebrands Corp. v. FTC*, 457 F.3d 354, 357 n.5 (4th Cir. 2006) (citation and internal quotation marks omitted). Here, we believe that the two-RCT mandate is appropriate and reasonably crafted to prevent the recurrence of respondents' alleged unlawful conduct. This requirement conforms to well-recognized scientific principles favoring replication of study results to establish a causal relationship between exposure to a substance and a health outcome. *See, e.g.*, *Thompson Med. Co.*, 104 F.T.C. 648, 720-21, 825 (1984) (requiring two RCTs to support claims of arthritis pain relief and

[1] Compl. Exs. G and H.

thereby affirming determination that "[r]eplication is necessary because there is a potential for systematic bias and random error in any clinical trial"), *aff'd*, 791 F.2d 189 (D.C. Cir. 1986).[2] It also provides clear rules for respondents, facilitating the setting of future research and marketing agendas, and preserves law enforcement resources by minimizing future argument over the quantity and quality of substantiation needed for the most serious health claims about respondents' products. Moreover, the deceptive claims alleged in the complaint are the type of significant violations of law for which fencing-in relief is more than justified as an additional safeguard against potential recidivism. *See, e.g., id.*at 834 (ruling that deceptive health claims about topical analgesic for arthritis pain warranted fencing-in, and noting that the seriousness of the violations was "affected by the fact that consumers could not readily judge the truth or falsity of the claims").

While not taking issue with respondents' liability as alleged in the Commission's complaint, Commissioner Ohlhausen objects to the Commission's decision to require, as a remedial matter, that respondents have at least two RCTs before representing that their genetic products can cure, treat, diagnose, or prevent a disease. In addition to arguing that the two-RCT requirement is "unduly high," Commissioner Ohlhausen expresses concern that these and other recent Commission orders may lead advertisers in general to believe that they too must invariably have two RCTs to substantiate health and disease claims for a variety of products, leading them to forgo otherwise adequately substantiated claims and depriving consumers of potentially useful information.[3] We respectfully disagree.

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[2] *See also* GEOFFREY MARCZYK ET AL., ESSENTIALS OF RESEARCH DESIGN AND METHODOLOGY 15-16 (2005) ("The importance of replication in research cannot be overstated. Replication serves several integral purposes, including establishing the reliability (*i.e.*, consistency) of the research study's findings and determining . . . whether the results of the original study are *generalizable* to other groups of research participants.").

[3] Statement of Commissioner Maureen K. Ohlhausen, Dissenting in Part and Concurring in Part [hereinafter Ohlhausen Statement] at 1. In her Statement, Commissioner Ohlhausen also references various weight-loss related enforcement actions announced today by the Commission, including *FTC v. Sensa Products, LLC*. Her objections, however, center on the remedy imposed

There is nothing in our action today that amounts to the imposition of a "de facto two-RCT standard on health- and disease-related claims."[4] In this and other recent enforcement actions, the Commission has consistently adhered to its longstanding view that the proper level of substantiation for establishing liability is a case-specific factual determination as to what constitutes competent and reliable scientific evidence for the advertising claims at issue.[5] The same fact-specific approach has guided the Commission's remedial standards. Recent Commission consent orders concerning different types of health claims have variously required two RCTs,[6] one RCT,[7] or more generally defined "competent and reliable scientific evidence."[8] Against this backdrop, we are not persuaded that by requiring two RCTs as a remedial matter here, the Commission will create

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in this matter.

[4] Ohlhausen Statement at 3.

[5] *See, e.g.*, *Bristol Meyers Co.*, 102 F.T.C. 21, 332-38 (1983), *aff'd*, 738 F.2d 554 (2d Cir. 1984); FTC, DIETARY SUPPLEMENTS: AN ADVERTISING GUIDE FOR INDUSTRY 10 (Apr. 2001) [hereinafter DIETARY SUPPLEMENTS ADVERTISING GUIDE] ("When no specific claim about the level of support is made, the evidence needed depends on the nature of the claim. A guiding principle for determining the amount and type of evidence that will be sufficient is what experts in the relevant area of study would generally consider to be adequate.").

[6] *See, e.g.*, *FTC v. Skechers U.S.A., Inc.*, No. 1:12-cv-01214-JG (N.D. Ohio July 12, 2012) (prohibiting, as a remedial matter, weight loss claims without two RCTs); *FTC v. Labra*, No. 11 C 2485 (N.D. Ill. Jan. 11, 2012) (same); *FTC v. Iovate Health Scis.USA, Inc.*, No. 10-CV-587 (W.D.N.Y. July 29, 2010) (same); *Nestlé Healthcare Nutrition, Inc.*, 151 F.T.C. 1 (2011) (requiring two RCTs for claims that any probiotic drink or certain nutritionally complete drinks reduce the duration of acute diarrhea in children or absences from daycare or school due to illness).

[7] *See, e.g.*, *FTC v. Skechers U.S.A., Inc.*, No. 1:12-cv-01214-JG (N.D. Ohio July 12, 2012) (prohibiting muscle strengthening claims for any footwear product without one RCT); *FTC v. Reebok Int'l Ltd.*, No. 1:11-cv-02046-DCN (N.D. Ohio Sept. 29, 2011) (same).

[8] *See, e.g.*, *NBTY, Inc.*, 151 F.T.C. 201 (2011) (requiring marketer of vitamins to possess "competent and reliable scientific evidence" for any claim about the health benefits, performance, or efficacy of any product).

a misperception among advertisers about the substantiation standards that govern liability for deceptive advertising.[9] However, to the extent other marketers look to our orders for signals as to the type of backing required for disease treatment claims, we prefer that they understand that serious claims like those made by respondents must have hard science behind them.

We also disagree that the proposed remedy will deny consumers access to useful information about new areas of science. The value of information naturally depends on its accuracy.[10] As the D.C. Circuit has emphasized, "misleading advertising does not serve, and, in fact, disserves, th[e] interest" of "consumers and society . . . in the free flow of commercial information." *FTC v. Brown & Williamson Tobacco Corp*., 778 F.2d 35, 43 (D.C. Cir. 1985) (citation and internal quotation marks omitted). If respondents wish to rely on emerging science, they can qualify their claims accordingly. Properly qualified claims are lawful and permissible under our proposed orders. *See* Proposed Consent Orders, Part III.

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[9] Moreover, as Commissioner Ohlhausen notes, Ohlhausen Statement at 2 n.7, there may be some instances in which the medical community would not require RCTs to demonstrate that a substance treats, prevents, or reduces the risk of a disease. *See, e.g.*, DIETARY SUPPLEMENTS ADVERTISING GUIDE, *supra* note 5, at 11 (explaining that an appropriately qualified claim based on epidemiological evidence would be permitted where "[a] clinical intervention trial would be very difficult and costly to conduct," "experts in the field generally consider epidemiological evidence to be adequate" and there is no "stronger body of contrary evidence"). But, contrary to Commissioner Ohlhausen's contention, the link between folic acid and neural tube birth defects was substantiated using a combination of RCTs and observational epidemiological evidence, as indicated by the articles she cites. *See, e.g*., Walter C. Willett, *Folic Acid and Neural Tube Defect: Can't We Come to Closure?*, 82 AM. J. PUB. HEALTH 666, 667 (1992).

[10] In some instances, "emerging" scientific evidence has been subsequently contradicted by further research, leading to consumer confusion and potential physical and financial harm. *See, e.g*., Eric A. Klein et al., *Vitamin E and the Risk of Prostate Cancer, The Selenium and Vitamin E Cancer Prevention Trial (SELECT)*, 306 J. AM. MED. ASS'N 1549, 1551 (2011) (reporting that a 2008 randomized, placebo-controlled prospective clinical trial of over 35,000 men contradicted "considerable preclinical and epidemiological evidence that selenium and vitamin E may reduce prostate cancer risk," and that follow-up observational data from 2011 showed a statistically significant *increase* in prostate cancer in the vitamin E group over placebo).

The fact that the ingredients in respondents' products are safe also does not alter our conclusion. Consumers who rely on respondents' claims may forgo important diet and lifestyle changes that are known to reduce the risk of diabetes, heart disease, or arthritis. Or they may forgo treatments that, unlike respondents' products, have been demonstrated to be effective. In addition, respondents charge a premium, over $100 per month, for their customized products. Consumers, therefore, may be deceived both to their medical and economic detriment when a safe product provides an ineffective treatment. *See FTC v. QT, Inc.*, 512 F.3d 858, 863 (7th Cir. 2008) (safe but deceptively advertised treatment "will lead some consumers to avoid treatments that cost less and do more; the lies will lead others to pay too much for [treatment] or otherwise interfere with the matching of remedies to medical conditions"); *Pfizer Inc.*, 81 F.T.C. 23, 62 (1972) ("A consumer should not be compelled to enter into an economic gamble to determine whether a product will or will not perform as represented."). Unsubstantiated disease claims also harm honest competitors that expend considerable resources on studies or analyses of the existing science and conform their advertising claims accordingly. Allowing companies to rely on "emerging" evidence to support disease claims merely because the products in question are safe would risk a "race to the bottom" – the proliferation of progressively more egregious disease claims, which would harm both legitimate competitors and consumers in the process.

Finally, Commissioner Ohlhausen argues that requiring the RCTs to be conducted by different researchers working independently of each other imposes undue burdens in the absence of evidence that a defendant has fabricated or interfered with a study or its results.[1] This requirement is an important safeguard that lessens the likelihood that researcher bias will affect the outcome of a study and helps ensure that the results are replicable.[2]

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[1] Ohlhausen Statement at 2-3.

[2] Commissioner Ohlhausen also objects to the Part I requirement that testing be conducted on the product about which the advertising claim is made or an "essentially equivalent product," arguing that the order should authorize "claims regarding individual ingredients in combined products as long as

In short, we believe the relief obtained by the Commission in this settlement is warranted and strikes the right balance between the need for accuracy in health-related advertising claims and the burden placed on respondents.

STATEMENT OF COMMISSIONER MAUREEN K. OHLHAUSEN DISSENTING IN PART AND CONCURRING IN PART

I strongly support the Commission's enforcement efforts against false and misleading advertisements and therefore have voted in favor of the consent agreements with Sensa Products, LLC; HCG Diet Direct, LLC; L'Occitane, Inc.; and LeanSpa, LLC, despite having some concerns about the scope of the relief in several of these weight-loss related matters. I voted against the consent agreements in the matter of GeneLink, Inc. and foru International Corporation, however, because they impose an unduly high standard of at least two randomized controlled trials (or RCTs) to substantiate *any* disease-related claims, not just weight-loss claims. Adopting a one-size-fits-all approach to substantiation by imposing such rigorous and possibly costly requirements for such a broad category of health- and disease-related claims[3] may, in many instances, prevent useful

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claims for each ingredient are properly substantiated and there are no known interactions." Ohlhausen Statement at 3. In fact, the orders permit that very thing. If there is reliable evidence that the additional ingredients will not interact with the tested product in a way that impacts efficacy, the orders do not require testing of the combined product. *See* Proposed Consent Orders at 3 (defining "Essentially Equivalent Product" to permit additional ingredients, beyond those in the tested product, if "reliable scientific evidence generally accepted by experts in the field demonstrates that the amount and combination of additional ingredients [in the respondent's product] is unlikely to impede or inhibit the effectiveness of the ingredients in the [tested product]").

[3] This provision may apply quite broadly in practice given the Commission majority's conclusion in our *POM Wonderful* decision that many of the claims involving the continued healthy functioning of the body also conveyed implied disease-related claims. *See POM Wonderful, LLC*, No. 9344, 2013 WL 268926 (F.T.C. Jan. 16, 2013).

information from reaching consumers in the marketplace and ultimately make consumers worse off.[4]

The Commission has traditionally applied the *Pfizer*[5] factors to determine the appropriate level of substantiation required for a specific advertising claim. These factors examine the nature of the claim and the type of product it covers, the consequences of a false claim, the benefits of a truthful claim, the cost of developing the required substantiation for the claim, and the amount of substantiation experts in the field believe is reasonable for such a claim.[6] One of the goals of the *Pfizer* analysis is to balance the value of greater certainty of information about a product's claimed attributes with the risks of both the product itself and the suppression of potentially useful information about it. Under such an analysis, the burden for substantiation for health- or disease-related claims about a safe product, such as a food, for example, should be lower than the burdens imposed on drugs and biologics because consumers face lower risks when consuming the safe product.[7]

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[4] To be clear, however, I am not advocating in favor of permitting "unsubstantiated disease claims," as suggested in the statement of Chairwoman Ramirez and Commissioner Brill. Rather, I am suggesting that consumers would on balance be better off if we clarified that our requirements permit a variety of health- or disease-related claims about safe products, such as foods or vitamins, to be substantiated by competent and reliable scientific evidence that might not comprise two RCTs.

[5] *Pfizer, Inc.*, 81 F.T.C. 23 (1972).

[6] *Id.* at 91-93; *see also FTC Policy Statement Regarding Advertising Substantiation*, 104 F.T.C. 839 (1984) (appended to *Thompson Med. Co.*, 104 F.T.C. 648, 839 (1984)).

[7] The FDA designates most food ingredients as GRAS (generally recognized as safe). 21 C.F.R. § 170.30. Vitamins and minerals are treated as foods by the FDA and are also GRAS. *See* FDA Guidance for Industry: Frequently Asked Questions about GRAS (Dec. 2004), *available at* http://www.fda.gov/Food/GuidanceRegulation/GuidanceDocumentsRegulatoryInformation/IngredientsAdditivesGRASPackaging/ucm061846.htm#Q1. As a result, food ingredients, vitamins, and minerals can be combined and sold to the public without direct evidence on the particular combination realized in the new product. Many products are made up of several common generic ingredients, for which there is little financial incentive to test individually or to retest in each particular combination.

Recently, however, Commission orders, including the ones in the matter of GeneLink and foru International, seem to have adopted two RCTs as a standard requirement for health- and disease-related claims for a wide array of products.[8] RCTs can be difficult to conduct and are often costly and time-consuming relative to other types of testing, particularly for diseases that develop over a long period of time or complex health conditions. Requiring RCTs may be appropriate in some circumstances, such as where use of a product carries some significant risk, or where the costs of conducting RCTs may be relatively low, such as for conditions whose development or amelioration can be observed over a short time period. Thus, I am willing to support the order requirement of two RCTs for short-term weight loss claims in the Sensa, HCG Diet Direct, L'Occitane, and LeanSpa matters because such studies can be conducted in a relatively short amount of time at a lower cost than for many other health claims. My concern with GeneLink and foru International and the series of similar orders is that they might be read to imply that two RCTs are required to substantiate any health- or disease-related claims, even for relatively-safe products. It seems likely that producers may forgo making such claims about these kinds of products, even if they may otherwise be adequately supported by evidence that does not comprise two RCTs.[9]

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[8] The orders in this matter include as a Covered Product any food, drug, or cosmetic that is genetically customized or personalized for a consumer or that is promoted to modulate the effect of genes. Other cases requiring two RCTs are *POM Wonderful LLC*, Docket No. 9344 (F.T.C. Jan. 10, 2013) (fruit juice); *Dannon Co., Inc.*, 151 F.T.C. 62 (2011) (yogurt); *Nestlé Healthcare Nutrition, Inc.*, 151 F.T.C. 1 (2011) (food); *FTC v. Iovate Health Sci. USA, Inc.*, No. 10-CV-587 (W.D.N.Y. July 29, 2010) (dietary supplement).

[9] Notably, the medical community does not always require RCTs to demonstrate the beneficial effects of medical and other health-related innovations. For example, the recommendation that women of childbearing age take a folic acid supplement to reduce the risk of neural tube birth defects was made without RCT evidence on the relevant population. *See* Walter C. Willett, "Folic Acid and Neural Tube Defect: Can't We Come to Closure?" *American Journal of Public Health*, May 1992, Vol. 82, No. 5; Krista S. Crider, Lynn B. Bailey and Robert J. Berry, "Folic Acid Food Fortification—Its History, Effect, Concerns, and Future Directions," *Nutrients* 2011, Vol. 3, 370-384.

Although raising the requirement for both the number and the rigor of studies required for substantiation for all health- or disease-related claims may increase confidence in those claims, the correspondingly increased burdens in time and money in conducting such studies may suppress information that would, on balance, benefit consumers. If we demand too high a level of substantiation in pursuit of certainty, we risk losing the benefits to consumers of having access to information about emerging areas of science and the corresponding pressure on firms to compete on the health features of their products. In my view, the Commission should apply the *Pfizer* balancing test in a more finely calibrated manner than they have in the GeneLink and foru International orders to avoid imposing "unduly burdensome restrictions that might chill information useful to consumers in making purchasing decisions."[10]

In addition, based on the same concerns about imposing unnecessarily burdensome and costly obligations, I do not support a general requirement that all products be tested by different researchers working independently without an indication that the defendant fabricated or otherwise interfered with a study or its results. [11] Where defendants have fabricated results, as our complaint against Sensa alleges, a requirement of independent testing may be appropriate, but a simple failure to have adequate substantiation should not automatically trigger such an obligation. In other cases, where there is some concern about a sponsor or researcher biasing a study, our orders may address this in a less burdensome way by requiring the producer making the disease-related claims to provide the underlying testing data to substantiate its claims, which we can examine for

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[10] 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.

[11] The FDA does not require independent testing for clinical investigational studies of medical products, including human drug and biological products or medical devices, and it permits sponsors to use a variety of approaches to fulfill their responsibilities for monitoring. *See* FDA Guidance for Industry Oversight of Clinical Investigations—A Risk-Based Approach to Monitoring (Aug. 2013), *available at* http://www.fda.gov/downloads/Drugs/GuidanceComplianceRegulatoryInformation/Guidances/UCM269919.pdf.

reliability. Similarly, the requirement to test an "essentially equivalent product," which appears to be more rigorous than FDA requirements for food and supplement products, can significantly and unnecessarily increase the costs of substantiation, again potentially depriving consumers of useful information. Instead, Commission orders should clearly allow claims regarding individual ingredients in combined products as long as claims for each ingredient are properly substantiated and there are no known relevant interactions.[12]

It is my hope and recommendation that as we consider future cases involving health- and disease-related claims, the Commission and its staff engage in a further dialogue about our substantiation requirements to discern how best to assess the potential costs and benefits of allowing different types of evidence that might provide a reasonable basis to substantiate such claims. Although I am willing to support liability for failures to have adequate substantiation for health- and disease-related claims under certain circumstances, I am not willing to support a de facto two-RCT standard on health- and disease-related claims for food or other relatively-safe products.

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[12] Although the statement by Chairwoman Ramirez and Commissioner Brill asserts that the orders in GeneLink and foru International permit claims for individual ingredients in combined products as long as the claims for each ingredient are properly substantiated and there are no known interactions, the orders actually require that "reliable scientific evidence generally accepted by experts in the field demonstrate that the amount and *combination of additional ingredients* is unlikely to impede or inhibit the effectiveness of the ingredients in the Essentially Equivalent Product." Decision and Order at 2, *In the Matter of GeneLink, Inc.* FTC File No. 112 3095 (emphasis added). My point is that the FDA does not require direct evidence regarding *combinations of individual ingredients deemed GRAS* but the order on its face requires scientific evidence demonstrating the effect of such combinations.

Statement of Commissioner Joshua D. Wright

Today the Commission announces five settlements involving the deceptive marketing of a variety of nutritional and dietary supplements, skincare products, and weight-loss remedies. While the course of business conduct, type of product and particular advertising claim at issue in each case differs, all share one common characteristic – the Commission has alleged that, in the course of advertising their products, each of these defendants has made false or unsubstantiated claims about the treatment of certain medical or health conditions.

Cases that challenge false or unsubstantiated claims – especially those involving serious medical conditions – are an important component of our agency's mission to protect consumers from economic injury. Indeed, the aggregate consumer injury in these particular matters is estimated to be $420 million and these settlement agreements will return approximately $33 million to consumers. I fully support the Commission's efforts to deter deceptive advertising and voted in favor of authorizing these particular settlements.

In crafting remedial relief in these cases, the Commission inevitably faces a tradeoff between deterring deceptive advertising and preserving the benefits to competition and consumers from truthful claims. Tailoring remedial relief – including the level of substantiation required – to the specific claims at issue is in the best interests of consumers.[1] I write today to express some of my views on this issue.

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[1] The Commission's determination of whether an advertiser has adequate substantiation in the first instance depends upon "a number of factors relevant to the benefits and costs of substantiating a particular claim. These factors include: 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." FTC Policy Statement Regarding Advertising Substantiation, appended to *Thompson Medical Co*., 104 F.T.C. 648, 839 (1984), *aff'd*, 791 F.2d 189 (D.C. Cir. 1986), *cert. denied*, 479 U.S. 1086 (1987). Formulating the required level of substantiation for injunctive relief should necessarily be grounded in the factors set forth in this policy statement, although additional considerations might also be relevant.

Concurring Statement

Each of the consent agreements announced today includes injunctive relief provisions requiring the settling parties to satisfy a standard of "competent and reliable scientific evidence" before again making the claims at issue. Each consent agreement further defines "competent and reliable scientific evidence" as requiring, among other things, two adequate and well-controlled human clinical studies (randomized controlled trials or RCTs) of the product. I encourage the Commission to explore more fully whether the articulation and scope of injunctive relief in these and similar settlements strikes the right balance between deterring deceptive advertising and preserving for consumers the benefits of truthful claims. The optimal amount and type of evidence to substantiate a future claim will vary from case to case. Similarly, a fact-specific inquiry may justify specially crafted injunctive relief in certain cases, such as bans, performance bonds or document retention requirements for underlying study data. I look forward to working with my fellow Commissioners to continue to examine and evaluate our formulation of the competent and reliable scientific evidence standard, as well as the ancillary injunctive provisions in consent agreements, in order to best protect consumers from the costs imposed upon them by deceptive advertising while encouraging competition and truthful advertising that benefits consumers.

Complaint

IN THE MATTER OF

CORELOGIC, INC.

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

Docket No. C-4458; File No. 131 0199
Complaint, May 20, 2014 – Decision, May 20, 2014

This consent order addresses the $661 million acquisition by CoreLogic, Inc. of certain assets of TPG VI Ontario 1 AIV L.P. The complaint alleges that the acquisition, if consummated, would violate Section 7 of the Clayton Act and Section 5 of the Federal Trade Commission Act by substantially lessening competition in the market for national assessor and recorder bulk data. Under the order respondent must grant Renwood RealtyTrac LLC a license for national assessor and recorder bulk data that will restore to the market a third competitor that will act independently of CoreLogic.

Participants

For the *Commission*: *Susan A. Huber* and *Cathlin Tully.*

For the *Respondent*: *David Beddow* and *Courtney Dyer*, *O'Melveny & Myers LLP*, and *David Ernst* and *Elaine Johnston*, *Allen & Overy 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 CoreLogic, Inc. ("CoreLogic") has agreed to acquire certain assets and interests of TPG VI Ontario 1 AIV L.P. ("TPG"), including its DataQuick Information Systems, Inc. ("DataQuick") national real property public record bulk data business, in violation of Section 5 of the Federal Trade Commission Act, as amended, 15 U.S.C. § 45, and which, if consummated, would violate Section 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. THE RESPONDENT

1. Respondent CoreLogic is a publicly-traded 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 40 Pacifica, Irvine, California, 92618-7471.

2. Respondent is engaged in, among other things, the licensing of national assessor and recorder bulk data in the United States.

3. 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 PROPOSED ACQUISITION

4. Pursuant to a Purchase and Sale Agreement ("Agreement") dated June 30, 2013, Respondent CoreLogic proposes to acquire certain assets and other interests, including DataQuick, from TPG for $661 million (the "Acquisition").

III. THE RELEVANT MARKET

5. For the purposes of this Complaint, the relevant line of commerce in which to analyze the effects of the Acquisition is the market for national assessor and recorder bulk data. National assessor and recorder bulk data consist of aggregated current and historical assessor and recorder data in bulk format for the vast majority of properties across the United States. National assessor and recorder bulk data providers offer data for all properties in covered jurisdictions in a standardized form.

6. For the purposes of this Complaint, the relevant geographic market in which to assess the competitive effects of

the Acquisition is the world. The relevant product is provided through electronic file transfer technology and can be supplied from anywhere in the world, notwithstanding the more limited geographic scope of the product itself.

IV. THE STRUCTURE OF THE MARKET

7. Assessor and recorder data provide information regarding ownership, status, and value of properties. Assessor data consist of public record information concerning characteristics of individual real property parcels, including, but not limited to, square footage, number of bedrooms and bathrooms, sales information, history, and assessed value. Assessor data are often referred to as tax assessor or tax roll data. Recorder data consist of public record information that is abstracted from transactions related to real property, including, but not limited to, deeds, mortgages, liens, assignments, and foreclosures, and contains information, including, but not limited to, the parties to the transaction, transfer tax, and purchase price. Assessor and recorder data and information are available from local (county or county-equivalent) government offices.

8. National assessor and recorder bulk data customers integrate the data into proprietary programs and systems for internal analyses or to create value-added products using the data, such as risk and fraud management tools, valuation models, and consumer-oriented property websites. National assessor and recorder bulk data customers cannot use regional assessor and recorder bulk data to create reliable internal analyses or value-added products. Regional bulk data providers offer data for certain limited geographic areas in the United States. National bulk data customers could not combine the data offered by regional firms to meet their needs because it would not provide the required geographic scope.

9. The Acquisition would significantly increase concentration in an already highly concentrated market for national assessor and recorder bulk data. CoreLogic and DataQuick are two of only three competitors that offer national assessor and recorder bulk data. Black Knight Financial Services, Inc. (formerly Lender Processing Services, Inc.) ("Black Knight")

is the other competitor. DataQuick obtained historical data through a prior acquisition and since 2004 has obtained on-going national assessor and recorder bulk data primarily through a license with CoreLogic. The license allows DataQuick to re-license the data in bulk and act independently of CoreLogic. DataQuick aggressively competes head-to-head against CoreLogic and Black Knight to furnish national assessor and recorder bulk data to customers, offering lower prices and less restrictive contract terms than its competitors.

V. ENTRY CONDITIONS

10. Entry or expansion into the market for national assessor and recorder bulk data would not occur in a timely, likely, or sufficient manner to deter or negate the anticompetitive effects of the Acquisition. In order to compete effectively in the market for national assessor and recorder bulk data, a firm must have several years of national historical data and an ability to provide go-forward national data. Firms currently offering assessor and recorder bulk data on a regional basis would not expand their historical and on-going offerings in a timely manner to provide national assessor and recorder bulk data. Regional firms could not combine their offerings to provide national assessor and recorder bulk data customers with the necessary geographic scope of data they require, nor is it likely that a firm combining the offerings of all of the regional firms could expand to offer national coverage in a timely enough manner to constrain any exercise of market power. It would be cost-prohibitive for a potential entrant to collect the necessary on-going and historical data. Finally, a potential entrant without its own historical data would not be able to enter the market for national assessor and recorder bulk data by obtaining a license from CoreLogic or Black Knight. Neither CoreLogic nor Black Knight has any incentive to offer such a license to a potential entrant only to create a new competitor.

VI. EFFECTS OF THE ACQUISITION

11. The effects of the Acquisition, if consummated, may be to substantially lessen competition and 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, among other things:

a. eliminating actual, direct, and substantial competition between Respondent CoreLogic and DataQuick;

b. increasing the likelihood and degree of coordinated interaction between or among Respondent CoreLogic and the remaining competitor, Black Knight; and

c. increasing the likelihood that Respondent CoreLogic unilaterally would exercise market power.

VII. VIOLATIONS CHARGED

12. The Agreement described in Paragraph 4 constitutes a violation of Section 5 of the Federal Trade Commission Act, as amended, 15 U.S.C. § 45.

13. The Acquisition described in Paragraph 4, if consummated, would constitute a violation of Section 7 of the Clayton Act, as amended, 15 U.S.C. § 18, and Section 5 of the Federal Trade Commission Act, as amended, 15 U.S.C. § 45.

WHEREFORE, THE PREMISES CONSIDERED, the Federal Trade Commission on this twentieth day of May, 2014, issues its Complaint against Respondent.

By the Commission, Commissioner McSweeny not participating.

DECISION AND ORDER
[PUBLIC RECORD VERSION]

The Federal Trade Commission ("Commission") having initiated an investigation of the proposed acquisition of certain assets and other interests of TPG VI Ontario 1 AIV L.P. ("TPG"), including its DataQuick Information Systems, Inc. ("DataQuick") national real property public record bulk data business, by CoreLogic, Inc. ("CoreLogic" or "Respondent"), and Respondent having been furnished thereafter with a copy of a draft of Complaint that the Bureau of Competition proposed to present to the Commission for its consideration and which, if issued 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 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 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 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 40 Pacifica, Irvine, California, 92618-7471.

2. The Federal Trade Commission has jurisdiction over the subject matter of this proceeding and over 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. "CoreLogic" or "Respondent" means CoreLogic, Inc., its directors, officers, employees, agents, representatives, predecessors, successors, and assigns; its joint ventures, subsidiaries, divisions, groups, and affiliates, in each case controlled by CoreLogic, including CoreLogic Solutions, LLC, CoreLogic Acquisition Co. I, LLC, CoreLogic Acquisition Co. II, LLC, and CoreLogic Acquisition Co. III, LLC; and the respective directors, officers, employees, agents, representatives, successors, and assigns of each.

B. "TPG" means TPG VI Ontario 1 AIV, L.P., its directors, officers, employees, agents, representatives, predecessors, successors, and assigns; its joint ventures, subsidiaries, divisions, groups, and affiliates, in each case controlled by TPG, including DataQuick; and the respective directors, officers, employees, agents, representatives, successors, and assigns of each.

C. "DataQuick" means DataQuick Information Systems, 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 at 9530 Towne Centre Drive, San Diego, California 92121. DataQuick is an indirect wholly-owned subsidiary of TPG.

D. "RealtyTrac" means Renwood RealtyTrac LLC, a limited liability company organized, existing and doing business under and by virtue of the laws of the State of Nevada, with its office and principal place of business at One Venture Plaza, Suite 300, Irvine, California 92618.

E. "Acquirer" means RealtyTrac or any other person or entity approved by the Commission to enter a Remedial Agreement.

F. "Acquisition" means CoreLogic's acquisition of certain non-corporate interests and assets of TPG through a Purchase and Sale Agreement dated June 30, 2013, by and among Property Data Holdings, Ltd., DataQuick Lending Solutions, Inc., and Decision Insight Information Group S.a.r.l., as Sellers, and CoreLogic Acquisition Co. I, LLC, CoreLogic Acquisition Co. II, LLC, and CoreLogic Acquisition Co. III, LLC, as Buyers, and solely with respect to, and as specified in Sections 5.4 and 5.7, Property Data Holdings, L.P., and solely with respect to, and as specified in, Sections 2.5, 2.7, 2.10(f), 5.7, 5.18, 5.21, 8.2(b), 8.7(b), and 9.15, CoreLogic Solutions, LLC.

G. "Acquisition Date" means the date on which the Acquisition is consummated.

H. "Assessor Data" means public record information concerning characteristics of individual real property parcels, including, but not limited to, square footage, number of bedrooms and bathrooms, sales information, history and assessed value. Assessor Data is often referred to as tax assessor or tax roll data.

I. "CoreLogic-RealtyTrac Agreement" means the Data License Agreement between CoreLogic Solutions, LLC and Renwood RealtyTrac, LLC, attached hereto as Confidential Appendix A.

J. "DataQuick Customer" means any person, business or other entity that had a contract to license or purchase, or who licensed or purchased, aggregated current or historical Assessor Data or Recorder Data in bulk format from DataQuick at any time after March 1, 2013.

K. "Divestiture Date" means the later of (1) the effective date of the Remedial Agreement; (2) the first date on which the Assessor Data, Recorder Data, automated model values, equity files, foreclosure flags, home price index data, and tax data delivery are being delivered to the Acquirer on an on-going basis pursuant to the delivery requirements in the Remedial Agreement; (3) the date on which all of the Licensed Historical Data is delivered to the Acquirer; or (4) the date on which the Relevant First Tier Business Records are delivered to the Acquirer.

L. "Divestiture Trustee(s)" means any person or entity appointed by the Commission pursuant to Paragraph IV of the Order to act as a trustee in this matter.

M. "Licensed Data" means Assessor Data, Recorder Data and Other Related Data, other than Licensed Historical Data, that is to be provided to the Acquirer pursuant to the delivery requirements in the CoreLogic-RealtyTrac Agreement or other Remedial Agreement.

N. "Licensed Historical Data" means the Assessor Data, Recorder Data and Other Related Data in the possession, custody or control of DataQuick on the day prior to the Acquisition Date, and the Licensed Data generated, collected, licensed or obtained by Respondent from the Acquisition Date through the date Respondent begins delivering all of the Licensed

Data on an on-going basis to the Acquirer pursuant to the delivery requirements in the CoreLogic-RealtyTrac Agreement or other Remedial Agreement.

O. "Other Related Data" means any data, derived data, or other product that a DataQuick Customer licensed or purchased through the same agreement under which the DataQuick Customer licensed or purchased Assessor Data or Recorder Data, including, but not limited to, automated model values, equity files, foreclosure flags, home price index data, and tax data delivery.

P. "Recorder Data" means public record information that is abstracted from transactions related to real property, including, but not limited to, deeds, mortgages, liens, assignments and foreclosures, and contains information, including, but not limited to, the parties to the transaction, transfer tax, and purchase price.

Q. "Relevant Employee" means any employee who was employed by DataQuick on the day prior to the Acquisition Date whose duties related, in whole or part, to gathering, obtaining, generating, manipulating, storing, marketing, selling or licensing Assessor Data, Recorder Data or Other Related Data.

R. "Relevant First Tier Business Records" means:

1. All documents required to be delivered under the Remedial Agreement;

2. All documents necessary to enable the Acquirer to receive, manage, verify, quality check, manipulate, reformulate and provide to DataQuick Customers the Licensed Data and Licensed Historical Data in the same manner as DataQuick; and

3. All contracts, licenses, agreements and purchase histories of DataQuick Customers.

S. "Relevant Long-Term Contract" means any contract, contract renewal, contract extension or other agreement that was entered into prior to the Acquisition Date and expires on or after March 31, 2017, between DataQuick and a DataQuick Customer through which the DataQuick Customer licenses or purchases Assessor Data or Recorder Data.

T. "Relevant Other Business Records" means all documents and information, other than Relevant First Tier Business Records, in the possession or control of DataQuick on the day prior to the Acquisition that relate to:

1. DataQuick Customers; *provided, however*, Relevant Other Business Records shall not include documents and other information that wholly concern products other than Assessor Data, Recorder Data or Other Related Data;

2. Marketing, selling and licensing of Assessor Data, Recorder Data and Other Related Data; and

3. Collecting, managing, manipulating, storing, and providing Assessor Data, Recorder Data and Other Related Data, including, but not limited to, intellectual property, proprietary software, quality control documents, record layouts, data manipulation and data formatting information.

U. "Relevant Renewal Contract" means (i) any contract, contract renewal, contract extension or other agreement between DataQuick and a DataQuick Customer that was entered into between July 1, 2013 and the Acquisition Date through which the DataQuick Customer licenses or purchases Assessor Data or Recorder Data; or (ii) any contract or other agreement between the Respondent and a DataQuick Customer that was entered into between July 1, 2013 and the Acquisition Date through which the DataQuick

Customer licenses or purchases Assessor Data or Recorder Data.

V. "Remedial Agreement" means the CoreLogic-RealtyTrac Agreement if approved by the Commission, or any other agreement between an Acquirer and the Respondent or a Divestiture Trustee that is entered into pursuant to this Order and approved by the Commission. The term Remedial Agreement includes the relevant agreement as approved by the Commission and all future amendments, exhibits, attachments, and schedules to such agreement.

W. "Transition Period" means a period of time lasting until eighteen (18) months after the Divestiture Date.

II.

IT IS FURTHER ORDERED that:

A. Not later than ten (10) days after the Acquisition Date, Respondent shall execute and make effective the CoreLogic-RealtyTrac Agreement,

Provided that, if, at the time the Commission determines to make this Order final, the Commission notifies Respondent that RealtyTrac is not an acceptable licensee of the Licensed Data and Licensed Historical Data, or the manner in which the Licensed Data and Licensed Historical Data was licensed is not acceptable, Respondent shall notify RealtyTrac and immediately rescind the CoreLogic-RealtyTrac Agreement, and within six (6) months from the date this Order becomes final, absolutely and in good faith, at no minimum price, license the Licensed Data and Licensed Historical Data to an Acquirer that receives the prior approval of the Commission and in a manner that receives the prior approval of the Commission.

B. Not later than ten (10) days after the Acquisition Date, Respondent shall license the Licensed Data to an

Acquirer in a manner that receives the approval of the Commission and conforms with the following:

1. The Licensed Data shall include at least the same scope and quality of Assessor Data, Recorder Data and Other Related Data as was collected, acquired, licensed, and generated by DataQuick prior to the Acquisition;

2. Respondent shall deliver the Licensed Data to the Acquirer in a manner that is at least as timely and accurate, and provides the same level of service, as Respondent provided to DataQuick prior to the Acquisition;

3. Within sixty (60) days of licensing the Licensed Data and Licensed Historical Data, Respondent shall begin delivering all of the Licensed Data to the Acquirer in a manner that conforms with the requirement of the Remedial Agreement and this Order;

4. Respondent shall deliver the Licensed Data to the Acquirer in a format (including record layout) and manner that is acceptable to the Acquirer, it being understood that if the Acquirer has agreed to provision of the data in a particular format and manner in a Remedial Agreement that such format and manner are acceptable to the Acquirer;

5. Respondent shall not restrict the marketing, licensing or use of the Licensed Data by the Acquirer, except as agreed to by the Acquirer and approved by the Commission in the Remedial Agreement;

6. Respondent shall not restrict the ability of the Acquirer to transfer or assign the license to the Licensed Data except as agreed to by the Acquirer and approved by the Commission in the Remedial Agreement; and

7. Respondent shall license and provide the Acquirer with the Licensed Data for a period of no less than five years except as agreed to by the Acquirer and approved by the Commission in the Remedial Agreement; *provided, however*, that the Monitor, in consultation with staff of the Commission, may, as necessary to achieve the remedial purposes of this Order, authorize up to two (2) one-year extensions of such period.

C. Not later than ten (10) days after the Acquisition Date, Respondent shall irrevocably license the Licensed Historical Data to an Acquirer in a manner that receives the approval of the Commission and conforms with the following:

1. Respondent CoreLogic shall deliver the Licensed Historical Data to the Acquirer upon entry of the license, except that Licensed Historical Data obtained after the date of the license shall be delivered to Acquirer on the same schedule as the Licensed Data;

2. Respondent shall deliver the Licensed Historical Data to the Acquirer in a format (including record layout) and manner that is acceptable to the Acquirer, it being understood that if the Acquirer has agreed to provision of the data in a particular format and manner in a Remedial Agreement that such format and manner are acceptable to the Acquirer;

3. Respondent shall not restrict the marketing, licensing or use of the Licensed Historical Data by the Acquirer, except as agreed to by the Acquirer and approved by the Commission in the Remedial Agreement; and

4. Respondent shall not restrict the ability of the Acquirer to transfer or assign the license to the Licensed Historical Data except as agreed to by the

Acquirer and approved by the Commission in the Remedial Agreement.

D. Not later than fifteen (15) days after the Remedial Agreement is executed, Respondent shall deliver to the Acquirer all Relevant First Tier Business Records, in their original format together with any software or other tools used by DataQuick to view and manipulate such records, or in an alternative format agreed to by both the Acquirer and the Respondent.

E. Not later than thirty (30) days after the Remedial Agreement is executed, Respondent shall deliver to the Acquirer all Relevant Other Business Records in their original format together with any software or other tools used by DataQuick to view and manipulate such records, or in an alternative format agreed to by both the Acquirer and the Respondent,

Provided, however, Respondent shall not be required to deliver a Relevant Other Business Record until ten (10) days after the Acquirer requests delivery of such record.

F. Continuing until the day after termination of the Transition Period, Respondent shall, upon reasonable request, provide the Acquirer with access to knowledgeable employees and information related to DataQuick's collection, manipulation, storage and provision of Assessor Data, Recorder Data and Other Related Data as needed to assist the Acquirer in collecting, manipulating, storing and providing to customers the Licensed Data and Licensed Historical Data as required by this Order and the Remedial Agreement. As part of this obligation, Respondent shall, on or before the day the Remedial Agreement is executed, designate one or more employees as transition coordinator(s) and shall provide the name and contact information for the transition coordinator(s) to the Acquirer, to the Commission and

the Monitor. The transition coordinator(s) shall be responsible for ensuring Respondent complies with its obligations to provide transition assistance as required by this Paragraph and the Remedial Agreement, including by timely providing knowledgeable employees and information to the Acquirer. Respondent shall ensure that the transition coordinator(s) has the authority, capability and resources necessary to meet Respondent's obligations under this paragraph and the Remedial Agreement.

G. In any agreement to provide a DataQuick Customer with Assessor Data or Recorder Data executed between the Acquisition Date and nine (9) months after the Divestiture Date, Respondent shall include a provision allowing the customer to terminate the agreement in order to license or purchase Assessor Data or Recorder Data from the Acquirer so long as the DataQuick Customer provides 180-days' written notice of its intent to terminate the agreement, *provided, however*, that the DataQuick Customer may, at any time after providing its written termination notice, revoke or postpone the effective date of such notice.

H. Respondent shall permit any DataQuick Customer to terminate a Relevant Renewal Contract in order to license or purchase Assessor Data and Recorder Data from the Acquirer so long as the DataQuick Customer provides 180-days' written notice of its intent to terminate the Relevant Renewal Contract, *provided, however*, that the DataQuick Customer may, at any time after providing its written termination notice, revoke or postpone the effective date of such notice.

I. Respondent shall permit any DataQuick Customer to terminate a Relevant Long-Term Contract on or after March 31, 2016, in order to license or purchase Assessor Data or Recorder Data from the Acquirer so long as the DataQuick Customer provides 180-days' written notice of its intent to terminate the Relevant

Long-Term Contract, *provided, however,* that the DataQuick Customer may, at any time after providing its written termination notice, revoke or postpone the effective date of such notice.

J. No later than thirty (30) days after the Remedial Agreement is executed, Respondent shall notify all DataQuick Customers who have either a Relevant Long-Term Contract or a Relevant Renewal Contract of their rights under this Order to terminate such agreement. Notification under this provision must comply with the following:

1. Notification must be sent to the person designated in the relevant customer agreement to receive notices or, if no such person has been designated, the Chief Executive Officer or General Counsel of the DataQuick Customer;

2. Notification must be sent by certified mail with return receipt requested, or electronic mail in a manner that provides documentation that the Notification was received and opened within 48 hours of being sent; and

3. Notification must be substantially in the form attached as Appendix C to this Order, and include a copy of the Order and Complaint or a link to the url on the ftc.gov website where the Order and Complaint may be located.

K. Respondent shall not directly or indirectly:

1. Require any Customer to make or pay any payment, penalty, or charge for, or provide any consideration in relation to, or otherwise deter, the exercise of the option to terminate and end a contract pursuant to Paragraph II.G, II.H, or II.I of this Order; or

2. Retaliate against or take any action adverse to the economic interests of any DataQuick Customer that exercises its rights under this Order,

Provided, however, that Respondent shall retain its right to enforce, or seek judicial remedies for, breaches of contracts based upon rights or causes of action that are unrelated to the exercise by a DataQuick Customer of its option to terminate, and

Provided further, however, that nothing in this provision shall prevent Respondent from competing for any customer in its ordinary course of business.

L. For a period lasting until one (1) year after the Divestiture Date:

1. Respondent shall, within ten (10) days of a request by the Acquirer, provide the following information to the Acquirer (to the extent permitted by applicable law and to the extent that Respondent has such information) regarding any Relevant Employee:

   a. The date of hire and effective service date;

   b. Job title or position held;

   c. A specific description of the Relevant Employee's responsibilities; *provided, however,* in lieu of this description, Respondent may provide the employee's most recent performance appraisal;

   d. The base salary or current wages;

   e. The most recent bonus paid, aggregate annual compensation and current target or guaranteed bonus, if any;

f. Employment status (*i.e.*, active or on leave or disability; full-time or part-time);

g. Any other material terms and conditions of employment in regard to such employee that are not otherwise generally available to similarly situated employees; and

h. Copies of all employee benefit plans and summary plan descriptions (if any) applicable to the relevant employees.

2. Respondent shall not interfere with the ability of the Acquirer to solicit, interview or hire any Relevant Employee and shall remove any impediments within the control of Respondent that may deter any Relevant Employee from accepting employment with the Acquirer, including, but not limited to, non-compete provisions and non-disclosure provisions related to documents, information, or knowledge acquired or created by the Relevant Employee before the Acquisition Date in any employment or other contracts. Respondent shall not make any counter-offer to a Relevant Employee who has received a written offer of employment from the Acquirer.

M. For a period lasting until two (2) years after the Divestiture Date, Respondent shall not solicit or otherwise attempt to induce any employee hired by the Acquirer to terminate his or her employment relationship with the Acquirer,

Provided, however, that Respondent may (1) hire any Relevant Employee whose employment has been terminated by the Acquirer or who independently applies for employment with Respondent, as long as such employee was not solicited in violation of the non-solicitation requirements contained herein; (2) advertise for employees in newspapers, trade publications or other media not targeted specifically at

Relevant Employees; or (3) hire a Relevant Employee who contacts Respondent on his or her own initiative without any direct or indirect solicitation or encouragement from Respondent.

N. The purpose of this Order is to enable the Acquirer to compete with Respondent in the provision of, marketing and licensing of Assessor Data and Recorder Data and to remedy the lessening of competition alleged in the Commission's Complaint.

III.

IT IS FURTHER ORDERED that:

A. The Commission may appoint a monitor or monitors ("Monitor") to assure that Respondent expeditiously complies with all obligations and performs all responsibilities required by this Order and the Remedial Agreement. The Monitor shall serve, without bond or other security, at the expense of Respondent, on such reasonable and customary terms and conditions to which the Monitor and Respondent agree and that the Commission approves.

B. The Commission appoints Mitchell S. Pettit as a Monitor and approves the agreement between Pettit and Respondent, attached as Appendix B to this Order.

C. The Monitor's duties and responsibilities shall include the following:

1. The Monitor shall act in a fiduciary capacity for the benefit of the Commission;

2. The Monitor shall have the power and authority to monitor Respondent's compliance with the terms of this Order, including the Remedial Agreement, and shall exercise such power and authority and carry out the duties and responsibilities of the

Monitor in a manner consistent with the purposes of this Order and in consultation with the Commission;

3. The Monitor shall, in his or her sole discretion, consult with third parties in the exercise of his or her duties under the Order or any agreement between the Monitor and Respondent, provided that such third parties enter into the same customary confidentiality agreements as the Monitor; and

4. The Monitor shall evaluate the reports submitted to the Commission by any Respondent pursuant to this Order and the Consent Agreement, and within thirty (30) days from the date the Monitor receives a report, report in writing to the Commission concerning performance by the submitting Respondent of its obligations under the Order.

D. Respondent shall grant and transfer to the Monitor, and such Monitor shall have, all rights, powers, and authority necessary to carry out the Monitor's duties and responsibilities, including, but not limited to, the following:

1. Respondent 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's compliance with this Order;

2. ubject to any demonstrated legally recognized privilege, Respondent shall provide the Monitor full and complete access to personnel, books, documents, records kept in the ordinary course of business, facilities and technical information, and such other relevant information as the Monitor may reasonably request related to Respondent's compliance with this Order;

3. Respondent shall deliver to the Monitor a copy of each report submitted to the Commission by such Respondent pursuant to the Order or the Consent Agreement;

4. The Monitor shall have authority to use the services of or 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;

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

6. Respondent may require the Monitor and each of the Monitor's consultants, accountants, attorneys and other representatives and assistants to sign an appropriate confidentiality agreement related to Respondent's materials and information received in connection with the performance of the Monitor's duties,

   Provided, however, that such agreement shall not restrict the Monitor from providing any information to the Commission or require the Monitor to report to the Respondent the substance of communications to or from the Commission or the Acquirer.

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 related to Commission materials and information received in connection with the performance of the Monitor's duties.

F. The Commission may on its own initiative, or at the request of the Monitor, issue such additional orders or directions as may be necessary or appropriate to assure compliance with the requirements of this Order.

G. If the Commission determines that the Monitor has ceased to act or failed to act diligently, the Commission may appoint a substitute Monitor. The Commission shall select the substitute Monitor, subject to the consent of Respondent, which consent shall not be unreasonably withheld. If Respondent has not opposed, in writing, including the reasons for opposing, the selection of any proposed substitute Monitor within ten (10) days after notice by the staff of the Commission to Respondent of the identity of any proposed substitute Monitor, Respondent shall be deemed to have consented to the selection of the proposed substitute Monitor.

H. The Monitor appointed pursuant to this Order may be the same Person appointed as a Divestiture Trustee pursuant to the relevant provisions of this Order.

I. The Monitor shall serve until the expiration of the Remedial Agreement under this Order, unless the Monitor's term is otherwise extended or limited by the Commission.

IV.

IT IS FURTHER ORDERED that:

A. If Respondent has not fully complied with the obligations specified in Paragraph II of this Order, the Commission may appoint a Divestiture Trustee to enter a Remedial Agreement in a manner that satisfies the requirements of Paragraph II. In the event that the Commission or the Attorney General brings an action pursuant to § 5(*l*) of the Federal Trade Commission Act, 15 U.S.C. § 45(*l*), or any other statute enforced by the Commission, Respondent shall consent to the appointment of a Divestiture Trustee in such action. 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 the Respondent to comply with this Order.

B. If a Divestiture Trustee is appointed by the Commission or a court pursuant to Paragraph IV of this Order, Respondent shall consent to the following terms and conditions regarding the Divestiture Trustee's powers, duties, authority, and responsibilities:

1. The Commission shall select the Divestiture Trustee, subject to the consent of Respondent, which consent shall not be unreasonably withheld. The Divestiture Trustee shall be a person with experience and expertise in acquisitions and divestitures. If Respondent has not opposed, in writing, including the reasons for opposing, the selection of any proposed Divestiture Trustee within ten (10) days after notice by the staff of the Commission to Respondent of the identity of any

proposed Divestiture Trustee, Respondent shall be deemed to have consented to the selection of the proposed Divestiture Trustee. The Commission shall require the Divestiture Trustee to sign a customary confidentiality agreement.

2. Subject to the prior approval of the Commission, the Divestiture Trustee shall have the exclusive power and authority to license the Licensed Data and Licensed Historical Data.

3. Within ten (10) days after appointment of the Divestiture Trustee, Respondent shall execute a trust agreement that, subject to the prior approval of the Commission and, in the case of a court-appointed Divestiture Trustee, of the court, transfers to the Divestiture Trustee all rights and powers necessary to permit the Divestiture Trustee to license the Licensed Data and Licensed Historical Data and enter a Remedial Agreement in a manner that satisfies the requirements of Paragraph II of the Order.

4. The Divestiture Trustee shall have twelve (12) months from the date the Commission approves the trust agreement described in Paragraph IV.B.3. to accomplish the license and execute a Remedial Agreement, which shall be subject to the prior approval of the Commission. If, however, at the end of the twelve-month period, the Divestiture Trustee has submitted a plan to license or believes that the license can be achieved within a reasonable time, the divestiture period may be extended by the Commission, or, in the case of a court-appointed Divestiture Trustee, by the court; *provided, however*, the Commission may extend the divestiture period only two (2) times.

5. The Divestiture Trustee shall have full and complete access to the personnel, books and records relating to the data that are required to be

licensed by this Order or to any other relevant information as the Divestiture Trustee may request. Respondent shall develop such financial or other information as the Divestiture Trustee may request and shall cooperate with the Divestiture Trustee. Respondent shall take no action to interfere with or impede the Divestiture Trustee's accomplishment of the license. Any delays in licensing caused by Respondent shall extend the time for the licensing 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.

6. The Divestiture Trustee shall use his or her best efforts to negotiate the most favorable price and terms available in each license that is submitted to the Commission, subject to Respondent's absolute and unconditional obligation to license at no minimum price. The license shall be made in the manner and to a Commission-approved Acquirer as required by this Order; *provided, however*, if the Divestiture Trustee receives bona fide offers from more than one acquiring entity, and if the Commission determines to approve more than one such acquiring entity, the Divestiture Trustee shall license 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) business days of receiving notification of the Commission's approval.

7. The Divestiture Trustee shall serve, without bond or other security, at the cost and expense of Respondent, on such reasonable and customary terms and conditions as the Commission or a court may set. The Divestiture Trustee shall have the authority to employ, at the cost and expense of Respondent, such consultants, accountants, attorneys, investment bankers, business brokers, appraisers, and other representatives and assistants

as are necessary to carry out the Divestiture Trustee's duties and responsibilities. The Divestiture Trustee shall account for all monies derived from the license and all expenses incurred. After approval by the Commission and, in the case of a court-appointed Divestiture Trustee, by the court, of the account of the Divestiture Trustee, including fees for his or her services, all remaining monies shall be paid at the direction of the Respondent, and the Divestiture Trustee's power shall be terminated. The compensation of the Divestiture Trustee shall be based at least in significant part on a commission arrangement contingent on the licensing of all Licensed Data and Licensed Historical Data.

8. Respondent shall indemnify the Divestiture Trustee and hold the Divestiture Trustee harmless against any losses, claims, damages, liabilities, or expenses arising out of, or in connection with, the performance of the Divestiture Trustee's duties, including all reasonable fees of counsel and other expenses incurred in connection with the preparation for, or defense of, any claim, whether or not resulting in any liability, except to the extent that such losses, claims, damages, liabilities, or expenses result from gross negligence, willful or wanton acts, or bad faith by the Divestiture Trustee.

9. If the Divestiture Trustee ceases to act or fails to act diligently, a substitute Divestiture Trustee shall be appointed in the same manner as provided in Paragraph IV.A. of this Order.

10. The Commission or, in the case of a court-appointed trustee, the court, may on its own initiative or at the request of the Divestiture Trustee issue such additional orders or directions as may be necessary or appropriate to accomplish the license required by this Order.

11. The Divestiture Trustee shall report in writing to Respondent and the Commission every sixty (60) days concerning the Divestiture Trustee's efforts to accomplish the license.

12. Respondent may require the Divestiture Trustee to sign a customary confidentiality agreement; *provided*, *however*, such agreement shall not restrict the Divestiture Trustee from providing any information to the Commission.

V.

IT IS FURTHER ORDERED that:

A. The Remedial Agreement shall be incorporated by reference into this Order and made a part hereof. Further, nothing in the Remedial Agreement shall limit or contradict, or be construed to limit or contradict, the terms of this Order, it being understood that nothing in this Order shall be construed to reduce any rights or benefits of the Acquirer or to reduce any obligations of Respondent under a Remedial Agreement. Respondent shall comply with the terms of the Remedial Agreement, and a breach by Respondent of any term of the Remedial Agreement shall constitute a violation of this Order. To the extent that any term of the Remedial Agreement conflicts with a term of this Order such that Respondent cannot fully comply with both, Respondent shall comply with the term of this Order.

B. Respondent shall include in the Remedial Agreement a specific reference to this Order and the remedial purposes thereof.

C. Between the date the Commission grants approval of the Remedial Agreement and the date the Remedial Agreement becomes effective, Respondent shall not modify or amend any material term of the Remedial Agreement without the prior approval of the

Commission. Further, any failure to meet any material condition precedent to closing (whether waived or not) shall constitute a violation of this Order.

D. During the term of the Remedial Agreement, Respondent shall not modify (materially or otherwise) the Remedial Agreement without the Commission's prior approval pursuant to Rule §2.41(f), 16 C.F.R. §2.41(f).

VI.

IT IS FURTHER ORDERED that:

A. Respondent shall submit to the Commission and any Monitor appointed by the Commission:

1. Verified written reports:

a. Within thirty (30) days after the date this Order becomes final and every sixty (60) days thereafter until sixty (60) days after termination of the Transition Period;

b. On the first anniversary of the date on which this Order becomes final, and annually thereafter until one year after termination of the Remedial Agreement,

which reports shall set forth in detail the manner and form in which it intends to comply, is complying, and has complied with this Order and the Remedial Agreement since the filing of any previous compliance report, and shall, *inter alia*, describe the status of any transition project plan in a Remedial Agreement, and identify all DataQuick Customers who have provided notice of termination pursuant to Paragraph II above, when such customer provided notice of termination and whether the relevant contract has been terminated; and

2. Written notice of Divestiture Date within ten (10) business days of the Divestiture Date; and

3. A copy of the following documents:

   a. A Complaint filed in a court of competent jurisdiction by Respondent or the Acquirer that alleges breach of a Remedial Agreement;

   b. Correspondence from legal representatives of Respondent to the Acquirer, wherein Respondent alleges breach of a Remedial Agreement; and

   c. Correspondence from legal representatives of the Acquirer to Respondent, wherein the Acquirer alleges breach of a Remedial Agreement,

   which documents shall be delivered to the Commission within ten (10) business days of being sent, filed or received by Respondent.

B. 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, the Respondent shall, without restraint or interference, permit any duly authorized representative of the Commission:

1. 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

2. To interview officers, directors, or employees of the Respondent, who may have counsel present, regarding such matters.

VII.

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

A. Any proposed dissolution of Respondent;

B. Any proposed acquisition, merger or consolidation of Respondent; or

C. Any other change in Respondent, including, but not limited to, assignment and the creation, sale or dissolution of subsidiaries, if such change may affect compliance obligations arising out of this Order.

VIII.

IT IS FURTHER ORDERED that this Order shall terminate on May 20, 2024.

By the Commission, Commissioner McSweeny not participating.

In re CoreLogic, Inc.

Confidential Appendix A

CoreLogic-RealtyTrac Agreement

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

In re CoreLogic, Inc.

Appendix B

Monitor Agreement

In re CoreLogic, Inc.

Confidential Appendix B-1

Monitor Agreement Exhibits A (Form of License Agreement) and B (Fee Schedule)

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

In re CoreLogic, Inc.

Appendix C

Notice of Termination Rights

March __, 2014
[Company Name]
Attention: [Company Representative]
[Street Address]
[City, State, Zip]

Dear [ ]:

On March [x], 2014, CoreLogic Solutions, LLC ("CoreLogic") acquired DataQuick Information Systems, Inc. ("DataQuick"). To settle Federal Trade Commission ("FTC") concerns arising from the acquisition, CoreLogic has agreed to enter into a consent order ("the Order") with the FTC. A copy of the Order is available at [cite url].

Pursuant to the Order, CoreLogic is licensing assessor and recorder data and certain ancillary products to [Renwood RealtyTrac LLC ("RealtyTrac") or other Acquirer] so that [RealtyTrac or other Acquirer] can offer you the bulk data and related products that DataQuick provided customers through DataFile Services License Agreements ("License Agreements"). The Order also requires CoreLogic to allow certain customers, including you, to terminate their License Agreements with DataQuick, in whole or in part, in order to obtain bulk assessor and recorder data from [RealtyTrac or other Acquirer].

If you wish to terminate your License Agreement, you must send a written termination notice to CoreLogic at least one-hundred and eighty (180) days before the date you want the termination to go into effect. Your written notice must state you are terminating your license agreement to begin obtaining bulk assessor and recorder data from [RealtyTrac or other Acquirer]. You may extend the effective date of, or revoke, your termination at any time before the termination takes effect.

You may exercise this termination right at any time during the term of your License Agreement, regardless of the termination date specified in your License Agreement or in any existing amendments to the License Agreement. CoreLogic will not charge you any fee for exercising this early termination right. Further, the Order prohibits CoreLogic from lessening its service to you or retaliating against you for exercising the right to terminate your License Agreement or obtain bulk assessor or recorder data from [RealtyTrac or other Acquirer].

If you have any questions concerning the FTC's Order, you may contact Mitchell S. Pettit, 33 Crimson Rose, Irvine, CA 92603, Tel (XXX) XXX-XXXX, Email mpettit@mspstrategic.com, who has been named Monitor under the terms of the Order. Your discussions with the Monitor will not be shared with CoreLogic or [RealtyTrac or other Acquirer] without your permission.

Thank you for your attention to this matter.

Sincerely,

[CoreLogic Contact]
[Contact Title]

ANALYSIS OF CONSENT ORDER TO AID PUBLIC COMMENT

INTRODUCTION

The Federal Trade Commission ("Commission") has accepted from CoreLogic, Inc. ("CoreLogic"), subject to final approval, an Agreement Containing Consent Order ("Consent Agreement") designed to remedy the anticompetitive effects resulting from CoreLogic's proposed acquisition of certain assets and other interests from TPG VI Ontario 1 AIV L.P. ("TPG"). Under the terms of the Decision and Order ("Order") contained in the

Consent Agreement, CoreLogic must grant Renwood RealtyTrac LLC ("RealtyTrac") a license for national assessor and recorder bulk data that will restore to the market a third competitor that will act independently of CoreLogic.

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 the Order final.

Pursuant to a Purchase and Sale Agreement dated June 30, 2013, CoreLogic proposes to acquire certain assets and other interests from TPG, including its DataQuick Information Systems, Inc. ("DataQuick") national real property public records bulk data business, for $661 million (the "acquisition"). The Commission's Complaint alleges that the acquisition, if consummated, would violate Section 7 of the Clayton Act, as amended, 15 U.S.C. § 18, and Section 5 of the Federal Trade Commission Act, as amended, 15 U.S.C. § 45, by substantially lessening competition in the market for national assessor and recorder bulk data.

THE PARTIES

CoreLogic, a publicly-traded company headquartered in Irvine, California, provides real property information, analytics, and services through a host of products tailored to the needs of customers in the lending, investment, and real estate industries. As part of its Data and Analytics segment, CoreLogic collects, maintains, and offers licenses for national assessor and recorder bulk data.

Among its various assets and interests, TPG wholly owns Decision Insight Information Group, which owns DataQuick. DataQuick provides real property information, analytics, and services to the real estate, mortgage lending, and secondary investor markets in the United States. As part of its business, DataQuick offers licenses for national assessor and recorder bulk data.

Analysis to Aid Public Comment

THE RELEVANT MARKET

The relevant product market in which to analyze the effects of the acquisition is the market for national assessor and recorder bulk data. National assessor and recorder bulk data consist of aggregated current and historical assessor and recorder data in bulk format for the vast majority of properties across the United States. National assessor and recorder bulk data offer data for all properties in covered jurisdictions in a standardized form.

Assessor and recorder data provide information regarding ownership, status, and value of properties. Assessor data consist of public record information concerning characteristics of individual real property parcels, including, but not limited to, square footage, number of bedrooms and bathrooms, sales information, history, and assessed value. Assessor data are often referred to as tax assessor or tax roll data. Recorder data consist of public record information abstracted from transactions related to real property, including, but not limited to, deeds, mortgages, liens, assignments, and foreclosures, the parties to the transaction, transfer tax, and purchase price. Assessor and recorder data and information are available from local (county or county-equivalent) government offices.

Customers integrate national assessor and recorder bulk data into proprietary programs and systems for internal analyses or to create value-added products using the data, such as risk and fraud management tools, valuation models, and consumer-oriented property websites. National assessor and recorder bulk data customers cannot use regional assessor and recorder bulk data to create reliable internal analyses or value-added products. Regional bulk data providers offer data for certain limited geographic areas in the United States. National bulk data customers could not combine the data offered by regional firms to meet their needs because it would not provide the required geographic scope.

The relevant geographic market in which to assess the competitive effects of the acquisition is the world. The relevant product is provided through electronic file transfer technology and

can be supplied from anywhere in the world, notwithstanding the more limited geographic scope of the product itself.

THE STRUCTURE OF THE MARKET

The acquisition would significantly increase concentration in an already highly concentrated market for national assessor and recorder bulk data. CoreLogic and DataQuick are two of the three firms that offer national assessor and recorder bulk data. Black Knight Financial Services, Inc. (formerly Lender Processing Services, Inc.) ("Black Knight") is the only other competitor. DataQuick obtained historical data through a prior acquisition and since 2004 has obtained on-going national assessor and recorder bulk data primarily through a license with CoreLogic. The license allows DataQuick to re-license the data in bulk and act independently of CoreLogic. DataQuick aggressively competes head-to-head against CoreLogic and Black Knight to furnish national assessor and recorder bulk data to customers, offering lower prices and less restrictive license terms than its competitors.

ENTRY CONDITIONS

Without the Consent Agreement, entry or expansion into the market for national assessor and recorder bulk data would not occur in a timely, likely, or sufficient manner to deter or negate the anticompetitive effects of the acquisition. In order to compete effectively in the market for national assessor and recorder bulk data, a firm typically must have several years of national historical data and an ability to provide go-forward national data. It would be cost-prohibitive for a potential entrant to collect the necessary historical and go-forward data.

Firms currently offering assessor and recorder bulk data on a regional basis would not expand their historical and on-going offerings in a timely manner to provide national assessor and recorder bulk data. Regional firms could not combine their offerings to provide national assessor and recorder bulk data customers with the necessary geographic scope of data they require, nor is it likely that a firm combining the offerings of all of the regional firms could expand to offer national coverage in a timely enough manner to constrain any exercise of market power.

Finally, a potential entrant without its own historical data would not be able to enter the market for national assessor and recorder bulk data by obtaining a license from CoreLogic or Black Knight. Neither CoreLogic nor Black Knight has any incentive to offer such a license to a potential entrant that will compete against them. DataQuick has been able to obtain a license because it is unlike any other potential licensee; it owns historical data and could credibly threaten to enter the market for national assessor and recorder bulk data without a license.

EFFECTS OF THE ACQUISITION

The acquisition may substantially lessen competition in the market for national assessor and recorder bulk data. The acquisition will eliminate actual, direct, and substantial competition between CoreLogic and DataQuick. Further, the acquisition may increase the likelihood and degree of coordination between CoreLogic and the only other remaining competitor, Black Knight, and the likelihood that CoreLogic will exercise market power unilaterally post-acquisition.

THE DECISION AND ORDER

The Order resolves the competitive concerns raised by the acquisition by restoring to the market a third competitor. The Order requires CoreLogic to grant RealtyTrac a license that allows it to replicate DataQuick's data offerings and competitive position. The Order does this by requiring CoreLogic to provide RealtyTrac with the data, information, support, and access to customers it needs to enter successfully and compete in the market for national assessor and recorder bulk data. RealtyTrac has the relevant industry experience, reputation, and resources to enter the relevant market successfully under the terms of the Order. RealtyTrac operates an online marketplace of foreclosure real property listings and provides national foreclosure data and services to real estate consumers, investors, and professionals. As part of its business, RealtyTrac collects, maintains, and offers licenses for foreclosure data for properties throughout the United States.

The license required by the Order allows RealtyTrac to step into the shoes of DataQuick as CoreLogic's licensee. The Order requires that CoreLogic grant a license to RealtyTrac for national assessor and recorder bulk data of the "same scope and quality" as DataQuick provides its customers today. The Order requires that the license include both current and historical data and several ancillary derived data sets that DataQuick provides. The Order requires that CoreLogic offer the license to RealtyTrac for no less than 5 years, and provides that a Monitor appointed by the Commission may, if needed, extend the license for two additional one-year terms. The Commission must either approve, or waive its right to approve, any proposed modification to the license.

The license terms and post-termination rights are substantially similar to those in DataQuick's license with CoreLogic, putting RealtyTrac in the same competitive position relative to CoreLogic as DataQuick is today. The license allows RealtyTrac to offer customers not only the data, but also the services, that CoreLogic and DataQuick offer to customers. Further, the license permits RealtyTrac to re-license the data in bulk and positions RealtyTrac to remain in the relevant market following the license's termination.

The Order includes additional provisions that provide RealtyTrac with the information and support it needs to begin offering bulk data licenses to customers as seamlessly and quickly as possible following Commission approval. The Order requires CoreLogic to provide RealtyTrac with access to information regarding customers and data management, including the information necessary to provide data to customers in the same manner as DataQuick. Moreover, the Order requires that CoreLogic provide RealtyTrac with access to technical support for 18 months to assist its management and provision of the data. Lastly, the Order helps RealtyTrac, at its option, hire and retain former DataQuick employees by requiring CoreLogic to waive certain non-compete and non-disclosure agreements during the first year and prohibiting CoreLogic from attempting to hire DataQuick employees away from RealtyTrac for two years.

The Order also requires CoreLogic to provide certain DataQuick customers with the opportunity to terminate their

contracts early and switch to RealtyTrac. These early termination provisions will give RealtyTrac more customers to compete for and will ensure that all DataQuick customers will be able to take advantage of RealtyTrac's entry during the first three years RealtyTrac is in the market. CoreLogic is required to permit these customers to terminate their agreements only in order to switch to RealtyTrac. Further, CoreLogic can require the customers to provide 180-days' notice of termination, although the Order requires CoreLogic to allow a customer to revoke or postpone the effective date of its termination notice at any time. CoreLogic must provide written notice to each customer who can terminate an existing contract under the Order and is prohibited from imposing penalties on or retaliating against customers that exercise their early termination rights.

There are three groups of customers that CoreLogic must allow to terminate their license agreements with 180-days' notice in order to switch to RealtyTrac. The first are DataQuick customers who renewed a DataQuick contract or switched to CoreLogic between July 1, 2013, and the acquisition date. The second are DataQuick customers who enter into or renew their licenses during the first nine months following the acquisition. The final group of DataQuick customers includes those who, prior to the acquisition, executed licenses with DataQuick that expire on or after March 31, 2017. The Order permits these customers to switch to RealtyTrac on or after March 31, 2016.

To ensure CoreLogic's compliance with the Order, the Order provides for the appointment of a Monitor as well as a Divestiture Trustee and imposes certain compliance requirements on CoreLogic. The Order appoints Mitchell S. Pettit as Monitor to oversee CoreLogic's ongoing compliance with their obligations and responsibilities under the Order. The Order also allows the Commission to appoint a Divestiture Trustee to assign, grant, license, divest, transfer, deliver, or otherwise convey the relevant data and information. Further, CoreLogic must submit periodic compliance reports and give the Commission prior notice of certain events that might affect its compliance obligations arising from the Order. Lastly, the Order terminates after 10 years.

Analysis to Aid Public Comment

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 Order or to modify its terms in any way.

Complaint

IN THE MATTER OF

AKORN, INC.
AND
HI-TECH PHARMACAL CO., INC.

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

Docket No. C-4452; File No. 131 0221
Complaint, April 11, 2014 – Decision, June 16, 2014

This consent order addresses the $640 million acquisition by Akorn Enterprises, Inc. of certain assets of Hi-Tech Pharmacal Co., Inc. The complaint alleges that the Acquisition, if consummated, would violate Section 7 of the Clayton Act and Section 5 of the Federal Trade Commission Act by lessening current and/or future competition in U.S. markets for (1) generic Ciloxan drops, (2) generic Ilotycin ointment, (3) generic Quixin drops, (4) generic Xylocaine jelly, and (5) generic EMLA cream. The consent order requires the parties to divest either Akorn's or Hi-Tech's rights and assets related to three generic ophthalmic prescription products: (1) generic Ciloxan drops, (2) generic Ilotycin ointment, and (3) generic Quixin drops, and two topical anesthetic products, (4) generic Xylocaine jelly, and (5) EMLA cream to Watson Laboratories, Inc., a wholly-owned subsidiary of Actavis plc.

Participants

For the *Commission*: *Erin L. Craig, Lisa D. DeMarchi Sleigh*, and *David Von Nirschl.*

For the *Respondents*: *Ian Conner* and *Christine Wilson, Kirkland & Ellis LLP*; and *Benjamin Bleiberg* and *David Evans, Chadbourne & Parke 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 Akorn, Inc. ("Akorn"), a corporation subject to the jurisdiction of the Commission, has agreed to acquire Hi-Tech Pharmacal Co., Inc. ("Hi-Tech"), a corporation subject to the jurisdiction of the Commission, in violation of Section 5 of the

Federal Trade Commission Act ("FTC Act"), as amended, 15 U.S.C. § 45, that such acquisition, if consummated, would violate Section 7 of the Clayton Act, as amended, 15 U.S.C. § 18, and Section 5 of the FTC Act, as amended, 15 U.S.C. § 45, and it appearing to the Commission that a proceeding in respect thereof would be in the public interest, hereby issues its Complaint, stating its charges as follows:

I. RESPONDENT

1. Respondent Akorn is a corporation organized, existing, and doing business under and by virtue of the laws of the State of Louisiana, with its corporate head office and principal place of business located at 1925 W. Field Court, Suite 300, Lake Forest, Illinois, 60045.

2. Respondent Hi-Tech is a corporation organized, existing, and doing business under and by virtue of the laws of the State of Delaware, with its corporate head office and principal place of business located at 369 Bayview Avenue, Amityville, New York, 11701.

3. Each Respondent is, and at all times relevant herein has been, engaged in commerce, as "commerce" is defined in Section 1 of the Clayton Act as amended, 15 U.S.C. § 12, and is a company whose business is in or affects commerce, as "commerce" is defined in Section 4 of the FTC Act, as amended, 15 U.S.C. § 44.

II. THE PROPOSED ACQUISITION

4. Pursuant to an Agreement and Plan of Merger dated August 26, 2013, Akorn proposes to acquire Hi-Tech for approximately $640 million (the "Acquisition"). The Acquisition is subject to Section 7 of the Clayton Act, as amended, 15 U.S.C. § 18.

III. THE RELEVANT MARKETS

5. For the purposes of this Complaint, the relevant lines of commerce in which to analyze the effects of the Acquisition are

the development, license, manufacture, marketing, distribution, and sale of the following pharmaceutical products:

a. generic ophthalmic drops containing 0.3% ciprofloxacin hydrochloride ("generic Ciloxan drops");

b. generic ophthalmic ointment containing 0.5% erythromycin ("generic Ilotycin ointment");

c. generic ophthalmic drops containing 0.5% levofloxacin ("generic Quixin drops");

d. generic topical jelly containing 2% lidocaine ("generic Xylocaine jelly");

e. generic topical cream containing 2.5% lidocaine with prilocaine ("generic EMLA cream");

6. For the purposes of this Complaint, the United States is the relevant geographic area in which to assess the competitive effects of the Acquisition in each of the relevant lines of commerce.

IV. THE STRUCTURE OF THE MARKETS

7. Generic Ciloxan drops are an antibiotic used to treat bacterial infections of the eye and corneal ulcers. The market for generic Ciloxan drops is highly concentrated with only four current suppliers—Akorn, Hi-Tech, Novartis Corp. ("Novartis"), and Nexus Pharmaceuticals, Inc. ("Nexus"), which distributes its product through PACK Pharmaceuticals ("PACK"). The Acquisition would reduce the number of suppliers of generic Ciloxan drops from four to three, would increase the Herfindahl-Hirschman Index concentration ("HHI") by 384, from 3234 to a post-merger total of 3618, and would create a merged entity having a market share in excess of 28%.

8. Generic Ilotycin ointment is an antibiotic used to treat and prevent bacterial eye infections. Three firms—Akorn, Bausch & Lomb, Inc. ("Bausch & Lomb"), and Perrigo Company plc ("Perrigo")—currently supply generic Ilotycin ointment in this

highly concentrated market, which has an HHI in excess of 4000. Hi-Tech is likely to be the next entrant into this market as it is the only firm expected to file an Abbreviated New Drug Application ("ANDA") with the U.S. Food and Drug Administration ("FDA") in the foreseeable future. Thus, the Acquisition would reduce the number of suppliers of generic Ilotycin ointment from four to three.

9. Generic Quixin drops are an antibiotic used to treat bacterial eye infections. The market for generic Quixin drops is highly concentrated with only three current suppliers—Akorn, Hi-Tech, and Nexus, which distributes its product through PACK. Akorn has a market share of approximately 15% and Hi-Tech has a market share of approximately 23%. The Acquisition would reduce the number of suppliers of generic Quixin drops from three to two, would increase the HHI by 690, from 4598 to a post-merger total of 5288, and would create a merged entity having a market share in excess of 38%.

10. Generic Xylocaine jelly is a topical jelly used to treat and prevent pain in procedures involving male and female urethra, to treat painful urethritis topically, and also as an anesthetic lubricant for endotracheal intubation. Three firms currently supply generic Xylocaine jelly in this highly concentrated market—Akorn, Hi-Tech, and Amphastar Pharmaceuticals, Inc. ("Amphastar"). Akorn has a market share of approximately 39% and Hi-Tech has a market share of approximately 14%. The Acquisition would reduce the number of suppliers of generic Xylocaine jelly from three to two, would increase the HHI by 1092, from 3926 to a post-merger total of 5018, and would create a merged entity having a market share in excess of 53%.

11. Generic EMLA cream is a topical anesthetic for use on normal, intact skin for local analgesia and on genital mucous membranes for superficial minor surgery or as a pretreatment for infiltration anesthesia. The market for generic EMLA cream is highly concentrated with only four current suppliers—Akorn, Hi-Tech, Novartis, and TOLMAR, Inc. ("TOLMAR"), which distributes its product through Impax Laboratories, Inc. ("Impax"). Akorn has a market share of approximately 12% and Hi-Tech has a market share of approximately 62%. The

Acquisition would reduce the number of suppliers of generic EMLA cream from four to three, would increase the HHI by 1488, from 4481 to a post-merger total of 5969, and would create a merged entity having a market share in excess of 74%.

V. ENTRY CONDITIONS

12. Entry into the relevant markets described in Paragraphs 5 and 6 would not be timely, likely, or sufficient in magnitude, character, and scope to deter or counteract the anticompetitive effects of the Acquisition. De novo entry would not take place in a timely manner because the combination of drug development times and FDA approval requirements would be lengthy. In addition, no other entry is likely to occur such that it would be timely and sufficient to deter or counteract the competitive harm likely to result from the Acquisition.

VI. EFFECTS OF THE ACQUISITION

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

a. by eliminating actual, direct, and substantial competition between Akorn and Hi-Tech and reducing the number of significant competitors in the markets for (1) generic Ciloxan drops; (2) generic Quixin drops; (3) generic Xylocaine jelly; and (4) generic EMLA cream, thereby increasing the likelihood that: (a) Akorn would be able to unilaterally exercise market power in these markets; (b) the remaining competitors would engage in coordinated interaction between or among each other; and (c) customers would be forced to pay higher prices; and

b. by eliminating future competition between Akorn and Hi-Tech and reducing the number of generic competitors in the market for generic Ilotycin ointment, thereby (a) increasing the likelihood that the

combined entity would forego or delay the launch of this product and (b) increasing the likelihood that the combined entity would delay, eliminate, or otherwise reduce the substantial additional price competition that would have resulted from an additional supplier of this product.

VII. VIOLATIONS CHARGED

14. The Agreement and Plan of Merger described in Paragraph 4 constitutes a violation of Section 5 of the FTC Act, as amended, 15 U.S.C. § 45.

15. The Acquisition described in Paragraph 4, if consummated, would constitute a violation of Section 7 of the Clayton Act, as amended, 15 U.S.C. § 18, and Section 5 of the FTC Act, as amended, 15 U.S.C. § 45.

WHEREFORE, THE PREMISES CONSIDERED, the Federal Trade Commission on this eleventh day of April, 2014 issues its Complaint against said Respondents.

By the Commission.

ORDER TO MAINTAIN ASSETS

The Federal Trade Commission ("Commission"), having initiated an investigation of the proposed acquisition by Respondent Akorn, Inc. ("Akorn") of the voting securities of Respondent Hi-Tech Pharmacal Co., Inc. ("Hi-Tech"), collectively "Respondents", and Respondents having been furnished thereafter with a copy of a draft of Complaint that the Bureau of Competition proposed to present to the Commission for its consideration and which, if issued by the Commission, would charge Respondents with violations of Section 7 of the Clayton

Act, as amended, 15 U.S.C. § 18, and Section 5 of the Federal Trade Commission Act, as amended, 15 U.S.C. § 45; and

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

The Commission having thereafter considered the matter and having determined 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 Akorn is a corporation organized, existing and doing business under and by virtue of the laws of the State of Louisiana, with its headquarters address located at 1925 W. Field Court, Suite 300, Lake Forest, Illinois 60045.

2. Respondent Hi-Tech 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 369 Bayview Avenue, Amityville, New York 11701.

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

ORDER

I.

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

A. "Akorn" means: Akorn, Inc., its directors, officers, employees, agents, representatives, successors, and assigns; and its joint ventures, subsidiaries, divisions, groups and affiliates in each case controlled by Akorn, Inc. (including, without limitation, Akorn Enterprises, Inc.), and the respective directors, officers, employees, agents, representatives, successors, and assigns of each. After the Acquisition, Akorn shall include Hi-Tech. As a result of the merger, Akorn Enterprises, Inc., a wholly owned subsidiary of Akorn Inc., will merge with and into Hi-Tech with Hi-Tech surviving as wholly-owned subsidiary of Akorn.

B. "Hi-Tech" means: Hi-Tech Pharmacal Co., Inc., its directors, officers, employees, agents, representatives, successors, and assigns; and its joint ventures, subsidiaries, divisions, groups and affiliates in each case controlled by Hi-Tech Pharmacal Co., Inc., and the respective directors, officers, employees, agents, representatives, successors, and assigns of each.

C. "Respondents" means Akorn and Hi-Tech, individually and collectively.

D. "Commission" means the Federal Trade Commission.

E. "Decision and Order" means the:

1. Proposed Decision and Order contained in the Consent Agreement in this matter until the

issuance of a final and effective Decision and Order by the Commission; and

2. Final Decision and Order issued by the Commission following the issuance and service of a final Decision and Order by the Commission in this matter.

F. "Divestiture Product Business(es)" means the Business of Respondents within the Geographic Territory specified in the Decision and Order related to each of the Divestiture Products to the extent that such Business is owned, controlled, or managed by the Respondents and the assets related to such Business to the extent such assets are owned by, controlled by, managed by, or licensed to, the Respondents.

G. "Interim Monitor" means any monitor appointed pursuant to Paragraph III of this Order to Maintain Assets or Paragraph III of the Decision and Order

H. "Orders" means the Decision and Order and this Order to Maintain Assets.

II.

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

A. Until Respondents fully transfer and deliver each of the respective Divestiture Product Assets to an Acquirer, Respondents shall take such actions as are necessary to maintain the full economic viability, marketability and competitiveness of each of the related Divestiture Product Businesses, to minimize any risk of loss of competitive potential for such Divestiture Product Businesses, and to prevent the destruction, removal, wasting, deterioration, or impairment of such Divestiture Product Assets except for ordinary wear and tear. Respondents shall not sell, transfer, encumber or otherwise impair the Divestiture

Product Assets (other than in the manner prescribed in the Decision and Order) nor take any action that lessens the full economic viability, marketability or competitiveness of the related Divestiture Product Businesses.

B. Until Respondents fully transfer and deliver each of the respective Divestiture Product Assets to an Acquirer, Respondents shall maintain the operations of the related Divestiture Product Businesses in the regular and ordinary course of business and in accordance with past practice (including regular repair and maintenance of the assets of such business) and/or as may be necessary to preserve the full economic marketability, viability, and competitiveness of such Divestiture Product Businesses and shall use their best efforts to preserve the existing relationships with the following: suppliers; vendors and distributors; High Volume Accounts; end-use customers; Agencies; employees; and others having business relations with each of the respective Divestiture Product Businesses. Respondents' responsibilities shall include, but are not limited to, the following:

1. providing each of the respective Divestiture Product Businesses with sufficient working capital to operate at least at current rates of operation, to meet all capital calls with respect to such business and to carry on, at least at their scheduled pace, all capital projects, business plans and promotional activities for such Divestiture Product Business;

2. continuing, at least at their scheduled pace, any additional expenditures for each of the respective Divestiture Product Businesses authorized prior to the date the Consent Agreement was signed by Respondents including, but not limited to, all research, Development, manufacturing, distribution, marketing and sales expenditures;

3. providing such resources as may be necessary to respond to competition against each of the Divestiture Products and/or to prevent any diminution in sales of each of the Divestiture Products during and after the Acquisition process and prior to the complete transfer and delivery of the related Divestiture Product Assets to an Acquirer;

4. providing such resources as may be necessary to maintain the competitive strength and positioning of each of the Divestiture Products that were marketed or sold by Respondents prior to August 26, 2013, at the related High Volume Accounts;

5. making available for use by each of the respective Divestiture Product Businesses funds sufficient to perform all routine maintenance and all other maintenance as may be necessary to, and all replacements of, the assets related to such business; and

6. providing such support services to each of the respective Divestiture Product Businesses as were being provided to such business by Respondents as of the date the Consent Agreement was signed by Respondents.

C. Until Respondents fully transfer and deliver each of the respective Divestiture Product Assets to an Acquirer, Respondents shall maintain a work force that is (i) at least as large in size (as measured in full time equivalents) as, and (ii) comparable in training, and expertise to, what has been associated with the Divestiture Products for the relevant Divestiture Product's last fiscal year.

D. For each Acquirer of a Divestiture Product, Respondents shall:

1. for a period of six (6) months from the Closing Date or until the hiring of twenty (20) Divestiture Product Core Employees by that Acquirer or its Manufacturing Designee, whichever occurs earlier, provide that Acquirer or its Manufacturing Designee with the opportunity to enter into employment contracts with the Divestiture Product Core Employees related to the Divestiture Products and assets acquired by that Acquirer. Each of these periods is hereinafter referred to as the "Divestiture Product Core Employee Access Period(s);"

2. not later than the earlier of the following dates: (i) ten (10) days after notice by staff of the Commission to Respondents to provide the Product Employee Information; or (ii) ten (10) days after written request by an Acquirer, provide that Acquirer or Proposed Acquirer(s) with the Product Employee Information related to the Divestiture Product Core Employees. Failure by Respondents to provide the Product Employee Information for any Divestiture Product Core Employee within the time provided herein shall extend the Divestiture Product Core Employee Access Period(s) with respect to that employee in an amount equal to the delay; *provided, however*, that the provision of such information may be conditioned upon the Acquirer's or Proposed Acquirer's written confirmation that it will (i) treat the information as confidential and, more specifically, (ii) use the information solely in connection with considering whether to provide or providing to Divestiture Product Core Employees the opportunity to enter into employment contracts during a Divestiture Product Core Employee Access Period, (iii) restrict access to the information to such of the Acquirer's or Proposed Acquirer's employees who need such access in connection with the specified and

permitted use, and (iv) destroy or return the information without retaining copies at such time as the specified and permitted use ends;

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

   provided, however, that, subject to the conditions of continued employment prescribed in this Order, this Paragraph shall not prohibit Respondents from continuing to employ any Divestiture Product Core Employee under the terms of that employee's employment with Respondents prior to the date of the written offer of employment from the Acquirer or its Manufacturing Designee to that employee;

4. until the Closing Date, provide all Divestiture Product Core Employees with reasonable financial incentives to continue in their positions and to research, Develop, manufacture and/or market the Divestiture Product(s) consistent with past practices and/or as may be necessary to preserve the marketability, viability and competitiveness of

the Divestiture Product(s) and to ensure successful execution of the pre-Acquisition plans for that Divestiture Product(s). Such incentives shall include a continuation of all employee compensation and benefits offered by Respondents until the Closing Date(s) for the divestiture of the assets related to the Divestiture Product has occurred, including regularly scheduled raises, bonuses, and vesting of pension benefits (as permitted by Law); and

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

   provided, however, Respondents may hire any former Divestiture Product Employee whose employment has been terminated by the Acquirer or its Manufacturing Designee or who independently applies for employment with a Respondent, as long as that employee was not solicited in violation of the nonsolicitation requirements contained herein;

   provided further, however, that this Paragraph does not require nor shall be construed to require Respondents to terminate the employment of any employee or to prevent Respondents from continuing to employ the Divestiture Product Core Employees in connection with the Acquisition;

   provided further, however, that any Respondent may do the following: (i) advertise for employees in newspapers, trade publications or other media not targeted specifically at the Divestiture Product

Employees; or (ii) hire a Divestiture Product Employee who contacts any Respondent on his or her own initiative without any direct or indirect solicitation or encouragement from any Respondent.

E. Pending divestiture of the Divestiture Product Assets, Respondents shall:

1. not use, directly or indirectly, any Confidential Business Information related to the Business of the Divestiture Products other than as necessary to comply with the following:

   a. the requirements of this Order;

   b. Respondents' obligations to each respective Acquirer under the terms of any related Remedial Agreement; or

   c. applicable Law;

2. not disclose or convey any such Confidential Business Information, directly or indirectly, to any Person except (i) the Acquirer of the particular Divestiture Assets, (ii) other Persons specifically authorized by such Acquirer to receive such information, (iii) the Commission, or (iv) the Interim Monitor (if any has been appointed);

3. not provide, disclose or otherwise make available, directly or indirectly, any such Confidential Business Information related to the marketing or sales of the Divestiture Products to the employees associated with the Business related to those Retained Products that are the therapeutic equivalent (as that term is defined by the FDA) of the Divestiture Products; and

4. institute procedures and requirements to ensure that the above-described employees:

    a. do not provide, disclose or otherwise make available, directly or indirectly, any Confidential Business Information in contravention of this Order to Maintain Assets; and

    b. do not solicit, access or use any Confidential Business Information that they are prohibited from receiving for any reason or purpose.

F. Not later than thirty (30) days from the earlier of (i) the Closing Date or (ii) the date this Order to Maintain Assets is issued by the Commission, Respondents shall provide written notification of the restrictions on the use and disclosure of the Confidential Business Information related to the Divestiture Products by Respondents' personnel to all of their employees who (i) may be in possession of such Confidential Business Information or (ii) may have access to such Confidential Business Information.

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

H. Respondents shall monitor the implementation by its employees and other personnel of all applicable

restrictions with respect to Confidential Business Information, and take corrective actions for the failure of such employees and personnel to comply with such restrictions or to furnish the written agreements and acknowledgments required by this Order to Maintain Assets.

I. The purpose of this Order to Maintain Assets is to maintain the full economic viability, marketability and competitiveness of the Divestiture Product Businesses within the Geographic Territory through their full transfer and delivery to an Acquirer, to minimize any risk of loss of competitive potential for the Divestiture Product Businesses within the Geographic Territory, and to prevent the destruction, removal, wasting, deterioration, or impairment of any of the Divestiture Product Assets except for ordinary wear and tear.

III.

IT IS FURTHER ORDERED that:

A. At any time after Respondents sign the Consent Agreement in this matter, the Commission may appoint a monitor ("Interim Monitor") to assure that Respondents expeditiously comply with all of their obligations and perform all of their responsibilities as required by the Orders and the Remedial Agreements.

B. The Commission shall select the Interim Monitor, subject to the consent of Respondents, which consent shall not be unreasonably withheld. If Respondents have not opposed, in writing, including the reasons for opposing, the selection of a proposed Interim Monitor within ten (10) days after notice by the staff of the Commission to Respondents of the identity of any proposed Interim Monitor, Respondents shall be deemed to have consented to the selection of the proposed Interim Monitor.

C. Not later than ten (10) days after the appointment of the Interim Monitor, Respondents shall execute an agreement that, subject to the prior approval of the Commission, confers on the Interim Monitor all the rights and powers necessary to permit the Interim Monitor to monitor Respondents' compliance with the relevant requirements of the Orders in a manner consistent with the purposes of the Orders.

D. If an Interim Monitor is appointed, Respondents shall consent to the following terms and conditions regarding the powers, duties, authorities, and responsibilities of the Interim Monitor:

1. The Interim Monitor shall have the power and authority to monitor Respondents' compliance with the divestiture and asset maintenance obligations and related requirements of the Orders, and shall exercise such power and authority and carry out the duties and responsibilities of the Interim Monitor in a manner consistent with the purposes of the Orders and in consultation with the Commission.

2. The Interim Monitor shall act in a fiduciary capacity for the benefit of the Commission.

3. The Interim Monitor shall serve until the date of completion by the Respondents of the divestiture of all Divestiture Product Assets and the transfer and delivery of the related Product Manufacturing Technology in a manner that fully satisfies the requirements of this Order and, with respect to each Divestiture Product that is a Contract Manufacture Product, until the earliest of: (i) the date the Acquirer of that Divestiture Product (or that Acquirer's Manufacturing Designee(s)) is approved by the FDA to manufacture that Divestiture Product and able to manufacture the Divestiture Product in commercial quantities, in a manner consistent with cGMP, independently of

the Respondents; (ii) the date the Acquirer of that Divestiture Product notifies the Commission and Respondents of its intention to abandon its efforts to manufacture such Divestiture Product; or (iii) the date of written notification from staff of the Commission that the Interim Monitor, in consultation with staff of the Commission, has determined that the relevant Acquirer has abandoned its efforts to manufacture such Divestiture Product;

provided, however, that, with respect to each Divestiture Product, the Interim Monitor's service shall not exceed five (5) years from the Order Date *unless* the Commission decides to extend or modify this period as may be necessary or appropriate to accomplish the purposes of the Orders.

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 ordinary course of business, facilities and technical information, and such other relevant information as the Interim Monitor may reasonably request, related to Respondents' compliance with its obligations under the Orders, including, but not limited to, its obligations related to the relevant assets. Respondents shall cooperate with any reasonable request of the Interim Monitor and shall take no action to interfere with or impede the Interim Monitor's ability to monitor Respondents' compliance with the Orders.

F. The Interim Monitor shall serve, without bond or other security, at the expense of Respondents, on such reasonable and customary terms and conditions as the Commission may set. The Interim Monitor shall have authority to employ, at the expense of Respondents, such consultants, accountants, attorneys and other representatives and assistants as are reasonably

necessary to carry out the Interim Monitor's duties and responsibilities.

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

H. Respondents shall report to the Interim Monitor in accordance with the requirements of the Orders and as otherwise provided in any agreement approved by the Commission. The Interim Monitor shall evaluate the reports submitted to the Interim Monitor by Respondents, and any reports submitted by each Acquirer with respect to the performance of Respondents' obligations under the Orders or the Remedial Agreement(s). Within thirty (30) days from the date the Interim Monitor receives these reports, the Interim Monitor shall report in writing to the Commission concerning performance by Respondents of their obligations under the Orders; *provided*, *however*, beginning ninety (90) days after Respondents have filed their final report pursuant to Paragraph VII.B. of the Decision and Order, and ninety (90) days thereafter, the Interim Monitor shall report in writing to the Commission concerning progress by each Acquirer toward obtaining FDA approval to manufacture each Divestiture Product and obtaining the ability to manufacture each Divestiture Product in commercial quantities, in a manner consistent with cGMP, independently of Respondents.

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.

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 Orders.

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

IV.

IT IS FURTHER ORDERED that within thirty (30) days after the date this Order to Maintain Assets is issued by the Commission, and every sixty (60) days thereafter until Respondents have fully complied with this Order to Maintain Assets and the Paragraphs that are enumerated in Paragraph VII.B. of the related Decision and Order, Respondents shall submit to the Commission a verified written report setting forth in

detail the manner and form in which they intend to comply, are complying, and have complied with the Orders. Respondents shall submit at the same time a copy of their report concerning compliance with the Orders to the Interim Monitor, if any Interim Monitor has been appointed. Respondents shall include in their reports, among other things that are required from time to time, a detailed description of their efforts to comply with the relevant paragraphs of the Orders, including:

A. a detailed description of all substantive contacts, negotiations, or recommendations related to (i) the divestiture and transfer of all relevant assets and rights, (ii) transitional services being provided by the Respondents to the relevant Acquirer, and (iii) the agreement(s) to Contract Manufacture; and

B. a detailed description of the timing for the completion of such obligations.

provided, *however*, that, after the Decision and Order in this matter becomes final and effective, the reports due under this Order to Maintain Assets may be consolidated with, and submitted to the Commission at the same time as, the reports required to be submitted by Respondent pursuant to Paragraph VII of the Decision and Order.

V.

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

A. any proposed dissolution of a Respondent;

B. any proposed acquisition, merger or consolidation of a Respondent; or

C. any other change in a Respondent including, but not limited to, assignment and the creation or dissolution of subsidiaries, if such change might affect compliance obligations arising out of the Orders.

VI.

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

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

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

VII.

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

A. three (3) days after the Commission withdraws its acceptance of the Consent Agreement pursuant to the provisions of Commission Rule 2.34, 16 C.F.R. § 2.34; or

B. The day after the divestiture of all of the Divestiture Product Assets, as required by and described in the Decision and Order, has been completed and the Interim Monitor, in consultation with Commission staff and the Acquirer(s), notifies the Commission that

all assignments, conveyances, deliveries, grants, licenses, transactions, transfers and other transitions related to such divestitures are complete, or the Commission otherwise directs that this Order to Maintain Assets is terminated.

By the Commission.

DECISION AND ORDER
[Public Record Version]

The Federal Trade Commission ("Commission"), having initiated an investigation of the proposed acquisition by Respondent Akorn, Inc. ("Akorn") of the voting securities of Respondent Hi-Tech Pharmacal Co., Inc. ("Hi-Tech"), collectively "Respondents", and Respondents having been furnished thereafter with a copy of a draft of Complaint that the Bureau of Competition proposed to present to the Commission for its consideration and which, if issued by the Commission, would charge Respondents with violations of Section 7 of the Clayton Act, as amended, 15 U.S.C. § 18, and Section 5 of the Federal Trade Commission Act, as amended, 15 U.S.C. § 45; and

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

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

have violated the said Acts, and that a Complaint should issue stating its charges in that respect, and having 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 Akorn is a corporation organized, existing and doing business under and by virtue of the laws of the State of Louisiana, with its headquarters address located at 1925 W. Field Court, Suite 300, Lake Forest, Illinois 60045.

2. Respondent Hi-Tech 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 369 Bayview Avenue, Amityville, New York 11701.

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

ORDER

I.

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

A. "Akorn" means: Akorn, Inc., its directors, officers, employees, agents, representatives, successors, and assigns; and its joint ventures, subsidiaries, divisions, groups and affiliates in each case controlled by Akorn, Inc. (including, without limitation, Akorn Enterprises, Inc.), and the respective directors, officers, employees, agents, representatives, successors, and assigns of

each. After the Acquisition, Akorn shall include Hi-Tech. As a result of the merger, Akorn Enterprises, Inc., a wholly owned subsidiary of Akorn Inc., will merge with and into Hi-Tech with Hi-Tech surviving as wholly-owned subsidiary of Akorn.

B. "Hi-Tech" means: Hi-Tech Pharmacal Co., Inc., its directors, officers, employees, agents, representatives, successors, and assigns; and its joint ventures, subsidiaries, divisions, groups and affiliates in each case controlled by Hi-Tech Pharmacal Co., Inc., and the respective directors, officers, employees, agents, representatives, successors, and assigns of each.

C. "Respondents" means Akorn and Hi-Tech, individually and collectively.

D. "Commission" means the Federal Trade Commission.

E. "Acquirer(s)" means the following:

1. a Person specified by name in this Order to acquire particular assets or rights that a Respondent(s) is required to assign, grant, license, divest, transfer, deliver, or otherwise convey pursuant to this Order and that has been approved by the Commission to accomplish the requirements of this Order in connection with the Commission's determination to make this Order final and effective; or

2. a Person approved by the Commission to acquire particular assets or rights that a Respondent(s) is required to assign, grant, license, divest, transfer, deliver, or otherwise convey pursuant to this Order.

F. "Acquisition" means Respondent Akorn's acquisition of fifty percent (50%) or more of the voting securities of Hi-Tech. The Acquisition is contemplated pursuant to an *Agreement and Plan of Merger* between Akorn, Inc., Akorn Enterprises, Inc. and Hi-Tech Pharmacal

Co., Inc., dated as of August 26, 2013, submitted to the Commission.

G. "Acquisition Date" means the date on which the Acquisition is consummated.

H. "Agency(ies)" means any government regulatory authority or authorities in the world responsible for granting approval(s), clearance(s), qualification(s), license(s), or permit(s) for any aspect of the research, Development, manufacture, marketing, distribution, or sale of a Product. The term "Agency" includes, without limitation, the United States Food and Drug Administration ("FDA").

I. "Application(s)" means all of the following: "New Drug Application" ("NDA"), "Abbreviated New Drug Application" ("ANDA"), "Supplemental New Drug Application" ("SNDA"), or "Marketing Authorization Application" ("MAA"), the applications for a Product filed or to be filed with the FDA pursuant to 21 C.F.R. Part 314 et seq., and all supplements, amendments, and revisions thereto, any preparatory work, registration dossier, drafts and data necessary for the preparation thereof, and all correspondence between the Respondent and the FDA related thereto. The term "Application" also includes an "Investigational New Drug Application" ("IND") filed or to be filed with the FDA pursuant to 21 C.F.R. Part 312, and all supplements, amendments, and revisions thereto, any preparatory work, registration dossier, drafts and data necessary for the preparation thereof, and all correspondence between the Respondent and the FDA related thereto.

J. "Business" means the research, Development, manufacture, commercialization, distribution, marketing, importation, advertisement and sale of a Product.

K. "Categorized Assets" means the following assets and rights of the specified Respondent (as that Respondent is identified in the definition of the specified Divestiture Product), as such assets and rights are in existence as of the date the Respondent signs the Agreement Containing Consent Orders in this matter and as are maintained by the Respondent in accordance with the Asset Maintenance Order until the Closing Date:

1. all rights to all of the Applications related to the specified Divestiture Product;

2. all Product Intellectual Property related to the specified Divestiture Product that is not Product Licensed Intellectual Property;

3. all Product Approvals related to the specified Divestiture Product;

4. all Product Manufacturing Technology related to the specified Divestiture Product that is not Product Licensed Intellectual Property;

5. all Product Marketing Materials related to the specified Divestiture Product;

6. all Product Scientific and Regulatory Material related to the specified Divestiture Product;

7. all Website(s) related exclusively to the specified Divestiture Product;

8. the content related exclusively to the specified Divestiture Product that is displayed on any Website that is not dedicated exclusively to the specified Divestiture Product;

9. a list of all of the NDC Numbers related to the specified Divestiture Product, and rights, to the extent permitted by Law:

a. to require Respondent to discontinue the use of those NDC Numbers in the sale or marketing of the specified Divestiture Product *except* for returns, rebates, allowances, and adjustments for such Product sold prior to the Closing Date and *except* as may be required by applicable Law and *except* as is necessary to give effect to the transactions contemplated under any applicable Remedial Agreement;

b. to prohibit Respondent from seeking from any customer any type of cross- referencing of those NDC Numbers with any Retained Product(s) *except* for returns, rebates, allowances, and adjustments for such Product sold prior to the Closing Date and *except* as may be required by applicable Law;

c. to seek to change any cross-referencing by a customer of those NDC Numbers with a Retained Product (including the right to receive notification from the Respondent of any such cross-referencing that is discovered by Respondent);

d. to seek cross-referencing from a customer of the Respondent's NDC Numbers related to such Divestiture Product with the Acquirer's NDC Numbers related to such Divestiture Product;

e. to approve the timing of Respondent's discontinued use of those NDC Numbers in the sale or marketing of such Divestiture Product *except* for returns, rebates, allowances, and adjustments for such Divestiture Product sold prior to the Closing Date and *except* as may be required by applicable Law and *except* as is necessary to give effect to the transactions contemplated under any applicable Remedial Agreement; and

f. to approve any notification(s) from Respondent to any customer(s) regarding the use or discontinued use of such NDC numbers by the Respondent prior to such notification(s) being disseminated to the customer(s);

10. all Product Development Reports related to the specified Divestiture Product;

11. at the option of the Acquirer of the specified Divestiture Product, all Product Assumed Contracts related to the specified Divestiture Product (copies to be provided to that Acquirer on or before the Closing Date);

12. all patient registries related to the specified Divestiture Product, and any other systematic active post-marketing surveillance program to collect patient data, laboratory data and identification information required to be maintained by the FDA to facilitate the investigation of adverse effects related to the specified Divestiture Product (including, without limitation, any Risk Evaluation Mitigation Strategy as defined by the FDA);

13. for any specified Divestiture Product that has been marketed or sold by a Respondent prior to the Closing Date, a list of all customers and targeted customers for the specified Divestiture Product and a listing of the net sales (in either units or dollars) of the specified Divestiture Product to such customers on either an annual, quarterly, or monthly basis including, but not limited to, a separate list specifying the above-described information for the High Volume Accounts and including the name of the employee(s) for each High Volume Account that is or has been responsible for the purchase of the specified Divestiture Product on behalf of the High Volume

Account and his or her business contact information;

14. for each specified Divestiture Product that is a Contract Manufacture Product:

    a. a list of the inventory levels (weeks of supply) for each customer (*i.e.*, retailer, group purchasing organization, wholesaler or distributor) as of the Closing Date; and

    b. anticipated reorder dates for each customer as of the Closing Date;

15. at the option of the Acquirer of the specified Divestiture Product and to the extent approved by the Commission in the relevant Remedial Agreement, all inventory in existence as of the Closing Date including, but not limited to, raw materials, packaging materials, work-in-process and finished goods related to the specified Divestiture Product;

16. copies of all unfilled customer purchase orders for the specified Divestiture Product as of the Closing Date, to be provided to the Acquirer of the specified Divestiture Product not later than five (5) days after the Closing Date;

17. at the option of the Acquirer of the specified Divestiture Product, all unfilled customer purchase orders for the specified Divestiture Product; and

18. all of the Respondent's books, records, and files directly related to the foregoing;

provided, however, that "Categorized Assets" shall not include: (i) documents relating to any Respondent's general business strategies or practices relating to the conduct of its Business of generic pharmaceutical Products, where such documents do not discuss with

particularity the specified Divestiture Product; (ii) administrative, financial, and accounting records; (iii) quality control records that are determined not to be material to the manufacture of the specified Divestiture Product by the Interim Monitor or the Acquirer of the specified Divestiture Product; (iv) formulas used to determine the final pricing of any Divestiture Product and/or Retained Products to customers and competitively sensitive pricing information that is exclusively related to the Retained Products; (v) any real estate and the buildings and other permanent structures located on such real estate; and (vi) all Product Licensed Intellectual Property;

provided further, *however*, that in cases in which documents or other materials included in the assets to be divested contain information: (i) that relates both to the specified Divestiture Product and to Retained Products or Businesses of any Respondent and cannot be segregated in a manner that preserves the usefulness of the information as it relates to the specified Divestiture Product; or (ii) for which any Respondent has a legal obligation to retain the original copies, the specified Respondent shall be required to provide only copies or relevant excerpts of the documents and materials containing this information. In instances where such copies are provided to the Acquirer of the specified Divestiture Product, the specified Respondent shall provide that Acquirer access to original documents under circumstances where copies of documents are insufficient for evidentiary or regulatory purposes. The purpose of this provision is to ensure that the specified Respondent provides the Acquirer with the above-described information without requiring the Respondent completely to divest itself of information that, in content, also relates to Retained Product(s).

L. "cGMP" means current Good Manufacturing Practice as set forth in the United States Federal Food, Drug,

and Cosmetic Act, as amended, and includes all rules and regulations promulgated by the FDA thereunder.

M. "Ciprofloxacin Products" means the following: the Products in Development, manufactured, marketed, sold, owned or controlled by Respondent Hi-Tech pursuant to ANDA No. 076673, and any supplements, amendments, or revisions thereto.

N. "Clinical Trial(s)" means a controlled study in humans of the safety or efficacy of a Product, and includes, without limitation, such clinical trials as are designed to support expanded labeling or to satisfy the requirements of an Agency in connection with any Product Approval and any other human study used in research and Development of a Product.

O. "Closing Date" means, as to each Divestiture Product, the date on which a Respondent (or a Divestiture Trustee) consummates a transaction to assign, grant, license, divest, transfer, deliver, or otherwise convey assets related to such Divestiture Product to an Acquirer pursuant to this Order.

P. "Confidential Business Information" means all information owned by, or in the possession or control of, any Respondent that is not in the public domain and that is directly related to the conduct of the Business related to a Divestiture Product(s). The term "Confidential Business Information" *excludes* the following:

1. information relating to any Respondent's general business strategies or practices that does not discuss with particularity the Divestiture Products;

2. information specifically excluded from the Divestiture Product Assets conveyed to the Acquirer of the related Divestiture Product(s);

3. information that is contained in documents, records or books of any Respondent that is provided to an Acquirer by a Respondent that is unrelated to the Divestiture Products acquired by that Acquirer or that is exclusively related to Retained Product(s); and

4. information that is protected by the attorney work product, attorney-client, joint defense or other privilege prepared in connection with the Acquisition and relating to any United States, state, or foreign antitrust or competition Laws.

Q. "Contract Manufacture" means the following:

1. to manufacture, or to cause to be manufactured, a Contract Manufacture Product on behalf of an Acquirer;

2. to manufacture, or to cause to be manufactured, a Product that is the therapeutic equivalent (as that term is defined by the FDA) and in the identical dosage strength, formulation and presentation as a Contract Manufacture Product on behalf of an Acquirer;

3. to provide, or to cause to be provided, any part of the manufacturing process including, without limitation, the finish, fill, and/or packaging of a Contract Manufacture Product on behalf of an Acquirer.

R. "Contract Manufacture Product(s)" means:

1. the Ciprofloxacin Products;

2. the Levofloxacin Products;

3. the Lidocaine Products; and

4. any ingredient, material, or component used in the manufacture of the foregoing Products including the active pharmaceutical ingredient, excipients or packaging materials;

provided however, that with the consent of the Acquirer of the specified Product, a Respondent may substitute a therapeutic equivalent (as that term is defined by the FDA) form of such Product in performance of that Respondent's agreement to Contract Manufacture.

S. "Development" means all preclinical and clinical drug development activities (including formulation), including test method development and stability testing, toxicology, formulation, process development, manufacturing scale-up, development-stage manufacturing, quality assurance/quality control development, statistical analysis and report writing, conducting Clinical Trials for the purpose of obtaining any and all approvals, licenses, registrations or authorizations from any Agency necessary for the manufacture, use, storage, import, export, transport, promotion, marketing, and sale of a Product (including any government price or reimbursement approvals), Product approval and registration, and regulatory affairs related to the foregoing. "Develop" means to engage in Development.

T. "Direct Cost" means a cost not to exceed the cost of labor, material, travel and other expenditures to the extent the costs are directly incurred to provide the relevant assistance or service. "Direct Cost" to the Acquirer for its use of any of a Respondent's employees' labor shall not exceed the average hourly wage rate for such employee;

provided, however, in each instance where: (i) an agreement to divest relevant assets is specifically referenced and attached to this Order, and (ii) such agreement becomes a Remedial Agreement for a

Divestiture Product, "Direct Cost" means such cost as is provided in such Remedial Agreement for that Divestiture Product.

U. "Divestiture Product(s)" means the following, individually and collectively:

1. the Ciprofloxacin Products;

2. the Erythromycin Products;

3. the Levofloxacin Products;

4. the Lidocaine Products; and

5. the Lidocaine-Prilocaine Products.

V. "Divestiture Product Agreements" means the following:

1. The Asset Purchase Agreement between Akorn, Inc. and Watson Laboratories, Inc. and solely with respect to certain pre-Closing covenants and agreements Hi-Tech Pharmacal Co., Inc., dated as of March 21, 2014;

2. The Manufacturing Supply Agreement attached as an Exhibit C to the above-described Asset Purchase Agreement to be executed as of the Closing Date;

3. Amendment No. 1 to Asset Purchase Agreement dated April 3, 2014; and

all amendments, exhibits, attachments, agreements, and schedules thereto, related to the Divestiture Product Assets that have been approved by the Commission to accomplish the requirements of this Order. The Divestiture Product Agreements are contained in Non-Public Appendix I.

W. "Divestiture Product Assets" means all rights, title and interest in and to all assets related to the Business within the Geographic Territory of the specified Respondent (as that Respondent is identified in the definition of the respective Divestiture Product) related to each of the respective Divestiture Products, to the extent legally transferable, including, without limitation, the Categorized Assets related to the Divestiture Products.

X. "Divestiture Product Core Employees" means the Product Research and Development Employees and the Product Manufacturing Employees related to each Divestiture Product.

Y. "Divestiture Product License" means a perpetual, non-exclusive, fully paid-up and royalty-free license(s) under a Remedial Agreement with rights to sublicense to all Product Licensed Intellectual Property and all Product Manufacturing Technology related to general manufacturing know-how that was owned, licensed, or controlled by the specified Respondent (as that Respondent is identified in the definition of the specified Divestiture Product):

1. to research and Develop the specified Divestiture Products for marketing, distribution or sale within the Geographic Territory;

2. to use, make, have made, distribute, offer for sale, promote, advertise, or sell the specified Divestiture Products within the Geographic Territory;

3. to import or export the specified Divestiture Products to or from the Geographic Territory to the extent related to the marketing, distribution or sale of the specified Divestiture Products in the Geographic Territory; and

4. to have the specified Divestiture Products made anywhere in the World for distribution or sale within, or import into the Geographic Territory;

provided however, that for any Product Licensed Intellectual Property that is the subject of a license from a Third Party entered into by a Respondent prior to the Acquisition, the scope of the rights granted hereunder shall only be required to be equal to the scope of the rights granted by the Third Party to that Respondent.

Z. "Divestiture Product Releasee(s)" means the following Persons:

1. the Acquirer for the assets related to a particular Divestiture Product;

2. any Person controlled by or under common control with that Acquirer; and

3. any Manufacturing Designees, licensees, sublicensees, manufacturers, suppliers, distributors, and customers of that Acquirer, or of such Acquirer-affiliated entities.

AA. "Divestiture Trustee" means the trustee appointed by the Commission pursuant to Paragraph IV of this Order.

BB. "Domain Name" means the domain name(s) (universal resource locators), and registration(s) thereof, issued by any Person or authority that issues and maintains the domain name registration; *provided*, *however*, "Domain Name" shall not include any trademark or service mark rights to such domain names other than the rights to the Product Trademarks required to be divested.

CC. "Drug Master Files" means the information submitted to the FDA as described in 21 C.F.R. Part 314.420 related to a Product.

DD. "Erythromycin Products" means the generic 0.5% erythromycin ointment Product for ophthalmic use in Development by Respondent Hi-Tech.

EE. "Geographic Territory" shall mean the United States of America, including all of its territories and possessions, unless otherwise specified.

FF. "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.

GG. "High Volume Account(s)" means any retailer, wholesaler or distributor whose annual or projected annual aggregate purchase amounts (on a company-wide level), in units or in dollars, of a Divestiture Product in the United States of America from the Respondent was, or is projected to be among the top twenty highest of such purchase amounts by the Respondent's U.S. customers on any of the following dates: (i) the end of the last quarter that immediately preceded the date of the public announcement of the proposed Acquisition; (ii) the end of the last quarter that immediately preceded the Acquisition Date; (iii) the end of the last quarter that immediately preceded the Closing Date for the relevant assets; or (iv) the end of the last quarter following the Acquisition or the Closing Date.

HH. "Interim Monitor" means any monitor appointed pursuant to Paragraph III of this Order or Paragraph III of the related Order to Maintain Assets.

II. "Law" means all laws, statutes, rules, regulations, ordinances, and other pronouncements by any Government Entity having the effect of law.

JJ. "Levofloxacin Products" means the following: the Products in Development, manufactured, marketed, sold, owned or controlled by Respondent Hi-Tech pursuant to ANDA No. 076826, and any supplements, amendments, or revisions thereto.

KK. "Lidocaine-Prilocaine Products" means the following: the Products in Development, manufactured, marketed, sold, owned or controlled by Respondent Akorn pursuant to NDA No. 19941, and any supplements, amendments, or revisions thereto.

LL. "Lidocaine Products" means the following: the Products in Development, manufactured, marketed, sold, owned or controlled by Respondent Hi-Tech pursuant to ANDA No. 040837, and any supplements, amendments, or revisions thereto.

MM. "Manufacturing Designee" means any Person other than a Respondent that has been designated by an Acquirer to manufacture a Divestiture Product for that Acquirer.

NN. "NDC Number(s)" means the National Drug Code number, including both the labeler code assigned by the FDA and the additional numbers assigned by the labeler as a product code for a specific Product.

OO. "Orders" means this Decision and Order and the related Order to Maintain Assets.

PP. "Order Date" means the date on which the final Decision and Order in this matter is issued by the Commission.

QQ. "Order to Maintain Assets" means the Order to Maintain Assets incorporated into and made a part of the Agreement Containing Consent Orders.

RR. "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 filed, or in existence, on or before the Closing Date (*except* where this Order specifies a different time), and includes all reissues, additions, divisions, continuations, continuations-in-part, supplementary protection certificates, extensions and reexaminations thereof, all inventions disclosed therein, and all rights therein provided by international treaties and conventions.

SS. "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.

TT. "Product(s)" means any pharmaceutical, biological, or genetic composition containing any formulation or dosage of a compound referenced as its pharmaceutically, biologically, or genetically active ingredient and/or that is the subject of an Application.

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

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

1. that make specific reference to the specified Divestiture Product and pursuant to which any Third Party is obligated to purchase, or has the option to purchase without further negotiation of terms, the specified Divestiture Product from the Respondent unless such contract applies generally to the Respondent's sales of Products to that Third Party;

2. pursuant to which the Respondent had or has as of the Closing Date the ability to independently purchase the active pharmaceutical ingredient(s) or other necessary ingredient(s) or component(s) or had planned to purchase the active pharmaceutical ingredient(s) or other necessary ingredient(s) or component(s) from any Third Party for use in connection with the manufacture of the specified Divestiture Product;

3. relating to any Clinical Trials involving the specified Divestiture Product;

4. with universities or other research institutions for the use of the specified Divestiture Product in scientific research;

5. relating to the particularized marketing of the specified Divestiture Product or educational matters relating solely to the specified Divestiture Product(s);

6. pursuant to which a Third Party manufactures the specified Divestiture Product on behalf of the Respondent;

7. pursuant to which a Third Party provides any part of the manufacturing process including, without limitation, the finish, fill, and/or packaging of the specified Divestiture Product on behalf of Respondent;

8. pursuant to which a Third Party provides the Product Manufacturing Technology related to the specified Divestiture Product to the Respondent;

9. pursuant to which a Third Party is licensed by the Respondent to use the Product Manufacturing Technology;

10. constituting confidentiality agreements involving the specified Divestiture Product;

11. involving any royalty, licensing, covenant not to sue, or similar arrangement involving the specified Divestiture Product;

12. pursuant to which a Third Party provides any specialized services necessary to the research, Development, manufacture or distribution of the specified Divestiture Product to the Respondent including, but not limited to, consultation arrangements; and/or

13. pursuant to which any Third Party collaborates with the Respondent in the performance of research, Development, marketing, distribution or selling of the specified Divestiture Product or the Business related to such Divestiture Product;

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

WW. "Product Copyrights" means rights to all original works of authorship of any kind directly related to a Divestiture Product and any registrations and applications for registrations thereof within the Geographic Territory, including, but not limited to, the

following: all such rights with respect to all promotional materials for healthcare providers, all promotional materials for patients, and educational materials for the sales force; copyrights in all preclinical, clinical and process development data and reports relating to the research and Development of that Product or of any materials used in the research, Development, manufacture, marketing or sale of that Product, including all copyrights in raw data relating to Clinical Trials of that Product, all case report forms relating thereto and all statistical programs developed (or modified in a manner material to the use or function thereof (other than through user references)) to analyze clinical data, all market research data, market intelligence reports and statistical programs (if any) used for marketing and sales research; all copyrights in customer information, promotional and marketing materials, that Product's sales forecasting models, medical education materials, sales training materials, and advertising and display materials; all records relating to employees of a Respondent who accept employment with an Acquirer (excluding any personnel records the transfer of which is prohibited by applicable Law); all copyrights in records, including customer lists, sales force call activity reports, vendor lists, sales data, reimbursement data, speaker lists, manufacturing records, manufacturing processes, and supplier lists; all copyrights in data contained in laboratory notebooks relating to that Product or relating to its biology; all copyrights in adverse experience reports and files related thereto (including source documentation) and all copyrights in periodic adverse experience reports and all data contained in electronic databases relating to adverse experience reports and periodic adverse experience reports; all copyrights in analytical and quality control data; and all correspondence with the FDA or any other Agency.

XX. "Product Development Reports" means:

1. Pharmacokinetic study reports related to the specified Divestiture Product;

2. Bioavailability study reports (including reference listed drug information) related to the specified Divestiture Product;

3. Bioequivalence study reports (including reference listed drug information) related to the specified Divestiture Product;

4. all correspondence, submissions, notifications, communications, registrations or other filings made to, received from or otherwise conducted with the FDA relating to the Application(s) related to the specified Divestiture Product;

5. annual and periodic reports related to the above-described Application(s), including any safety update reports;

6. FDA approved Product labeling related to the specified Divestiture Product;

7. currently used or planned product package inserts (including historical change of controls summaries) related to the specified Divestiture Product;

8. FDA approved patient circulars and information related to the specified Divestiture Product;

9. adverse event reports, adverse experience information, descriptions of material events and matters concerning safety or lack of efficacy related to the specified Divestiture Product;

10. summary of Product complaints from physicians related to the specified Divestiture Product;

11. summary of Product complaints from customers related to the specified Divestiture Product;

12. Product recall reports filed with the FDA related to the specified Divestiture Product, and all reports, studies and other documents related to such recalls;

13. investigation reports and other documents related to any out of specification results for any impurities found in the specified Divestiture Product;

14. reports related to the specified Divestiture Product from any consultant or outside contractor engaged to investigate or perform testing for the purposes of resolving any product or process issues, including without limitation, identification and sources of impurities;

15. reports of vendors of the active pharmaceutical ingredients, excipients, packaging components and detergents used to produce the specified Divestiture Product that relate to the specifications, degradation, chemical interactions, testing and historical trends of the production of the specified Divestiture Product;

16. analytical methods development records related to the specified Divestiture Product;

17. manufacturing batch records related to the specified Divestiture Product;

18. stability testing records related to the specified Divestiture Product;

19. change in control history related to the specified Divestiture Product; and

20. executed validation and qualification protocols and reports related to the specified Divestiture Product.

YY. "Product Employee Information" means the following, for each Divestiture Product Core Employee, as and to the extent permitted by Law:

1. a complete and accurate list containing the name of each Divestiture Product Core Employee (including former employees who were employed by the specified Respondent within ninety (90) days of the execution date of any Remedial Agreement);

2. with respect to each such employee, the following information:

   a. the date of hire and effective service date;

   b. job title or position held;

   c. a specific description of the employee's responsibilities related to the relevant Divestiture Product; *provided, however*, in lieu of this description, the specified Respondent may provide the employee's most recent performance appraisal;

   d. the base salary or current wages;

   e. the most recent bonus paid, aggregate annual compensation for the relevant Respondent's last fiscal year and current target or guaranteed bonus, if any;

   f. employment status (*i.e.*, active or on leave or disability; full-time or part-time);

   g. and any other material terms and conditions of employment in regard to such employee that are not otherwise generally available to similarly situated employees;

3. at the Acquirer's option or the Proposed Acquirer's option (as applicable), copies of all employee benefit plans and summary plan descriptions (if any) applicable to the relevant employees.

ZZ. "Product Intellectual Property" means all of the following related to a Divestiture Product (other than Product Licensed Intellectual Property):

1. Patents;

2. Product Copyrights;

3. Product Trademarks, Product Trade Dress, trade secrets, know-how, techniques, data, inventions, practices, methods, and other confidential or proprietary technical, business, research, Development and other information; and

4. rights to obtain and file for patents, trademarks, and copyrights and registrations thereof and to bring suit against a Third Party for the past, present or future infringement, misappropriation, dilution, misuse or other violations of any of the foregoing;

5. for any Divestiture Product that is the subject of an NDA, the Drug Master File related to that NDA;

provided, however, "Product Intellectual Property" does not include the corporate names or corporate trade dress of "Akorn" or "Hi-Tech" or the related corporate logos thereof, or the corporate names or corporate trade dress of any other corporations or companies owned or controlled by the Respondent or the related corporate logos thereof, or general registered images or symbols by which Akorn, or Hi-Tech can be identified or defined.

AAA. "Product Licensed Intellectual Property" means the following:

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

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

3. for any Divestiture Product that is the subject of an ANDA, all Right(s) of Reference or Use that is either owned or controlled by, or has been granted or licensed to the Respondent that is related to the Drug Master File of an NDA of a Product that is the therapeutic equivalent (as that term is defined by the FDA) of the specified Divestiture Product.

BBB. "Product Manufacturing Employees" means all salaried employees of a Respondent who have directly participated in the planning, design, implementation or operational management of the Product Manufacturing Technology of the specified Divestiture Product (irrespective of the portion of working time involved unless such participation consisted solely of oversight of legal, accounting, tax or financial compliance)

within the eighteen (18) month period immediately prior to the Closing Date.

CCC. "Product Manufacturing Technology" means all of the following related to a Divestiture Product:

1. all technology, trade secrets, know-how, formulas, and proprietary information (whether patented, patentable or otherwise) related to the manufacture of that Product, including, but not limited to, the following: all product specifications, processes, analytical methods, product designs, plans, trade secrets, ideas, concepts, manufacturing, engineering, and other manuals and drawings, standard operating procedures, flow diagrams, chemical, safety, quality assurance, quality control, research records, clinical data, compositions, annual product reviews, regulatory communications, control history, current and historical information associated with the FDA Application(s) conformance and cGMP compliance, and labeling and all other information related to the manufacturing process, and supplier lists;

2. all ingredients, materials, or components used in the manufacture of that Product including the active pharmaceutical ingredient, excipients or packaging materials; and,

3. for those instances in which the manufacturing equipment is not readily available from a Third Party, at the Acquirer's option, all such equipment used to manufacture that Product.

DDD. "Product Marketing Materials" means all marketing materials used specifically in the marketing or sale of the specified Divestiture Product in the Geographic Territory as of the Closing Date, including, without limitation, all advertising materials, training materials, product data, mailing lists, sales materials (*e.g.*,

detailing reports, vendor lists, sales data), marketing information (*e.g.*, competitor information, research data, market intelligence reports, statistical programs (if any) used for marketing and sales research), customer information (including customer net purchase information to be provided on the basis of either dollars and/or units for each month, quarter or year), sales forecasting models, educational materials, and advertising and display materials, speaker lists, promotional and marketing materials, Website content and advertising and display materials, artwork for the production of packaging components, television masters and other similar materials related to the specified Divestiture Product.

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

FFF. "Product Scientific and Regulatory Material" means all technological, scientific, chemical, biological, pharmacological, toxicological, regulatory and Clinical Trial materials and information.

GGG. "Product Trade Dress" means the current trade dress of a Product, including but not limited to, Product packaging, and the lettering of the Product trade name or brand name.

HHH. "Product Trademark(s)" means all proprietary names or designations, trademarks, service marks, trade names, and brand names, including registrations and applications for registration therefor (and all renewals, modifications, and extensions thereof) and all common

law rights, and the goodwill symbolized thereby and associated therewith, for a Product.

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

JJJ. "Remedial Agreement(s)" means the following:

1. any agreement between a Respondent(s) and an Acquirer that is specifically referenced and attached to this Order, including all amendments, exhibits, attachments, agreements, and schedules thereto, related to the relevant assets or rights to be assigned, granted, licensed, divested, transferred, delivered, or otherwise conveyed, including without limitation, any agreement to supply specified products or components thereof, and that has been approved by the Commission to accomplish the requirements of the Order in connection with the Commission's determination to make this Order final and effective;

2. any agreement between a Respondent(s) and a Third Party to effect the assignment of assets or rights of that Respondent(s) related to a Divestiture Product to the benefit of an Acquirer that is specifically referenced and attached to this Order, including all amendments, exhibits, attachments, agreements, and schedules thereto, that has been approved by the Commission to accomplish the requirements of the Order in connection with the Commission's determination to make this Order final and effective;

3. any agreement between a Respondent(s) and an Acquirer (or between a Divestiture Trustee and an

Acquirer) that has been approved by the Commission to accomplish the requirements of this Order, including all amendments, exhibits, attachments, agreements, and schedules thereto, related to the relevant assets or rights to be assigned, granted, licensed, divested, transferred, delivered, or otherwise conveyed, including without limitation, any agreement by that Respondent(s) to supply specified products or components thereof, and that has been approved by the Commission to accomplish the requirements of this Order; and/or

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

KKK. "Retained Product" means any Product(s) other than a Divestiture Product.

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

MMM. "Supply Cost" means a cost not to exceed the Respondent's (as that Respondent is identified in the definition of the respective Divestiture Product) average direct per unit cost in United States dollars of manufacturing the specified Divestiture Product for the twelve (12) month period immediately preceding the Acquisition Date. "Supply Cost" shall expressly exclude any intracompany business transfer profit; *provided, however*, that in each instance where: (i) an

agreement to Contract Manufacture is specifically referenced and attached to this Order, and (ii) such agreement becomes a Remedial Agreement for a Divestiture Product, "Supply Cost" means the cost as specified in such Remedial Agreement for that Divestiture Product.

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

1. designating employees of the Respondent(s) knowledgeable about the Product Manufacturing Technology (and all related intellectual property) related to each of the Divestiture Products who will be responsible for communicating directly with the Acquirer or its Manufacturing Designee, and the Interim Monitor (if one has been appointed), for the purpose of effecting such delivery;

2. preparing technology transfer protocols and transfer acceptance criteria for both the processes and analytical methods related to the specified Divestiture Product that are acceptable to the Acquirer;

3. preparing and implementing a detailed technological transfer plan that contains, *inter alia*, the transfer of all relevant information, all appropriate documentation, all other materials, and projected time lines for the delivery of all such Product Manufacturing Technology (including all related intellectual property) to the Acquirer or its Manufacturing Designee; and

4. providing, in a timely manner, assistance and advice to enable the Acquirer or its Manufacturing Designee to:

    a. manufacture the specified Divestiture Product in the quality and quantities achieved by the specified Respondent (as that Respondent is identified in the definition of the specified Divestiture Product), or the manufacturer and/or developer of such Divestiture Product;

    b. obtain any Product Approvals necessary for the Acquirer or its Manufacturing Designee, to manufacture, distribute, market, and sell the specified Divestiture Product in commercial quantities and to meet all Agency-approved specifications for such Divestiture Product; and

    c. receive, integrate, and use all such Product Manufacturing Technology and all such intellectual property related to the specified Divestiture Product.

OOO. "Third Party(ies)" means any non-governmental Person other than the following: the Respondents; or, the Acquirer of particular assets or rights pursuant to this Order.

PPP. "Watson" means Watson Laboratories, 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 Morris Corporate Center III, 400 Interpace Parkway, Parsippany, New Jersey 07054. Watson Laboratories, Inc. is a wholly owned subsidiary of Actavis, Inc.

QQQ. "Website" means the content of the Website(s) located at the Domain Names, the Domain Names, and all copyrights in such Website(s), to the extent owned by a Respondent; *provided, however*, "Website" shall not include the following: (1) content owned by Third

Parties and other Product Intellectual Property not owned by a Respondent that are incorporated in such Website(s), such as stock photographs used in the Website(s), *except* to the extent that a Respondent can convey its rights, if any, therein; or (2) content unrelated to any of the Divestiture Products.

II.

IT IS FURTHER ORDERED that:

A. Not later than the earlier of: (i) ten (10) days after the Acquisition Date or (ii) ten (10) days after the Order Date, Respondents shall divest the Divestiture Product Assets and grant the related Divestiture Product License, absolutely and in good faith, to Watson pursuant to, and in accordance with, the Divestiture Product Agreement(s) (which agreements shall not limit or contradict, or be construed to limit or contradict, the terms of this Order, it being understood that this Order shall not be construed to reduce any rights or benefits of Watson or to reduce any obligations of Respondents under such agreements), and each such agreement, if it becomes a Remedial Agreement related to the Divestiture Product Assets is incorporated by reference into this Order and made a part hereof;

provided, however, that if Respondents have divested the Divestiture Product Assets to Watson prior to the Order Date, and if, at the time the Commission determines to make this Order final and effective, the Commission notifies Respondents that Watson is not an acceptable purchaser of the Divestiture Product Assets, then Respondents shall immediately rescind the transaction with Watson, in whole or in part, as directed by the Commission, and shall divest the Divestiture Product Assets within one hundred eighty (180) days from the Order Date, 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 Respondents have divested the Divestiture Product Assets to Watson prior to the Order Date, and if, at the time the Commission determines to make this Order final and effective, the Commission notifies Respondents that the manner in which the divestiture was accomplished is not acceptable, the Commission may direct Respondents, or appoint a Divestiture Trustee, to effect such modifications to the manner of divestiture of the Divestiture Product Assets to Watson (including, but not limited to, entering into additional agreements or arrangements) as the Commission may determine are necessary to satisfy the requirements of this Order.

B. Prior to the Closing Date, Respondents shall secure all consents and waivers from all Third Parties that are necessary to permit Respondents to divest the assets required to be divested pursuant to this Order to an Acquirer, and to permit the relevant Acquirer to continue the Business of the Divestiture Product(s) being acquired by that Acquirer;

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

C. Respondents shall:

1. submit to each Acquirer, at Respondents' expense, all Confidential Business Information related to the Divestiture Products being acquired by that Acquirer;

2. deliver all Confidential Business Information related to the Divestiture Products being acquired by that Acquirer to that Acquirer:

    a. in good faith;

    b. in a timely manner, *i.e.*, as soon as practicable, avoiding any delays in transmission of the respective information; and

    c. in a manner that ensures its completeness and accuracy and that fully preserves its usefulness;

3. pending complete delivery of all such Confidential Business Information to the relevant Acquirer, provide that Acquirer and the Interim Monitor (if any has been appointed) with access to all such Confidential Business Information and employees who possess or are able to locate such information for the purposes of identifying the books, records, and files directly related to the Divestiture Products acquired by that Acquirer that contain such Confidential Business Information and facilitating the delivery in a manner consistent with this Order;

4. not use, directly or indirectly, any such Confidential Business Information related to the Business of the Divestiture Products other than as necessary to comply with the following:

    a. the requirements of this Order;

    b. Respondents' obligations to each respective Acquirer under the terms of any related Remedial Agreement; or

    c. applicable Law;

5. not disclose or convey any Confidential Business Information, directly or indirectly, to any Person

except (i) the Acquirer of the particular Divestiture Products, (ii) other Persons specifically authorized by that Acquirer to receive such information, (iii) the Commission, or (iv) the Interim Monitor (if any has been appointed); and

6. not provide, disclose or otherwise make available, directly or indirectly, any Confidential Business Information related to the marketing or sales of the Divestiture Products to the marketing or sales employees associated with the Business related to those Retained Products that are the therapeutic equivalent (as that term is defined by the FDA) of the Divestiture Products.

D. For each Acquirer of a Divestiture Product, Respondents shall provide, or cause to be provided to that Acquirer in a manner consistent with the Technology Transfer Standards the following:

1. all Product Manufacturing Technology (including all related intellectual property) related to the Divestiture Product(s) being acquired by that Acquirer; and

2. all rights to all Product Manufacturing Technology (including all related intellectual property) that is owned by a Third Party and licensed to any Respondent related to the Divestiture Products being acquired by that Acquirer.

Respondents shall obtain any consents from Third Parties required to comply with this provision. No Respondent shall enforce any agreement against a Third Party or an Acquirer to the extent that such agreement may limit or otherwise impair the ability of that Acquirer to use or to acquire from the Third Party the Product Manufacturing Technology (including all related intellectual property) related to the Divestiture Products acquired by that Acquirer. Such agreements include, but are not limited to, agreements with respect

to the disclosure of Confidential Business Information related to such Product Manufacturing Technology. Not later than ten (10) days after the Closing Date, Respondents shall grant a release to each Third Party that is subject to such agreements that allows the Third Party to provide the relevant Product Manufacturing Technology to that Acquirer. Within five (5) days of the execution of each such release, Respondents shall provide a copy of the release to that Acquirer.

E. For each Acquirer of a Divestiture Product that is a Contract Manufacture Product, Respondents shall:

1. upon reasonable written notice and request from that Acquirer to Respondents, Contract Manufacture and deliver, or cause to be manufactured and delivered, to the requesting Acquirer, in a timely manner and under reasonable terms and conditions, a supply of each of the Contract Manufacture Products related to the Divestiture Products acquired by that Acquirer at Supply Cost, for a period of time sufficient to allow that Acquirer (or the Manufacturing Designee of the Acquirer) to obtain all of the relevant Product Approvals necessary to manufacture in commercial quantities, and in a manner consistent with cGMP, the finished drug product independently of Respondents, and to secure sources of supply of the active pharmaceutical ingredients, excipients, other ingredients, and necessary components listed in Application(s) of the relevant Respondent (as that Respondent is identified in the definition of the respective Divestiture Product) for the Divestiture Product(s) acquired by that Acquirer from Persons other than Respondents;

2. make representations and warranties to such Acquirer that the Contract Manufacture Product(s) supplied by a Respondent pursuant to a Remedial Agreement meet the relevant Agency-approved

specifications. For the Contract Manufacture Product(s) to be marketed or sold in the Geographic Territory, the supplying Respondent shall agree to indemnify, defend and hold the Acquirer harmless from any and all suits, claims, actions, demands, liabilities, expenses or losses alleged to result from the failure of the Contract Manufacture Product(s) supplied to the Acquirer pursuant to a Remedial Agreement by that Respondent to meet cGMP. This obligation may be made contingent upon the Acquirer giving that Respondent prompt written notice of such claim and cooperating fully in the defense of such claim;

provided, however, that a Respondent may reserve the right to control the defense of any such claim, including the right to settle the claim, so long as such settlement is consistent with that Respondent's responsibilities to supply the Contract Manufacture Products in the manner required by this Order; *provided further, however*, that this obligation shall not require Respondents to be liable for any negligent act or omission of the Acquirer or for any representations and warranties, express or implied, made by the Acquirer that exceed the representations and warranties made by a Respondent to the Acquirer in an agreement to Contract Manufacture;

provided further, however, that in each instance where: (i) an agreement to divest relevant assets or Contract Manufacture is specifically referenced and attached to this Order, and (ii) such agreement becomes a Remedial Agreement for a Divestiture Product, each such agreement may contain limits on a Respondent's aggregate liability resulting from the failure of the Contract Manufacture Products supplied to the Acquirer pursuant to such Remedial Agreement to meet cGMP;

3. give priority to supplying a Contract Manufacture Product to the relevant Acquirer over manufacturing and supplying of Products for Respondents' own use or sale;

4. make representations and warranties to each Acquirer that Respondents shall hold harmless and indemnify the Acquirer for any liabilities or loss of profits resulting from the failure of the Contract Manufacture Products to be delivered in a timely manner as required by the Remedial Agreement(s) unless Respondents can demonstrate that the failure was beyond the control of Respondents and in no part the result of negligence or willful misconduct by Respondents;

   provided, however, that in each instance where: (i) an agreement to divest relevant assets or Contract Manufacture is specifically referenced and attached to this Order and (ii) such agreement becomes a Remedial Agreement for a Divestiture Product, each such agreement may contain limits on a Respondent's aggregate liability for such a failure;

5. during the term of any agreement to Contract Manufacture, upon written request of that Acquirer or the Interim Monitor (if any has been appointed), make available to the Acquirer and the Interim Monitor (if any has been appointed) all records that relate directly to the manufacture of the relevant Contract Manufacture Products that are generated or created after the Closing Date;

6. during the term of any agreement to Contract Manufacture, Respondents shall take all actions as are reasonably necessary to ensure an uninterrupted supply of the Contract Manufacture Product(s);

7. in the event Respondents become (i) unable to supply or produce a Contract Manufacture Product from the facility or facilities originally contemplated under a Remedial Agreement with an Acquirer and (ii) that Product is the subject of an ANDA, then Respondents shall provide a therapeutically equivalent (as that term is defined by the FDA) Product from another of Respondents' facility or facilities in those instances where such facilities are being used or have previously been used, and are able to be used, by Respondents to manufacture such Product(s);

8. provide access to all information and facilities, and make such arrangements with Third Parties, as are necessary to allow the Interim Monitor to monitor compliance with the obligations to Contract Manufacture;

9. during the term of any agreement to Contract Manufacture, provide consultation with knowledgeable employees of the Respondents and training, at the written request of the Acquirer and at a facility chosen by the Acquirer, for the purposes of enabling that Acquirer (or the Manufacturing Designee of that Acquirer) to obtain all Product Approvals to manufacture the Contract Manufacture Products acquired by that Acquirer in the same quality achieved by, or on behalf of, the relevant Respondent (as that Respondent is identified in the definition of the respective Divestiture Product) and in commercial quantities, and in a manner consistent with cGMP, independently of Respondents and sufficient to satisfy management of the Acquirer that its personnel (or the Manufacturing Designee's personnel) are adequately trained in the manufacture of the Contract Manufacture Products;

The foregoing provisions, II.E.1. - 9., shall remain in effect with respect to each Contract Manufacture Product until the earliest of: (i) the date the Acquirer of that Contract Manufacture Product (or the Manufacturing Designee(s) of that Acquirer), respectively, is approved by the FDA to manufacture and sell such Contract Manufacture Product in the United States and able to manufacture such Contract Manufacture Product in commercial quantities, in a manner consistent with cGMP, independently of Respondents; (ii) the date the Acquirer of a particular Contract Manufacture Product notifies the Commission and Respondents of its intention to abandon its efforts to manufacture such Contract Manufacture Product; (iii) the date of written notification from staff of the Commission that the Interim Monitor, in consultation with staff of the Commission, has determined that the Acquirer of a particular Contract Manufacture Product has abandoned its efforts to manufacture such Contract Manufacture Product, or (iv) the date five (5) years from the Closing Date.

F. Respondents shall require, as a condition of continued employment post-divestiture of the assets required to be divested pursuant to this Order, that each employee that has had responsibilities related to the marketing or sales of the Divestiture Products within the one (1) year period prior to the Closing Date and each employee that has responsibilities related to the marketing or sales of those Retained Products that are the therapeutic equivalent (as that term is defined by the FDA) of the Divestiture Products, in each case who have or may have had access to Confidential Business Information, and the direct supervisor(s) of any such employee sign a confidentiality agreement pursuant to which that employee shall be required to maintain all Confidential Business Information related to the Divestiture Products as strictly confidential, including the nondisclosure of that information to all other employees, executives or other personnel of

Respondents (other than as necessary to comply with the requirements of this Order).

G. Not later than thirty (30) days after the Closing Date, Respondents shall provide written notification of the restrictions on the use and disclosure of the Confidential Business Information related to the Divestiture Products by Respondents' personnel to all of their employees who (i) may be in possession of such Confidential Business Information or (ii) may have access to such Confidential Business Information. Respondents shall give the above-described notification by e-mail with return receipt requested or similar transmission, and keep a file of those receipts for one (1) year after the Closing Date. Respondents shall provide a copy of the notification to the relevant Acquirer. Respondents shall maintain complete records of all such notifications at Respondents' registered office within the United States and shall provide an officer's certification to the Commission stating that the acknowledgment program has been implemented and is being complied with. Respondents shall provide the relevant Acquirer with copies of all certifications, notifications and reminders sent to Respondents' personnel.

H. For each Acquirer of a Divestiture Product, Respondents shall:

1. for a period of six (6) months from the Closing Date or until the hiring of twenty (20) Divestiture Product Core Employees by that Acquirer or its Manufacturing Designee, whichever occurs earlier, provide that Acquirer or its Manufacturing Designee with the opportunity to enter into employment contracts with the Divestiture Product Core Employees related to the Divestiture Products and assets acquired by that Acquirer. Each of these periods is hereinafter referred to as the "Divestiture Product Core Employee Access Period(s);"

2. not later than the earlier of the following dates: (i) ten (10) days after notice by staff of the Commission to Respondents to provide the Product Employee Information; or (ii) ten (10) days after written request by an Acquirer, provide that Acquirer or Proposed Acquirer(s) with the Product Employee Information related to the Divestiture Product Core Employees. Failure by Respondents to provide the Product Employee Information for any Divestiture Product Core Employee within the time provided herein shall extend the Divestiture Product Core Employee Access Period(s) with respect to that employee in an amount equal to the delay; *provided, however*, that the provision of such information may be conditioned upon the Acquirer's or Proposed Acquirer's written confirmation that it will (i) treat the information as confidential and, more specifically, (ii) use the information solely in connection with considering whether to provide or providing to Divestiture Product Core Employees the opportunity to enter into employment contracts during a Divestiture Product Core Employee Access Period, (iii) restrict access to the information to such of the Acquirer's or Proposed Acquirer's employees who need such access in connection with the specified and permitted use, and (iv) destroy or return the information without retaining copies at such time as the specified and permitted use ends;

3. during the Divestiture Product Core Employee Access Period(s), not interfere with the hiring or employing by that Acquirer or its Manufacturing Designee of the Divestiture Product Core Employees related to the Divestiture Products and assets acquired by that Acquirer, and remove any impediments within the control of Respondents that may deter these employees from accepting employment with that Acquirer or its Manufacturing Designee, including, but not limited to, any noncompete or nondisclosure provision of

employment with respect to a Divestiture Product or other contracts with Respondents that would affect the ability or incentive of those individuals to be employed by that Acquirer or its Manufacturing Designee. In addition, Respondents shall not make any counteroffer to such a Divestiture Product Core Employee who has received a written offer of employment from that Acquirer or its Manufacturing Designee;

provided, however, that, subject to the conditions of continued employment prescribed in this Order, this Paragraph shall not prohibit Respondents from continuing to employ any Divestiture Product Core Employee under the terms of that employee's employment with Respondents prior to the date of the written offer of employment from the Acquirer or its Manufacturing Designee to that employee;

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

provided, however, that this Paragraph does not require nor shall be construed to require Respondents to terminate the employment of any employee or to prevent Respondents from continuing to employ the

Divestiture Product Core Employees in connection with the Acquisition; and

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

provided, however, Respondents may hire any former Divestiture Product Employee whose employment has been terminated by the Acquirer or its Manufacturing Designee or who independently applies for employment with a Respondent, as long as that employee was not solicited in violation of the nonsolicitation requirements contained herein;

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

I. Until Respondents complete the divestitures required by this Order and fully provide, or cause to be provided, the Product Manufacturing Technology related to a particular Divestiture Product to the relevant Acquirer,

1. Respondents shall take actions as are necessary to:

   a. maintain the full economic viability and marketability of the Businesses associated with that Divestiture Product;

b. minimize any risk of loss of competitive potential for that Business;

c. prevent the destruction, removal, wasting, deterioration, or impairment of any of the assets related to that Divestiture Product;

d. ensure the assets related to each Divestiture Product are provided to the relevant Acquirer in a manner without disruption, delay, or impairment of the regulatory approval processes related to the Business associated with each Divestiture Product;

e. ensure the completeness of the transfer and delivery of the Product Manufacturing Technology; and

2. Respondents shall not sell, transfer, encumber or otherwise impair the assets required to be divested (other than in the manner prescribed in this Order) nor take any action that lessens the full economic viability, marketability, or competitiveness of the Businesses associated with that Divestiture Product.

J. Respondents shall not join, file, prosecute or maintain any suit, in law or equity, against an Acquirer or the Divestiture Product Releasee(s) of that Acquirer under the following:

1. any Patent owned by or licensed to a Respondent as of the day after the Acquisition Date that claims a method of making, using, or administering, or a composition of matter of a Product, or that claims a device relating to the use thereof;

2. any Patent that was filed or in existence on or before the Acquisition Date that is acquired by or licensed to a Respondent at any time after the Acquisition Date that claims a method of making,

using, or administering, or a composition of matter of a Product, or that claims a device relating to the use thereof;

if such suit would have the potential directly to limit or interfere with that Acquirer's freedom to practice the following: (i) the research, Development, or manufacture anywhere in the World of the Divestiture Product(s) acquired by that Acquirer for the purposes of marketing, sale or offer for sale within the United States of America of such Divestiture Product(s); or (ii) the use within, import into, export from, or the supply, distribution, or sale within, the United States of America of the Divestiture Product(s) acquired by that Acquirer. Each Respondent shall also covenant to that Acquirer that as a condition of any assignment or license from that Respondent to a Third Party of the above-described Patents, the Third Party shall agree to provide a covenant whereby the Third Party covenants not to sue that Acquirer or the related Divestiture Product Releasee(s) under such Patents, if the suit would have the potential directly to limit or interfere with that Acquirer's freedom to practice the following: (i) the research, Development, or manufacture anywhere in the World of the Divestiture Product(s) acquired by that Acquirer for the purposes of marketing, sale or offer for sale within the United States of America of such Divestiture Product(s); or (ii) the use within, import into, export from, or the supply, distribution, or sale or offer for sale within, the United States of America of the Divestiture Product(s) acquired by that Acquirer. The provisions of this Paragraph do not apply to any Patent owned by, acquired by or licensed to or from a Respondent that claims inventions conceived by and reduced to practice after the Acquisition Date.

K. Upon reasonable written notice and request from an Acquirer to Respondents, Respondents shall provide, in a timely manner, at no greater than Direct Cost, assistance of knowledgeable employees of

Respondents to assist that Acquirer to defend against, respond to, or otherwise participate in any litigation brought by a Third Party related to the Product Intellectual Property related to any of the Divestiture Product(s) acquired by that Acquirer, if such litigation would have the potential to interfere with that Acquirer's freedom to practice the following: (i) the research, Development, or manufacture anywhere in the World of the Divestiture Product(s) acquired by that Acquirer for the purposes of marketing, sale or offer for sale within the United States of America of such Divestiture Product(s); or (ii) the use within, import into, export from, or the supply, distribution, or sale within, the United States of America of the Divestiture Product(s) acquired by that Acquirer.

L. For any patent infringement suit filed prior to the Closing Date in which any Respondent is alleged to have infringed a Patent of a Third Party or any potential patent infringement suit from a Third Party that any Respondent has prepared or is preparing to defend against as of the Closing Date, and where such a suit would have the potential directly to limit or interfere with the relevant Acquirer's freedom to practice the following: (i) the research, Development, or manufacture anywhere in the World of the Divestiture Product(s) acquired by that Acquirer for the purposes of marketing, sale or offer for sale within the United States of America of such Divestiture Products; or (ii) the use within, import into, export from, or the supply, distribution, or sale or offer for sale within, the United States of America of such Divestiture Product(s), that Respondent shall:

1. cooperate with that Acquirer and provide any and all necessary technical and legal assistance, documentation and witnesses from that Respondent in connection with obtaining resolution of any pending patent litigation related to that Divestiture Product;

2. waive conflicts of interest, if any, to allow that Respondent's outside legal counsel to represent that Acquirer in any ongoing patent litigation related to that Divestiture Product; and

3. permit the transfer to that Acquirer of all of the litigation files and any related attorney work-product in the possession of that Respondent's outside counsel related to that Divestiture Product.

M. The purpose of the divestiture of the Divestiture Product Assets and the provision of the related Product Manufacturing Technology and the related obligations imposed on the Respondents by this Order is:

1. to ensure the continued use of such assets for the purposes of the Business associated with each Divestiture Product within the Geographic Territory; and

2. to create a viable and effective competitor, that is independent of Respondents in the Business of each Divestiture Product within the Geographic Territory; and,

3. to remedy the lessening of competition resulting from the Acquisition as alleged in the Commission's Complaint in a timely and sufficient manner.

III.

IT IS FURTHER ORDERED that:

A. At any time after the Respondents sign the Consent Agreement in this matter, the Commission may appoint a monitor ("Interim Monitor") to assure that the Respondents expeditiously comply with all of their obligations and perform all of their responsibilities as required by this Order, the Order to Maintain Assets and the Remedial Agreements.

B. The Commission shall select the Interim Monitor, subject to the consent of Respondents, which consent shall not be unreasonably withheld. If Respondents have not opposed, in writing, including the reasons for opposing, the selection of a proposed Interim Monitor within ten (10) days after notice by the staff of the Commission to Respondents of the identity of any proposed Interim Monitor, Respondents shall be deemed to have consented to the selection of the proposed Interim Monitor.

C. Not later than ten (10) days after the appointment of the Interim Monitor, Respondents shall execute an agreement that, subject to the prior approval of the Commission, confers on the Interim Monitor all the rights and powers necessary to permit the Interim Monitor to monitor Respondents' compliance with the relevant requirements of the Order in a manner consistent with the purposes of the Order.

D. If an Interim Monitor is appointed, Respondents shall consent to the following terms and conditions regarding the powers, duties, authorities, and responsibilities of the Interim Monitor:

1. The Interim Monitor shall have the power and authority to monitor Respondent's compliance with the divestiture and asset maintenance obligations and related requirements of the Order, and shall exercise such power and authority and carry out the duties and responsibilities of the Interim Monitor in a manner consistent with the purposes of the Order and in consultation with the Commission.

2. The Interim Monitor shall act in a fiduciary capacity for the benefit of the Commission.

3. The Interim Monitor shall serve until the date of completion by the Respondents of the divestiture of all Divestiture Product Assets and the transfer

and delivery of the related Product Manufacturing Technology in a manner that fully satisfies the requirements of this Order and, with respect to each Divestiture Product that is a Contract Manufacture Product, until the earliest of: (i) the date the Acquirer of that Divestiture Product (or that Acquirer's Manufacturing Designee(s)) is approved by the FDA to manufacture and sell that Divestiture Product and able to manufacture the Divestiture Product in commercial quantities, in a manner consistent with cGMP, independently of Respondents; (ii) the date the Acquirer of that Divestiture Product notifies the Commission and Respondents of its intention to abandon its efforts to manufacture that Divestiture Product; or (iii) the date of written notification from staff of the Commission that the Interim Monitor, in consultation with staff of the Commission, has determined that the Acquirer has abandoned its efforts to manufacture that Divestiture Product;

provided, however, that, the Interim Monitor's service shall not exceed five (5) years from the Order Date *unless* the Commission decides to extend or modify this period as may be necessary or appropriate to accomplish the purposes of the Orders.

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 ordinary course of business, facilities and technical information, and such other relevant information as the Interim Monitor may reasonably request, related to Respondents' compliance with its obligations under the Orders, including, but not limited to, its obligations related to the relevant assets. Respondents shall cooperate with any reasonable request of the Interim Monitor and shall take no action to interfere with or impede the

Interim Monitor's ability to monitor Respondents' compliance with the Orders.

F. The Interim Monitor shall serve, without bond or other security, at the expense of Respondents, on such reasonable and customary terms and conditions as the Commission may set. The Interim Monitor shall have authority to employ, at the expense of Respondents, such consultants, accountants, attorneys and other representatives and assistants as are reasonably necessary to carry out the Interim Monitor's duties and responsibilities.

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

H. Respondents shall report to the Interim Monitor in accordance with the requirements of this Order and as otherwise provided in any agreement approved by the Commission. The Interim Monitor shall evaluate the reports submitted to the Interim Monitor by Respondents, and any reports submitted by each Acquirer with respect to the performance of Respondents' obligations under the Order or the Remedial Agreement(s). Within thirty (30) days from the date the Interim Monitor receives these reports, the Interim Monitor shall report in writing to the Commission concerning performance by Respondents of their obligations under the Order. *provided, however*, beginning ninety (90) days after Respondents have filed their final report pursuant to Paragraph

VII.B., and ninety (90) days thereafter, the Interim Monitor shall report in writing to the Commission concerning progress by each Acquirer toward obtaining FDA approval to manufacture each Divestiture Product and obtaining the ability to manufacture each Divestiture Product in commercial quantities, in a manner consistent with cGMP, independently of Respondents.

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.

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.

IV.

IT IS FURTHER ORDERED that:

A. If Respondents have not fully complied with the obligations to assign, grant, license, divest, transfer, deliver or otherwise convey the Divestiture Product Assets as required by this Order, the Commission may appoint a trustee ("Divestiture Trustee") to assign, grant, license, divest, transfer, deliver or otherwise convey these assets in a manner that satisfies the requirements of this Order. In the event that the Commission or the Attorney General brings an action pursuant to § 5(*l*) of the Federal Trade Commission Act, 15 U.S.C. § 45(*l*), or any other statute enforced by the Commission, Respondents shall consent to the appointment of a Divestiture Trustee in such action to assign, grant, license, divest, transfer, deliver or otherwise convey these assets. Neither the appointment of a Divestiture Trustee nor a decision not to appoint a Divestiture Trustee under this Paragraph shall preclude the Commission or the Attorney General from seeking civil penalties or any other relief available to it, including a court-appointed Divestiture Trustee, pursuant to § 5(*l*) of the Federal Trade Commission Act, or any other statute enforced by the Commission, for any failure by Respondents to comply with this Order.

B. The Commission shall select the Divestiture Trustee, subject to the consent of Respondents, which consent shall not be unreasonably withheld. The Divestiture Trustee shall be a Person with experience and expertise in acquisitions and divestitures. If Respondents have not opposed, in writing, including the reasons for opposing, the selection of any proposed Divestiture Trustee within ten (10) days after notice by the staff of the Commission to Respondents of the identity of any proposed Divestiture Trustee, Respondents shall be deemed to have consented to the selection of the proposed Divestiture Trustee.

C. Not later than ten (10) days after the appointment of a Divestiture Trustee, Respondent shall execute a trust agreement that, subject to the prior approval of the Commission, transfers to the Divestiture Trustee all rights and powers necessary to permit the Divestiture Trustee to effect the divestiture required by this Order.

D. If a Divestiture Trustee is appointed by the Commission or a court pursuant to this Paragraph, Respondent shall consent to the following terms and conditions regarding the Divestiture Trustee's powers, duties, authority, and responsibilities:

1. Subject to the prior approval of the Commission, the Divestiture Trustee shall have the exclusive power and authority to assign, grant, license, divest, transfer, deliver or otherwise convey the assets that are required by this Order to be assigned, granted, licensed, divested, transferred, delivered or otherwise conveyed.

2. The Divestiture Trustee shall have one (1) year after the date the Commission approves the trust agreement described herein to accomplish the divestiture, which shall be subject to the prior approval of the Commission. If, however, at the end of the one (1) year period, the Divestiture Trustee has submitted a plan of divestiture or the Commission believes that the divestiture can be achieved within a reasonable time, the divestiture period may be extended by the Commission; *provided, however*, the Commission may extend the divestiture period only two (2) times.

3. Subject to any demonstrated legally recognized privilege, the Divestiture Trustee shall have full and complete access to the personnel, books, records and facilities related to the relevant assets that are required to be assigned, granted, licensed, divested, delivered or otherwise conveyed by this Order and to any other relevant information, as the

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

4. The Divestiture Trustee shall use commercially reasonable efforts to negotiate the most favorable price and terms available in each contract that is submitted to the Commission, subject to Respondent's absolute and unconditional obligation to divest expeditiously and at no minimum price. The divestiture shall be made in the manner and to an Acquirer as required by this Order; *provided, however*, if the Divestiture Trustee receives bona fide offers from more than one acquiring Person, and if the Commission determines to approve more than one such acquiring Person, the Divestiture Trustee shall divest to the acquiring Person selected by Respondent from among those approved by the Commission; *provided further, however*, that Respondent shall select such Person within five (5) days after receiving notification of the Commission's approval.

5. The Divestiture Trustee shall serve, without bond or other security, at the cost and expense of Respondents, on such reasonable and customary terms and conditions as the Commission or a court may set. The Divestiture Trustee shall have the authority to employ, at the cost and expense of Respondents, such consultants, accountants, attorneys, investment bankers, business brokers, appraisers, and other representatives and assistants

as are necessary to carry out the Divestiture Trustee's duties and responsibilities. The Divestiture Trustee shall account for all monies derived from the divestiture and all expenses incurred. After approval by the Commission of the account of the Divestiture Trustee, including fees for the Divestiture Trustee's services, all remaining monies shall be paid at the direction of Respondents, and the Divestiture Trustee's power shall be terminated. The compensation of the Divestiture Trustee shall be based at least in significant part on a commission arrangement contingent on the divestiture of all of the relevant assets that are required to be divested by this Order.

6. Respondent shall indemnify the Divestiture Trustee and hold the Divestiture Trustee harmless against any losses, claims, damages, liabilities, or expenses arising out of, or in connection with, the performance of the Divestiture Trustee's duties, including all reasonable fees of counsel and other expenses incurred in connection with the preparation for, or defense of, any claim, whether or not resulting in any liability, except to the extent that such losses, claims, damages, liabilities, or expenses result from gross negligence, willful or wanton acts, or bad faith by the Divestiture Trustee.

7. The Divestiture Trustee shall have no obligation or authority to operate or maintain the relevant assets required to be divested by this Order; *provided, however*, that the Divestiture Trustee appointed pursuant to this Paragraph may be the same Person appointed as Interim Monitor pursuant to the relevant provisions of this Order or the Order to Maintain Assets in this matter.

8. The Divestiture Trustee shall report in writing to Respondent and to the Commission every sixty

(60) days concerning the Divestiture Trustee's efforts to accomplish the divestiture.

9. 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,* that such agreement shall not restrict the Divestiture Trustee from providing any information to the Commission.

E. 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 related to Commission materials and information received in connection with the performance of the Divestiture Trustee's duties.

F. 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.

G. The Commission or, in the case of a court-appointed Divestiture Trustee, the court, may on its own initiative or at the request of the Divestiture Trustee issue such additional orders or directions as may be necessary or appropriate to accomplish the divestiture required by this Order.

V.

IT IS FURTHER ORDERED that, in addition to any other requirements and prohibitions relating to Confidential Business Information in this Order, each Respondent shall assure that its own counsel (including its own in-house counsel under appropriate confidentiality arrangements) shall not retain unredacted copies of documents or other materials provided to an

Acquirer or access original documents provided to an Acquirer, except under circumstances where copies of documents are insufficient or otherwise unavailable, and for the following purposes:

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

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

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

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

VI.

IT IS FURTHER ORDERED that:

A. Any Remedial Agreement shall be deemed incorporated into this Order.

B. Any failure by a Respondent to comply with any term of such Remedial Agreement shall constitute a failure to comply with this Order.

C. Respondents shall include in each Remedial Agreement related to each of the Divestiture Products a specific reference to this Order, the remedial purposes thereof, and provisions to reflect the full scope and breadth of each Respondent's obligation to the Acquirer pursuant to this Order.

D. For each Divestiture Product that is a Contract Manufacture Product, Respondents shall include in the Remedial Agreement(s) related to that Divestiture Product a representation from the Acquirer that the Acquirer shall use commercially reasonable efforts to secure the FDA approval(s) necessary to manufacture, or to have manufactured by a Third Party, in commercial quantities, each such Divestiture Product, as applicable, and to have any such manufacture to be independent of the Respondents, all as soon as reasonably practicable.

E. No Respondent shall seek, directly or indirectly, pursuant to any dispute resolution mechanism incorporated in any Remedial Agreement, or in any agreement related to any of the Divestiture Products a decision the result of which would be inconsistent with the terms of this Order or the remedial purposes thereof.

F. No Respondent shall modify or amend any of the terms of any Remedial Agreement without the prior approval of the Commission, except as otherwise provided in Rule 2.41(f)(5) of the Commission's Rules of Practice and Procedure, 16 C.F.R. § 2.41(f)(5). Notwithstanding any term of the Remedial Agreement(s), any modification or amendment of any Remedial Agreement made 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.

VII.

IT IS FURTHER ORDERED that:

A. Within five (5) days of the Acquisition, Respondents shall submit to the Commission a letter certifying the date on which the Acquisition occurred.

B. Within five (5) days of the merger of the Respondents, Respondents shall submit to the Commission a letter certifying the date on which the merger occurred.

C. Within thirty (30) days after the Order Date, and every sixty (60) days thereafter until Respondents have fully complied with Paragraphs II.A., II.B., II.C.1.-II.C.3., II.D., II.E., II.H., and II.I., Respondents shall submit to the Commission a verified written report setting forth in detail the manner and form in which it intends to comply, is complying, and has complied with this Order. Respondents 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. Respondents shall include in their reports, among other things that are required from time to time, a full description of the efforts being made to comply with the relevant paragraphs of the Order, including:

1. a detailed description of all substantive contacts, negotiations, or recommendations related to (i) the divestiture and transfer of all relevant assets and rights, (ii) transitional services being provided by the Respondents to the relevant Acquirer, and (iii) the agreement(s) to Contract Manufacture; and

2. a detailed description of the timing for the completion of such obligations.

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

VIII.

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.

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 any Respondent made to its principal United States offices, registered office of its United States subsidiary, or its headquarters address, that Respondent shall, without restraint or interference, permit any duly authorized representative of the Commission:

A. access, during business office hours of 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 June 16, 2024.

By the Commission, Commissioner McSweeny not participating.

NON-PUBLIC APPENDIX I
AGREEMENTS RELATED TO THE DIVESTITURES
[Redacted From the Public Record Version, But Incorporated By Reference]

ANALYSIS OF CONSENT ORDER TO AID PUBLIC COMMENT

The Federal Trade Commission ("Commission") has accepted, subject to final approval, an Agreement Containing Consent Orders ("Consent Agreement") from Akorn Enterprises, Inc. ("Akorn") that is designed to remedy the anticompetitive effects in five generic pharmaceutical markets resulting from Akorn's acquisition of Hi-Tech Pharmacal Co., Inc. ("Hi-Tech"). Under the terms of the proposed Consent Agreement, the parties

are required to divest either Akorn's or Hi-Tech's rights and assets related to three generic ophthalmic prescription products: (1) generic Ciloxan drops, (2) generic Ilotycin ointment, and (3) generic Quixin drops, and two topical anesthetic products, (4) generic Xylocaine jelly, and (5) EMLA cream (collectively, the "Products") to Watson Laboratories, Inc. ("Watson"), a wholly-owned subsidiary of Actavis plc.

The proposed Consent Agreement has been placed on the public record for thirty days for receipt of comments from interested persons. Comments received during this period will become part of the public record. After thirty days, the Commission will again evaluate the proposed Consent Agreement, along with the comments received, in order to make a final decision as to whether it should withdraw from the proposed Consent Agreement, or make final the Decision and Order ("Order").

Pursuant to an Agreement and Plan of Merger dated August 26, 2013, Akorn proposes to acquire all of the voting securities of Hi-Tech, for approximately $640 million (the "Proposed Acquisition"). The Commission alleges in its Complaint that the Proposed Acquisition, if consummated, would violate Section 7 of the Clayton Act, as amended, 15 U.S.C. § 18, and Section 5 of the Federal Trade Commission Act, as amended, 15 U.S.C. § 45, by lessening current and/or future competition in U.S. markets for the following pharmaceutical products: (1) generic Ciloxan drops, (2) generic Ilotycin ointment, (3) generic Quixin drops, (4) generic Xylocaine jelly, and (5) generic EMLA cream. The proposed Consent Agreement will remedy the alleged violations by preserving the competition that would otherwise be eliminated by the Proposed Acquisition.

The Products and Structure of the Markets

The Proposed Acquisition would reduce the number of suppliers in the relevant markets, each of which has or will have a limited number of market participants. In pharmaceutical product markets with generic competition, price generally decreases as the number of generic competitors increases. Accordingly, the reduction in the number of suppliers within each relevant market

would have a direct and substantial anticompetitive effect on pricing.

The Proposed Acquisition would reduce current competition in markets for two generic prescription ophthalmic products--generic Ciloxan drops and generic Quixin drops--as well as reduce current competition in the markets for generic Xylocaine jelly and generic EMLA cream, which are topical anesthetic prescription products. The structure of these markets is as follows:

- The generic Ciloxan opthalmic drops market currently has four suppliers: Akorn, with a market share of approximately 12%, Hi-Tech, with a market share of approximately 16%, Novartis Corporation ("Novartis"), with a market share of approximately 47%, and PACK Pharmaceuticals ("PACK"), with a market share of approximately 25%. The proposed transaction would reduce the number of suppliers in this market from four to three, and would give the merged firm a market share of approximately 28%.

- The generic Quixin ophthalmic drops market currently has three suppliers: Akorn, with a market share of approximately 15%, Hi-Tech, with a market share of approximately 23%, and PACK, with a market share of approximately 62%. The proposed transaction would reduce the number of suppliers in this market from three to two, and would give the merged firm a market share of approximately 38%.

- The generic Xylocaine jelly market has three suppliers: Akorn, with a market share of approximately 39%, Hi-Tech, with a market share of approximately 14%, and Amphastar Pharmaceuticals, Inc. ("Amphastar"), with a market share of approximately 47%. The proposed transaction would reduce the number of suppliers of generic Xylocaine from three to two, and would give the merged firm a market share in excess of 50%.

- The generic EMLA cream market currently has four suppliers: Akorn, with a market share of approximately 12%, Hi-Tech, with a market share of approximately 62%, Novartis, with a market share of approximately 22%, and Global Pharmaceuticals ("Global") with a market share of approximately 3%. In addition to marketing generic EMLA, Akorn markets the branded product. The proposed transaction would reduce the number of suppliers in the generic market from four to three, and would give the merged firm a market share in excess of 70%.

The proposed transaction would also reduce future competition in the generic Ilotycin ophthalmic ointment market. Generic Ilotycin ophthalmic ointment is prescribed for the treatment of bacterial infections in the eye. Three firms currently supply generic Ilotycin: Akorn, Perrigo Company ("Perrigo"), and Bausch + Lomb, Inc. ("Bausch + Lomb"). Bausch + Lomb leads the market with a 57% share with Akorn and Perrigo having market shares of 31% and 12%, respectively. Hi-Tech appears poised to be the next entrant with a generic Ilotycin product and there are no other likely entrants for the foreseeable future. Akorn's acquisition of Hi-Tech would therefore deprive consumers of the increased competition and likely price reductions that would have occurred as a result of Hi-Tech's entry.

Entry

Entry into the markets for the Products would not be timely, likely, or sufficient in magnitude, character, and scope to deter or counteract the anticompetitive effects of the acquisition. The combination of drug development times and regulatory requirements, including U.S. Food and Drug Administration ("FDA") approval, is costly and lengthy. Industry participants also note that expertise and facilities associated with manufacturing topical products, including sterile products such as ophthalmic products is sufficiently specialized that a relatively small number of firms participate in such markets.

Effects

The Proposed Acquisition would likely cause significant anticompetitive harm to consumers in the relevant generic pharmaceutical markets by eliminating current and/or future competition in concentrated existing markets or in future generic markets.

In generic pharmaceuticals markets, price is heavily influenced by the number of participants with sufficient supply. Market participants consistently characterize generic drug markets as commodity markets in which the number of generic suppliers has a direct impact on pricing. Customers and competitors alike have confirmed that the prices of the generic pharmaceutical products at issue continue to decrease with new entry even after a number of suppliers have entered these generic markets. Further, customers generally believe that having at least four suppliers in a generic pharmaceutical market produces more competitive prices than if fewer suppliers are available to them.

The evidence shows that anticompetitive effects are likely to result from the proposed transaction, due to a decrease in the number of independent competitors in the markets at issue. In each of the current generic prescription markets, industry participants have indicated that the presence of Hi-Tech as a competitor has allowed them to negotiate lower prices from other suppliers, including Akorn, and has allowed them to locate additional supply in times of product shortages from their existing suppliers.

The evidence also shows that the Proposed Acquisition would eliminate significant future competition between Akorn and Hi-Tech. Although Hi-Tech does not currently have a marketed product in the generic Ilotycin market, the Proposed Acquisition eliminates the next most likely entrant from a very limited pool of future entrants.

By eliminating the significant current and future competition between the parties, the Proposed Acquisition will likely cause U.S. consumers to pay significantly higher prices for these generic drugs, absent a remedy.

The Consent Agreement

The proposed Consent Agreement effectively remedies the Proposed Acquisition's anticompetitive effects in each of the relevant product markets. Pursuant to the Consent Agreement, the parties are required to divest Akorn's or Hi-Tech's rights and assets related to the Products to Watson. Further, the proposed Consent Agreement requires Akorn to assign its contract manufacturing agreement for branded and generic EMLA to Watson. The parties must accomplish these divestitures and relinquish their rights no later than ten days after the Proposed Acquisition is consummated.

The Commission's goal in evaluating possible purchasers of divested assets is to maintain the competitive environment that existed prior to the Proposed Acquisition. If the Commission determines that Watson is not an acceptable acquirer of the divested assets, or that the manner of the divestitures is not acceptable, the parties must unwind the sale of rights to Watson and divest the Products to a Commission-approved acquirer within six months of the date the Order becomes final. In that circumstance, the Commission may appoint a trustee to divest the Products if the parties fail to divest the Products as required.

The proposed Consent Agreement contains several provisions to help ensure that the divestitures are successful. The Order requires Akorn and Hi-Tech to take all action to maintain the economic viability, marketability, and competitiveness of the products to be divested until such time that they are transferred to a Commission-approved acquirer. Depending on the product, Akorn or Hi-Tech must transfer their respective manufacturing technologies for the Products to Watson and must supply Watson with these products during a transitional period.

The Commission has agreed to appoint Denise Smart from Smart Consulting Group, LLC to act as an interim monitor to assure that Akorn and Hi-Tech expeditiously comply with all of their obligations and perform all of their responsibilities pursuant to the Consent Agreement. In order to ensure that the Commission remains informed about the status of the transfer of rights and assets, the Consent Agreement requires Akorn and Hi-

Tech to file reports with the interim monitor who will report in writing to the Commission concerning performance by the parties of their obligations under the Consent Agreement.

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

Complaint

IN THE MATTER OF

AMERICAN APPAREL, INC.

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

Docket No. C-4459; File No. 142 3036
Complaint, June 16, 2014 – Decision, June 16, 2014

This consent order addresses American Apparel, Inc.'s representations made to consumers concerning its participation in the Safe Harbor privacy frameworks agreed upon by the U.S. and the European Union and the U.S. and Switzerland. The complaint alleges that American Apparel falsely represented that it was a "current" participant in the Safe Harbor Frameworks when, in fact, from June 2013 until December 2013, American Apparel was not a "current" participant in the Safe Harbor Frameworks. The consent order prohibits American Apparel from making misrepresentations about its membership in any privacy or security program sponsored by the government or any other self-regulatory or standard-setting organization, including, but not limited to, the U.S.-EU Safe Harbor Framework and the U.S.-Swiss Safe Harbor Framework.

Participants

For the *Commission*: *Katie Race Brin*, *Jessica Lyon*, and *Katherine White.*

For the *Respondent*: *Peter Schey, in-house counsel and solo practitioner.*

COMPLAINT

The Federal Trade Commission, having reason to believe that American Apparel, Inc., 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. Respondent American Apparel, Inc. is a Delaware corporation with its principal office or place of business at 747 Warehouse Street, Los Angeles, CA 90021.

2. Respondent is a clothing manufacturer and retailer with more than 200 stores worldwide.

3. The acts and practices of respondent as alleged in this complaint have been in or affecting commerce, as "commerce" is defined in Section 4 of the FTC Act.

4. Respondent has set forth on its website, www.americanapparel.net, privacy policies and statements about its practices, including statements related to its participation in the Safe Harbor privacy framework agreed upon by the U.S. and the European Union ("U.S.-EU Safe Harbor Framework") and by the U.S. and Switzerland ("U.S.-Swiss Safe Harbor Framework")

The Frameworks

5. The U.S.-EU Safe Harbor Framework provides a method for U.S. companies to transfer personal data outside of Europe that is consistent with the requirements of the European Union Directive on Data Protection ("Directive"). Enacted in 1995, the Directive sets forth European Union ("EU") requirements for privacy and the protection of personal data. Among other things, it requires EU Member States to implement legislation that prohibits the transfer of personal data outside the EU, with exceptions, unless the European Commission ("EC") has made a determination that the recipient jurisdiction's laws ensure the protection of such personal data. This determination is referred to commonly as meeting the EU's "adequacy" standard.

6. To satisfy the EU adequacy standard for certain commercial transfers, the U.S. Department of Commerce ("Commerce") and the EC negotiated the U.S.-EU Safe Harbor Framework, which went into effect in 2000. The U.S.-EU Safe Harbor Framework allows U.S. companies to transfer personal data lawfully from the EU. To join the U.S.-EU Safe Harbor Framework, a company must self-certify to Commerce that it complies with seven principles and related requirements that have been deemed to meet the EU's adequacy standard.

7. Companies under the jurisdiction of the U.S. Federal Trade Commission ("FTC"), as well as the U.S. Department of Transportation, are eligible to join the U.S.-EU Safe Harbor Framework. A company under the FTC's jurisdiction that claims it has self-certified to the Safe Harbor principles, but failed to

self-certify to Commerce, may be subject to an enforcement action based on the FTC's deception authority under Section 5 of the FTC Act.

8. The U.S.-Swiss Safe Harbor Framework is identical to the U.S.-EU Safe Harbor Framework and is consistent with the requirements of the Swiss Federal Act on Data Protection.

9. Commerce maintains a public website, www.export.gov/safeharbor, where it posts the names of companies that have self-certified to the U.S.-EU Safe Harbor Framework and the U.S.-Swiss Safe Harbor Framework. The listing of companies indicates whether their self-certification is "current" or "not current" and a date when recertification is due. Companies are required to re-certify every year in order to retain their status as "current" members of the Safe Harbor Frameworks.

Violations of Section 5 of the FTC Act

10. In June 2012, respondent submitted to Commerce a self-certification of compliance to the Safe Harbor Frameworks.

11. In June 2013, respondent did not renew its self-certification to the Safe Harbor Frameworks, and Commerce subsequently updated respondent's status to "not current" on its public website. In December 2013, respondent renewed its self-certification to the Safe Harbor Frameworks, and respondent's status was changed to "current" on Commerce's website.

12. Since at least June 2012, respondent has disseminated or caused to be disseminated privacy policies and statements on the www.americanapparel.net website, including, but not limited to, the following statements:

> We at American Apparel Corporation ("American Apparel") respect your concerns about privacy and value the relationship we have with you. American Apparel has certified that it abides by the Safe Harbor privacy principles, as set forth by the United States Department of Commerce, regarding the collection, storage, transfer, use and other processing of Personal Information (as defined

below) transferred to the United States from the European Economic Area ("EEA") and Switzerland . . .

13. Through the means described in Paragraph 12, respondent represents, expressly or by implication, that it is a "current" participant in the U.S.-EU Safe Harbor Framework and the U.S.-Swiss Safe Harbor Framework.

14. In truth and in fact, from June 2013 until December 2013, respondent was not a "current" participant in the U.S.-EU Safe Harbor Framework or U.S.-Swiss Safe Harbor Framework. Therefore, the representation set forth in Paragraph 13 was false and misleading.

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

THEREFORE, the Federal Trade Commission this sixteenth day of June, 2014, has issued this complaint against respondent.

By the Commission, Commissioner McSweeny not participating.

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 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, now in further conformity with the procedure prescribed by Commission Rule 2.34, the Commission hereby issues its complaint, makes the following jurisdictional findings, and enters the following Order:

1. Respondent American Apparel, Inc. is a Delaware corporation with its principal office or place of business at 747 Warehouse Street, Los Angeles, CA 90021.

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

ORDER

DEFINITIONS

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

A. Unless otherwise specified, "respondent" shall mean American Apparel, Inc. and its successors and assigns.

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

I.

IT IS ORDERED that respondent and its officers, agents, representatives, and employees, whether acting directly or indirectly, in connection with the advertising, marketing, promotion, offering for sale, or sale of any product or service, in or affecting commerce, shall not misrepresent in any manner, expressly or by implication, the extent to which respondent is a member of, adheres to, complies with, is certified by, is endorsed by, or otherwise participates in any privacy or security program sponsored by the government or any other self-regulatory or standard-setting organization, including, but not limited to, the U.S.-EU Safe Harbor Framework and the U.S.-Swiss Safe Harbor Framework.

II.

IT IS FURTHER ORDERED that respondent shall maintain and upon request make available to the Federal Trade Commission for inspection and copying, a print or electronic copy of, for a period of five (5) years from the date of preparation or dissemination, whichever is later, all documents relating to compliance with this order, including but not limited to:

A. all advertisements, promotional materials, and any other statements containing any representations covered by this order, with all materials relied upon in disseminating the representation; and

B. any documents, whether prepared by or on behalf of respondent, that call into question respondent's compliance with this order.

III.

IT IS FURTHER ORDERED that respondent shall deliver a copy of this order to all current and future principals, officers, directors, and managers, and to all current and future employees, agents, and representatives having responsibilities relating to the subject matter of this order. 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 IV, delivery shall be at least ten (10) days prior to the change in structure. Respondent must secure a signed and dated statement acknowledging receipt of this order, within thirty (30) days of delivery, from all persons receiving a copy of the order pursuant to this section.

IV.

IT IS FURTHER ORDERED that respondent shall notify the Commission at least thirty (30) days prior to any change in the corporation(s) that may affect compliance obligations arising under this order, including, but not limited to: a dissolution, assignment, sale, merger, or other action that would result in the emergence of a successor corporation; the creation or dissolution of a subsidiary, parent, or affiliate that engages in any acts or practices subject to this order; the proposed filing of a bankruptcy petition; or a change in the corporate name or address. *Provided, however*, that, with respect to any proposed change in the corporation(s) about which respondent learns fewer than thirty (30) days prior to the date such action is to take place, respondent shall notify the Commission as soon as is practicable after obtaining such knowledge. 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 of Enforcement, Bureau of Consumer Protection, Federal Trade Commission, 600 Pennsylvania Avenue, N.W., Washington, D.C. 20580. The subject line must begin: *In re American Apparel, Inc.*, FTC File No. 1423036.

V.

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

VI.

This order will terminate on June 16, 2034, 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 McSweeny not participating.

ANALYSIS OF CONSENT ORDER TO AID PUBLIC COMMENT

The Federal Trade Commission ("FTC" or "Commission") has accepted, subject to final approval, a consent agreement applicable to American Apparel, Inc. ("American Apparel").

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

This matter concerns alleged false or misleading representations that American Apparel made to consumers concerning its participation in the Safe Harbor privacy frameworks agreed upon by the U.S. and the European Union ("EU") ("U.S.-EU Safe Harbor Framework") and the U.S. and Switzerland ("U.S.-Swiss Safe Harbor Framework"). It is among several actions the Commission is bringing to enforce the promises that companies make when they certify that they participate in the U.S.-EU Safe Harbor Framework and/or the U.S.-Swiss Safe Harbor Framework ("Safe Harbor Frameworks"). The Safe Harbor Frameworks allow U.S. companies to transfer data outside the EU and Switzerland consistent with European law. To join the Safe Harbor frameworks, a company must self-certify to the U.S. Department of Commerce ("Commerce") that it complies with a set of principles and related requirements that have been deemed by the European Commission and Switzerland as providing "adequate" privacy protection. These principles include notice, choice, onward transfer, security, data integrity, access, and enforcement. Commerce maintains a public website, www.export.gov/safeharbor, where it posts the names of companies that have self-certified to the Safe Harbor frameworks. The listing of companies indicates whether their self-certification is "current" or "not current." Companies are required to re-certify every year in order to retain their status as "current" members of the Safe Harbor frameworks.

American Apparel is a clothing manufacturer and retailer with more than 200 stores worldwide. According to the Commission's complaint, since at least June 2012, American Apparel has set forth on its website, www.americanapparel.net, privacy policies and statements about its practices, including statements related to its participation in the U.S-EU Safe Harbor Framework and the U.S.-Swiss Safe Harbor Framework.

The Commission's complaint alleges that American Apparel falsely represented that it was a "current" participant in the Safe Harbor Frameworks when, in fact, from June 2013 until December 2013, American Apparel was not a "current" participant in the Safe Harbor Frameworks. The Commission's complaint alleges that in June 2012, American Apparel submitted self-certification to the Safe Harbor Frameworks. American Apparel did not renew its self-certification in June 2013 and Commerce subsequently updated American Apparel's status to "not current" on its public website. In December 2013, American Apparel renewed its self-certification to the Safe Harbor Frameworks and its status was changed to "current" on Commerce's website.

Part I of the proposed order prohibits American Apparel from making misrepresentations about its membership in any privacy or security program sponsored by the government or any other self-regulatory or standard-setting organization, including, but not limited to, the U.S.-EU Safe Harbor Framework and the U.S.-Swiss Safe Harbor Framework.

Parts II through VI of the proposed order are reporting and compliance provisions. Part II requires American Apparel to retain documents relating to its compliance with the order for a five-year period. Part III requires dissemination of the order now and in the future to persons with responsibilities relating to the subject matter of the order. Part IV ensures notification to the FTC of changes in corporate status. Part V mandates that American Apparel submit an initial compliance report to the FTC, and make available to the FTC subsequent reports. Part VI is a provision "sunsetting" the order after twenty (20) years, with certain exceptions.

The purpose of 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

ARDAGH GROUP S.A.; SAINT-GOBAIN CONTAINERS, INC.; AND COMPAGNIE DE SAINT-GOBAIN

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

Docket No. 9356; File No. 131 0087
Complaint, June 28, 2013 – Decision, June 17, 2014

This consent order addresses the $1.7 billion acquisition by Ardagh Group S.A. of Saint-Gobain Containers, Inc. from Compagnie de Saint-Gobain. The complaint alleges that the acquisition, if consummated, may substantially lessen competition in the markets for the manufacture and sale of glass containers to brewers and distillers in the United States in violation of Section 7 of the Clayton Act and Section 5 of the Federal Trade Commission Act. Under the order, Ardagh must divest six of its nine United States glass container manufacturing plants to an acquirer approved by the Commission.

Participants

For the *Commission*: *Angelike Andrinopoulos Mina, Josh Goodman*, and *Monica van Panhuys.*

For the *Respondents*: *Michael Antalics* and *Richard Parker, O'Melveny & Myers LLP*; *Dale Collins, Lisl Dunlop*, and *Richard Schwed, Shearman & Sterling LLP*; and *Yonatan Even* and *Christine Varney, Cravath, Swaine & Moore LLP.*

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 (the "Commission"), having reason to believe that Respondent Ardagh Group S.A. ("Ardagh") and Respondent Compagnie de Saint-Gobain have executed an agreement and plan of merger in violation of Section 5 of the Federal Trade Commission Act ("FTC Act"), 15 U.S.C. § 45, and which if consummated would violate Section 7 of the Clayton

Act, as amended, 15 U.S.C. § 18, and it appearing to the Commission that a proceeding by it in respect thereof would be in the public interest, hereby issues its complaint pursuant to Section 11(b) of the Clayton Act, 15 U.S.C. § 21(b), and Section 5(b) of the Federal Trade Commission Act, 15 U.S.C. § 45(b), stating its charges as follows:

I.

NATURE OF THE CASE

1. Each year, Americans use more than 18 billion glass beer and spirits containers. Three manufacturers produce the overwhelming majority of these glass containers: Ardagh, Saint-Gobain Containers, Inc. ("Saint-Gobain"), and Owens-Illinois, Inc. ("O-I"). Together, these "Three Majors" dominate the approximately $5 billion U.S. glass container industry.

2. Ardagh's proposed $1.7 billion acquisition of Saint-Gobain (the "Acquisition") would combine the second- and third-largest U.S. glass container manufacturers, resulting in an effective duopoly. Ardagh and O-I would control the lion's share of the markets for glass containers sold to beer and glass containers sold to spirits customers. The merging parties' own business documents suggest that the Acquisition would result in a duopoly controlling more than [redacted] of the sales of glass containers to beer customers ("Brewers") and spirits customers ("Distillers") in the United States. The market shares presented in these relevant markets easily exceed the market concentration levels presumed likely to result in anticompetitive effects under the Federal Trade Commission and U.S. Department of Justice Horizontal Merger Guidelines ("Merger Guidelines") and under the case law.

3. The Acquisition would substantially lessen competition by dramatically increasing the ease and likelihood of coordination between the only two remaining major glass container manufacturers and by eliminating head-to-head competition between Ardagh and Saint-Gobain that to date has helped lower prices for customers. The result will be higher prices, lower availability, and less innovation.

4. New entry into the relevant markets will not prevent the Acquisition's anticompetitive effects. Glass container plants are expensive to build, costing at least $150 million. Construction is also time-consuming and subject to significant regulatory hurdles. Expansion by fringe manufacturers is also difficult and unlikely because the remaining firms in the marketplace are substantially smaller than the major manufacturers, with no fringe firm operating more than one dedicated glass container plant. Finally, Respondents cannot show cognizable efficiencies that would outweigh the competitive harm that the Acquisition will cause.

II.

JURISDICTION

5. Respondents Ardagh, Compagnie de Saint-Gobain, and Saint-Gobain are, and at all relevant times have been, engaged in commerce or in activities affecting commerce, within the meaning of the Clayton Act. The Acquisition constitutes an acquisition under Section 7 of the Clayton Act.

III.

RESPONDENTS

6. Respondent Ardagh is a corporation existing and doing business under and by virtue of the laws of Luxembourg, with its office and principal place of business located at 56, rue Charles Martel, Luxembourg. Ardagh is a global leader in glass and metal packaging solutions with global sales of approximately $4.8 billion. Ardagh owns nine glass container plants located in seven U.S. states. In 2012, Ardagh achieved U.S. glass container sales of [redacted] of these sales were made to Brewers and [redacted] were made to Distillers. Presently, Ardagh is the third-largest glass container manufacturer in the United States overall, the third-largest glass container manufacturer for Brewers, and the second-largest for Distillers.

7. Respondent Compagnie de Saint-Gobain is a corporation existing and doing business under and by virtue of the laws of France, with its office and principal place of business located at

"Les Miroirs," 18 avenue d'Alsace, Courbevoie, France. Compagnie de Saint-Gobain operates a number of industrial manufacturing businesses, including manufacturing glass containers. Its U.S. glass container business, Saint-Gobain, operates under the name "Verallia North America" or "VNA." Saint-Gobain operates 13 glass container plants in 11 U.S. states. In 2012, Saint-Gobain achieved U.S. sales of [redacted] of these sales were made to Brewers and [redacted] were made to Distillers. Presently, Saint-Gobain is the second-largest glass container manufacturer in the United States overall, the second-largest glass container manufacturer to Brewers, and the third-largest to Distillers.

IV.

THE ACQUISITION

8. Pursuant to a Share Purchase Agreement entered into between Ardagh and Compagnie de Saint-Gobain on January 17, 2013, Ardagh proposes to acquire all the voting securities of Saint-Gobain for approximately $1.7 billion.

V.

BACKGROUND

A.

Glass Containers

9. Glass container manufacturers produce beverage and food containers in a variety of shapes and sizes for beer, spirits, non-alcoholic beverages, ready-to-drink alcoholic beverages, and various food products. In 2011, sales to Brewers represented approximately 58% of U.S. glass container shipments and sales to Distillers represented approximately 4%.

10. Glass containers have certain attributes that are prized by Brewers and Distillers who package their products in glass. Among other features, glass:

- Protects beer and spirits by guarding against oxygen invasion for a longer shelf life;

- Maintains the true taste of the beer or spirits;

- Is chemically inert and does not leach chemicals into the beer and spirits;

- Is 100% recyclable;

- Promotes a premium or distinctive brand image; and

- Enables Brewers and Distillers to associate the quality appearance of the glass with their product identity.

11. Other categories of glass, such as flat window glass, table glass (*e.g.*, drinking glasses and kitchenware), and specialty pharmaceutical or industrial glass are manufactured differently than glass containers. Respondents do not make or sell these other types of glass.

B.

Market Structure

12. The approximately $5 billion glass container industry in the United States is dominated by the Three Majors: O-I, Saint-Gobain, and Ardagh. Presently, O-I is the largest U.S. producer of glass containers, operating 17 plants in the country, plus two in Canada. Saint-Gobain is the second-largest glass container producer with 13 plants, and Ardagh is the third-largest with 9 plants.

13. Ardagh entered the U.S. glass container industry in 2012 with two acquisitions. First, Ardagh bought Leone Industries, a small, single-plant glass container producer in Bridgeton, New

Jersey. Shortly thereafter, it bought Anchor Glass Container Corporation ("Anchor"), the longstanding, third-largest glass container producer in the United States. Ardagh's proposed acquisition of Saint-Gobain would be its third glass container acquisition in the United States in less than two years, and, in its own words, will make Ardagh the largest glass producer in the country.

14. Beyond the Three Majors, there is a fringe of glass manufacturers each with only a single-plant dedicated to glass containers in the United States, including the independent glass-makers Arkansas Glass, Piramal, Anchor Hocking, Bennu Glass, and Gerresheimer Glass. Of these, only three make glass containers for Distillers and only two make any type of glass containers for Brewers. These sales are extremely limited.

15. Three beverage companies, E. & J. Gallo Winery (through Gallo Glass Company), Anheuser-Busch InBev (through Longhorn Glass Corporation), and MillerCoors (through Rocky Mountain Bottle Company, a joint venture with O-I) operate single-plant glass container manufacturing facilities. Gallo manufactures mostly wine bottles and a small number of glass containers for its own spirits products. Brewers Anheuser-Busch InBev and MillerCoors do not have any external sales of the glass containers that they produce.

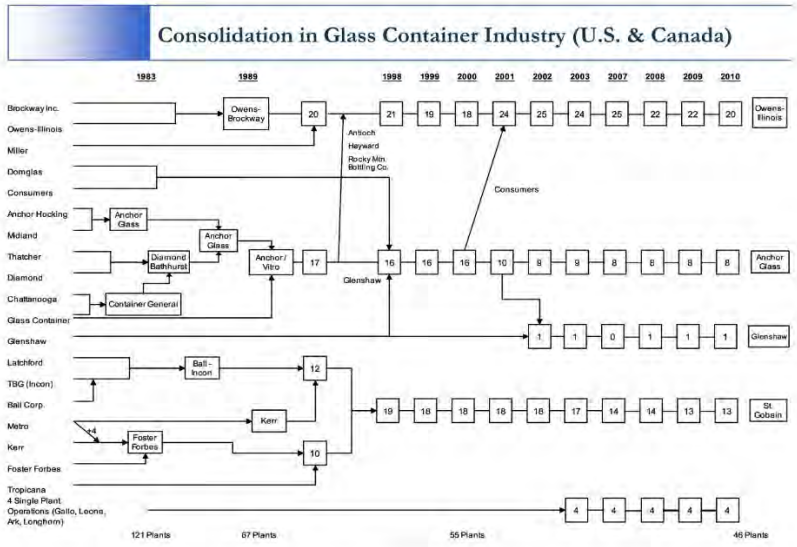
16. Two Mexican manufacturers, Vitro and Fevisa, currently export a small amount of glass containers to the United States. The U.S. fringe, self-suppliers, and Mexican firms have a limited impact on competition in the relevant markets, servicing limited regions and portions of demand from Brewers and Distillers.

VI.

INDUSTRY BACKGROUND: MARKET CONSOLIDATION

17. The U.S. glass container industry has changed dramatically over the past thirty years, as manufacturers have consolidated and shed excess capacity. In 1983, there were approximately 121 glass container plants run by 23 different

manufacturers, 19 of which operated more than one plant in the United States. During the 1980s and 1990s, a series of mergers reduced the number of competitors. Today, there are only 47 glass container plants, and only the Three Majors operate more than one dedicated glass container plant.



[Note: Anchor Glass is now Ardagh and Glenshaw is now Kelman and is not currently operational].

18. In the years past, mainly before the mid-2000s, when there was excess capacity in the market, the Three Majors competed particularly vigorously against each other. To keep their plants fully loaded, the Three Majors prioritized glass container sales volume over prices. The Respondents refer to this period as one of [redacted] or [redacted] Their efforts to fill excess capacity and the resulting price competition led to lower margins for the Three Majors and lower prices for their customers.

19. Beginning in the mid-2000s, the Three Majors [redacted] The Three Majors began pursuing a "price over volume" strategy (also referred to as "value over volume" or "margin before volume"). The Three Majors recognized that this shared approach would help keep industry capacity in close

balance with demand, help maintain pricing policies, and ensure more profitable returns. As a presentation to Ardagh's top executives explains, [redacted]

20. While rationalizing capacity and announcing a focus on profitability, the Three Majors began demanding cost pass-through provisions in their contracts and implementing surcharges to protect themselves from cost increases. Meanwhile, the Three Majors successfully shielded themselves from increases in raw materials, energy, labor, natural gas, and fuel costs, which were passed on to customers. At the same time, the Three Majors recognized the advantages of keeping industry supply tight, which maximized their own leverage with customers. To avoid excess capacity, they closed down glass container plants and idled furnaces. As demonstrated in this chart prepared in 2012 for Ardagh contemplating this very Acquisition, the combination of these two strategies led to higher margins for glass container manufacturers and higher prices for customers.

Confidential
Proprietary Graphic
Redacted

21. Despite the Three Majors' recognition of mutually beneficial behavior, glass container buyers continue to pit O-I, Saint-Gobain, and Ardagh against each other to obtain better prices. For example, in 2013, a Saint-Gobain distributor reported that it was a [redacted] when one of its major Brewers switched to Ardagh in response to a [redacted]% price increase, and warned Saint-Gobain to [redacted] Similarly, in August 2011, the CEO of Anchor (now President of Ardagh Glass North America) wrote that it [redacted] after one of Ardagh's liquor customers obtained a lower price quote from O-I.

VII.

THE RELEVANT PRODUCT MARKETS

22. The relevant product markets in which to analyze the Acquisition's effects are: (1) the manufacture and sale of glass containers to Brewers; and (2) the manufacture and sale of glass containers to Distillers. This is appropriate because, as described in the Merger Guidelines, prices are individually negotiated in this industry and customers cannot engage in arbitrage.

23. Together, beer and spirits are an important driver for U.S. glass container demand and represent more than 60% of the glass container usage in this country. Brewers purchase over $2 billion in glass containers annually to meet consumer demand for beer in glass bottles. Non-glass packaging materials, such as aluminum cans or plastic containers, are not in this relevant product market because not enough Brewers would switch to such products to make a small but significant and non-transitory increase in the price ("SSNIP") of glass containers to Brewers unprofitable for a hypothetical monopolist.

24. Brewers and Distillers do not view other packaging materials as interchangeable for glass containers because of commercial constraints, such as consumer preferences and brand identity. The existence of other packaging materials has not prevented the Three Majors from shifting cost increases to Brewers and Distillers and raising prices in recent years. Indeed, glass container prices have increased substantially more than plastic containers and aluminum cans.

25. Aluminum cans and plastic containers are already significantly less expensive than size-equivalent glass containers, yet Brewers continue to purchase glass containers. Many Brewers sell beer in both aluminum cans and glass bottles, and view these two forms of packaging as complementary to each other, not as substitutes. Despite the presence of aluminum cans, Respondents forecast demand for glass bottles for beer as stable for the two largest Brewers and growing for craft Brewers.

26. Distillers purchase more than $500 million in glass containers to package and promote their spirits products. Non-glass packaging materials, such as plastic containers, are not in this relevant product market because not enough spirits customers would switch to non-glass packaging materials to make a SSNIP in glass containers to spirits customers unprofitable for a hypothetical monopolist.

27. Distillers who package their products in glass containers rely on competition among glass container manufacturers, not plastic suppliers, to obtain favorable pricing. In instances where spirits manufacturers decide to package their products in plastic – mainly in the sub-premium brands, small container sizes, and bulk sizes – there is little that glass manufacturers can do to prevent these customers from switching to plastic containers. In other words, a customer's decision to convert spirits products from glass packaging to plastic packaging are not typically driven by price competition. Moreover, once a customer converts to plastic, they very rarely return to packaging in glass.

28. Head-to-head competition between glass containers and other types of packaging is rare. Brewers and Distillers compete glass container manufacturers against each other to obtain favorable pricing and commercial terms. While other packaging materials can functionally be used to package beer and spirits, these other packaging materials, primarily aluminum cans for beer and plastic for spirits, lack a close price relationship with glass containers. Quite simply, other types of packaging do not constrain Ardagh and Saint-Gobain to the same degree as glass container competition. Indeed, as Ardagh itself described in its bond offering memorandum raising money to acquire Anchor: "We are subject to intense competition from other glass container producers against whom we compete on the basis of price, quality, customer service, reliability of delivery and marketing." Ardagh distinguished this direct competition with its glass-making rivals by describing that it competes "indirectly" with other forms of rigid packaging, such as plastic and metal. The absence of plastic and metal competition is particularly acute in the relevant product markets.

29. The Respondents' own assessment of competition shows why products other than glass containers are not in the relevant markets. In their business documents, Saint-Gobain and Ardagh routinely identify each other and O-I as their most consistent and direct competitive constraints. Respondents' own documents focus on competition from each other and O-I when analyzing sales to Brewers and Distillers. Respondents identify their competition as the other glass container manufacturers and discuss business strategies for glass container sales. Ardagh and Saint-Gobain calculate their sales volumes and revenues relative to each other and O-I. For example, in a recent presentation to [redacted], Ardagh explained its "North American Glass Expansion" would make Ardagh the "#1 Player [with a] 49% Market Share."

VIII.

THE RELEVANT GEOGRAPHIC MARKET

30. The relevant geographic market in which to analyze the competitive effects of this Acquisition is no broader than the United States. All Three Majors have manufacturing plants throughout the United States that enable them to compete on a nationwide basis. There are limited imports of glass containers to the United States, because of high freight costs, logistical and supply chain risks, and customer perceptions of inferior quality. Imports are thus unlikely to defeat a small but significant and non-transitory increase in price by a hypothetical monopolist of glass containers manufactured and sold to Brewers and Distillers in the United States.

IX.

MARKET CONCENTRATION AND THE ACQUISITION'S PRESUMPTIVE ILLEGALITY

31. The glass container industry in the United States will be highly concentrated after the Acquisition. The Merger Guidelines measure concentration using the Herfindahl-Hirschman Index ("HHI"). Under that test, a merger is presumed likely to create or enhance market power (and presumptively illegal) when the post-

merger HHI exceeds 2,500 and the merger increases the HHI by more than 200 points. Here, both markets' post-merger HHI well exceeds 2,500, and the Acquisition increases concentration in the sale of glass containers sold to Brewers by 781 points, and 1,069.3 for the sale of glass containers to Distillers.

Glass Containers Sold to Distillers Market				
Company	Pre-Merger		Post-Merger	
	Share (%)	HHI	Share (%)	HHI
O-I	[redacted]	[redacted]	[redacted]	[redacted]
Ardagh	[redacted]	[redacted]	[redacted]	[redacted]
Saint-Gobain	[redacted]	[redacted]	[redacted]	[redacted]
Vitro	[redacted]	[redacted]	[redacted]	[redacted]
Anchor Hocking	[redacted]	[redacted]	[redacted]	[redacted]
Gallo	[redacted]	[redacted]	[redacted]	[redacted]
Piramal	[redacted]	[redacted]	[redacted]	[redacted]
Gerresheimer Glass	[redacted]	[redacted]	[redacted]	[redacted]
	[redacted]	[redacted]	[redacted]	[redacted]
Total	**Pre-Merger HHI = 2,179.8** **Post-Merger HHI = 3,249.1** **Increase = 1,069.3**			

Glass Containers Sold to Brewers Market				
Company	Pre-Merger		Post-Merger	
	Share (%)	HHI	Share (%)	HHI
O-I	[redacted]	[redacted]	[redacted]	[redacted]
Saint-Gobain	[redacted]	[redacted]	[redacted]	[redacted]
Ardagh	[redacted]	[redacted]	[redacted]	[redacted]
Rocky Mtn. Bottle	[redacted]	[redacted]	[redacted]	[redacted]
Fevisa	[redacted]	[redacted]	[redacted]	[redacted]
Longhorn	[redacted]	[redacted]	[redacted]	[redacted]
Gerresheimer Glass	[redacted]	[redacted]	[redacted]	[redacted]
Vitro	[redacted]	[redacted]	[redacted]	[redacted]
Imports	[redacted]	[redacted]	[redacted]	[redacted]
Total	**Pre-Merger HHI = 2,884.8** **Post-Merger HHI = 3,665.8** **Increase = 781**			

X.

ANTICOMPETITIVE EFFECTS

A.

The Acquisition Will Likely Lead To Anticompetitive Coordination.

32. The glass container markets for beer and spirits have many features that increase the likelihood of post-Acquisition coordination, including low demand growth, tight capacity, stable market shares, and high barriers to entry. The Three Majors already obtain a wealth of information about the markets and each other, including plant-by-plant production capabilities, profitability, the identities of each other's customers, and details regarding each other's contracts and negotiations with customers. Customers, industry analysts, public statements, and distributors all serve as conduits for market information.

33. After the Acquisition, with only two major glass container manufacturers left, it will become substantially easier for the remaining two majors to coordinate with one another on price and non-price terms to achieve supracompetitive prices or other anticompetitive outcomes.

34. All Three Majors recognize their mutual interdependence and aligned incentives today. They have reduced capacity, either by closing plants or idling furnaces, to rationalize industry supply so as not to exceed customer demand. The Three Majors share an [redacted] and have embraced a "price over volume" or "margin over volume" strategy of cutting capacity, boosting price, and shifting input cost volatility to the customers. Indeed, Saint-Gobain repeatedly referred to its strategy of "margin over volume" as its [redacted] O-I is the only one of the Three Majors that is publicly traded and Ardagh and Saint-Gobain closely follow O-I's financial reports and public strategy statements.

35. Not only do the Three Majors pay close attention to each other's public statements but their executives often obtain non-

public information through third parties. For example, in 2009, Anchor requested a call with a key industry analyst. After the call, in which Anchor's CEO, CFO, and a board member participated, the industry analyst wrote back, "I will let you know what I hear back from St. Gobain when I hear from them." Three days later, Anchor's CEO responded:

> We hope that our view confirms your thoughts regarding the industry leader's efforts on enhanced performance. We continue to desire to play the role as the rational #3 glass provider in NA, support customers where there is a strong geographic alignment logistically, and focus our assets to support improved value rather than just volume.
>
> We believe our curtailment efforts on capacity and balancing capacity/demand/ inventory are very consistent with what has been pursued by the leader as well.

The industry analyst later responded with information he had learned from discussions with O-I:

> I was chatting with OI recently and they are optimistic about the outlook for a recovery in glass volumes, but probably not until 2010 . . . In the US, they anticipate achieving some price success with their 2 big customers at the end of this year, but they seemed (in my opinion) to have backed off a bit of the bullishness they had a few quarters ago regarding timing and absolute level of increase. They do feel that supply/demand is being well managed in the US, but given the volume trends thus far in 2009 they seem a little concerned (in my view) on whether they will be able to get the big step up in price they (and investors) wanted . . . Reading between the lines a little, it seems to me they are a little concerned about losing some volume to competitors.

36. This merger to duopoly would greatly increase the likelihood and risk of coordination. For example, prior to quoting on craft Brewer business, Saint-Gobain advised its sales committee to

B.

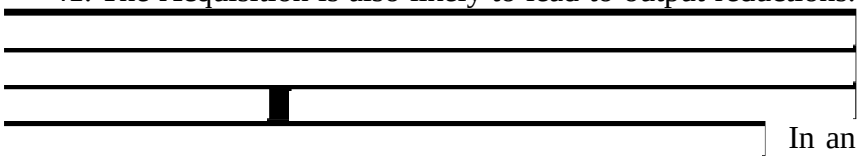
The Acquisition Will Eliminate Direct Competition Between Ardagh and Saint-Gobain.

37. The Acquisition would eliminate head-to-head competition between the second- and third-largest U.S. glass container manufacturers in the relevant product markets. Brewers and Distillers have reaped substantial benefits from Respondents' rivalry, which would be immediately extinguished by The Acquisition.

38. Direct competition between Ardagh and Saint-Gobain has led to lower prices for customers. For example, in 2012, Anchor lowered its prices to in response to competition from Saint-Gobain. Another craft brewer, was able to obtain more favorable pricing by competing Saint-Gobain and Anchor off each other. A spirits customer, also used the threat of switching from Saint-Gobain to Anchor to get better prices on its glass bottles.

Respondents' ordinary-course business documents confirm that they understand competition from each other to constrain price increases. For example, in a 2011 email, the Vice President of Sales for Anchor wrote about price increases through its glass distributor for beer customers: In a 2012 email, the other Vice President of Sales for Anchor wrote about Saint-Gobain's pricing at another beer customer:

40. Ardagh and Saint-Gobain have also competed directly to offer customers more innovative products and better service. For example, in 2012, a customer invited Ardagh and Saint-Gobain to submit prototypes for an innovative glass beer bottle. Both firms submitted proposals before Saint-Gobain won the business. At another Brewer, competition from Saint-Gobain prompted Ardagh to offer lighter weight glass bottles.

41. The Acquisition is also likely to lead to output reductions.  In an industry where capacity is tight, and utilization rates are nearly at maximum capacity, such plant closures or idling furnaces are likely to result in overall output reductions.

XI.

ENTRY BARRIERS

42. Effective entry or expansion into the relevant markets would neither be timely, likely, or sufficient to counteract the Acquisition's likely anticompetitive effects. The barriers facing potential entrants include the large capital investment necessary to build a glass plant, the need to obtain environmental permits, the high fixed costs of operating a glass plant, existing long-term contracts that foreclose much of the market, the need for specific manufacturing knowledge that is not easily transferred from other industries, and the molding technologies and extensive mold libraries already in place at existing manufacturers.

XII.

EFFICIENCIES

43. Extraordinarily great merger-specific efficiencies would be necessary to justify the Acquisition in light of its vast potential to harm competition. Nearly all of Ardagh's alleged efficiencies are either speculative, unverifiable, or not merger-specific.

Respondents cannot show cognizable efficiencies that would outweigh the competitive harm that the Acquisition will cause.

VIOLATIONS

Count I: Illegal Agreement

44. The allegations contained in Paragraphs 1-43 are incorporated by reference as though fully set forth.

45. The agreement and plan of merger constitutes an unfair method of competition in violation of Section 5 of the FTC Act, as amended, 15 U.S.C. § 45.

Count II: Illegal Acquisition

46. The allegations contained in Paragraphs 1-43 are incorporated by reference as though fully set forth.

47. The Acquisition, if consummated, may substantially lessen competition in violation of Section 7 of the Clayton Act, as amended, 15 U.S.C. § 18, and is an unfair method of competition in violation of Section 5 of the Federal Trade Commission Act, as amended, 15 U.S.C. § 45.

NOTICE

Notice is hereby given to the Respondents that the second day of December, 2013, at 10:00 a.m. is hereby fixed as the time, and the Federal Trade Commission offices at 600 Pennsylvania Avenue, N.W., Room 532, Washington, D.C. 20580, as the place when and where an evidentiary hearing will be had before an Administrative Law Judge of the Federal Trade Commission, on the charges set forth in this complaint, at which time and place you will have the right under the Federal Trade Commission Act and the Clayton Act to appear and show cause why an order should not be entered requiring you to cease and desist from the violations of law charged in the complaint.

You are notified that the opportunity is afforded you to file with the Commission an answer to this complaint on or before the

fourteenth (14th) day after service of it upon you. An answer in which the allegations of the complaint are contested shall contain a concise statement of the facts constituting each ground of defense; and specific admission, denial, or explanation of each fact alleged in the complaint or, if you are without knowledge thereof, a statement to that effect. Allegations of the complaint not thus answered shall be deemed to have been admitted.

If you elect not to contest the allegations of fact set forth in the complaint, the answer shall consist of a statement that you admit all of the material facts to be true. Such an answer shall constitute a waiver of hearings as to the facts alleged in the complaint and, together with the complaint, will provide a record basis on which the Commission shall issue a final decision containing appropriate findings and conclusions and a final order disposing of the proceeding. In such answer, you may, however, reserve the right to submit proposed findings and conclusions under Rule 3.46 of the Commission's Rules of Practice for Adjudicative Proceedings.

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

The Administrative Law Judge shall hold a prehearing scheduling conference not later than ten (10) days after the Respondents file their answers. Unless otherwise directed by the Administrative Law Judge, the scheduling conference and further proceedings will take place at the Federal Trade Commission, 600 Pennsylvania Avenue, N.W., Room 532, Washington, D.C. 20580. Rule 3.21(a) requires a meeting of the parties' counsel as early as practicable before the pre-hearing scheduling conference (but in any event no later than five (5) days after the Respondents file their answers). Rule 3.31 (b) obligates counsel for each party, within five (5) days of receiving the Respondents' answers, to make certain initial disclosures without awaiting a discovery request.

NOTICE OF CONTEMPLATED RELIEF

Should the Commission conclude from the record developed in any adjudicative proceedings in this matter that the Acquisition challenged in this proceeding violates Section 7 of the Clayton Act, as amended, or Section 5 of the FTC Act, as amended, the Commission may order such relief against Respondents as is supported by the record and is necessary and appropriate, including, but not limited to:

1. If the Acquisition is consummated, divestiture or reconstitution of all associated and necessary assets, in a manner that restores two or more distinct and separate, viable and independent businesses in the relevant markets, with the ability to offer such products and services as Ardagh and Saint-Gobain were offering and planning to offer prior to the Acquisition.

2. A prohibition against any transaction between Ardagh and Saint-Gobain that combines their businesses in the relevant markets, except as may be approved by the Commission.

3. A requirement that, for a period of time, respondents provide prior notice to the Commission of acquisitions, mergers, consolidations, or any other combinations of their businesses in the relevant markets with any other company operating in the relevant markets.

4. A requirement to file periodic compliance reports with the Commission.

5. Any other relief appropriate to correct or remedy the anticompetitive effects of the transaction or restore Saint-Gobain as a viable, independent competitor in the relevant markets.

IN WITNESS WHEREOF, the Federal Trade Commission has caused this complaint to be signed by its Secretary and its

official seal to be hereto affixed, at Washington, D.C., this twenty-eighth day of June, 2013.

By the Commission, Commissioner Wright dissenting.

ORDER TO HOLD SEPARATE AND MAINTAIN ASSETS
[Public Record Version]

The Federal Trade Commission ("Commission"), having heretofore issued its Complaint charging Ardagh Group, S.A. ("Respondent Ardagh" or "Respondent"), Saint-Gobain Containers, Inc. (also known as Verallia North America ("VNA"), and Compagnie de Saint-Gobain ("CSG"), with a violation of Section 5 of the Federal Trade Commission Act, as amended, 15 U.S.C. § 45, and Section 7 of the Clayton Act, as amended, 15 U.S.C. § 18, and Respondents having been served with a copy of that Complaint, together with a notice of contemplated relief and having filed their answers denying said charges; and

Respondents, their attorneys, and counsel for the Commission having thereafter executed an Agreement Containing Consent Orders ("Consent Agreement"), containing an admission by Respondents of all the jurisdictional facts set forth in the aforesaid 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 withdrawn the matter from adjudication in accordance with Commission Rule 3.25(c), 16 C.F.R. § 3.25(c); and the Commission having thereafter considered the matter and having thereupon accepted the executed Consent Agreement and placed such agreement on the public record for the receipt of public comments pursuant to

Commission Rule 2.34, 16 C.F.R. § 2.34, now in conformity with the procedure prescribed in Commission Rule 3.25(f), 16 C.F.R. § 3.25(f), the Commission hereby makes the following jurisdictional findings and factual findings and issues the following Order to Hold Separate and Maintain Assets ("Hold Separate Order"):

1. Respondent Ardagh Group, S.A., is a limited liability corporation organized, existing, and doing business under, and by virtue of, the laws of Luxembourg with its office and principal place of business at 56, rue Charles Martel, Luxembourg, and operates its glass container business in the United States through its subsidiary Ardagh Glass, Inc., which has its office and principal place of business located at 401 E. Jackson Street, Suite 2800, Tampa, FL 33602.

2. Respondent Saint-Gobain Containers, Inc., 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 1509 S. Macedonia Ave, Muncie, IN 47302.

3. Respondent Compagnie de Saint-Gobain is a corporation organized, existing, and doing business under, and by virtue of, the laws of France with its office and principal place of business located at "Les Miroirs," 18 avenue d'Alsace, Courbevoie, France, and its United States office and principal place of business located at 750 E. Swedesford Rd, Valley Forge, PA 19482.

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.

I.

IT IS HEREBY ORDERED that, as used in this Hold Separate Order, the following definitions, and all other definitions

used in the Consent Agreement and the Decision and Order, shall apply:

A. "Ardagh Retained Employees" means employees of Respondent Ardagh who are not Anchor Glass Designated Employees.

B. "Ardagh Retained Business" means the assets and businesses of Respondent Ardagh other than the Anchor Glass Business.

C. "Hold Separate Manager" means the Person appointed pursuant to Paragraph IV of this Hold Separate Order to be the manager of the Anchor Glass Business.

D. "Hold Separate Monitor" means the Person appointed pursuant to Paragraph III of this Hold Separate Order to oversee the Hold Separate Manager and the Anchor Glass Business.

E. "Hold Separate Period" means the period during which the Anchor Glass Business shall be held separate from the Ardagh Retained Business under this Hold Separate Order, which shall begin on the Acquisition Date and terminate on the Divestiture Date.

F. "Hold Separate Services" means those services provided by the Anchor Glass Business to the Ardagh Retained Business as described in Non-public Appendix B, and any other services as agreed to by Respondent Ardagh, the Hold Separate Manager, the Hold Separate Monitor, and Commission staff.

G. "Orders" means the Decision and Order in this matter and this Hold Separate Order.

II.

IT IS FURTHER ORDERED that:

A. With respect to the Anchor Glass Business during the Hold Separate Period:

1. Respondent Ardagh shall hold the Anchor Glass Business separate, apart, and independent of Respondent Ardagh's other businesses and assets as required by this Hold Separate Order and shall vest the Anchor Glass Business with all rights, powers, and authority necessary to conduct business in a manner consistent with the Orders. *Provided, however,* that the Anchor Glass Business shall be allowed to provide Hold Separate Services to Respondent Ardagh.

2. Respondent Ardagh shall not exercise direction or control over, or influence directly or indirectly, the Anchor Glass Business or any of its operations, the Hold Separate Monitor, or the Hold Separate Manager, except to the extent that Respondent Ardagh must exercise direction and control over the Anchor Glass Business as is necessary to assure compliance with the Consent Agreement, the Orders, and all applicable laws and regulations, including, in consultation with the Hold Separate Monitor, continued oversight of compliance of the Anchor Glass Business with policies and standards concerning safety, health, and environmental aspects of its operations and the integrity of its financial and operational controls. Respondent Ardagh shall have the right in consultation with the Hold Separate Monitor to defend any legal claims, investigations, or enforcement actions threatened or brought against the Anchor Glass Business;

3. Respondent Ardagh shall take all actions necessary to maintain and assure the continued viability, marketability, and competitiveness of the Anchor

Glass Business (including, but not limited to, taking such actions as the Hold Separate Monitor in consultation with Commission staff requests or directs that are reasonably necessary to maintain and assure the continued viability, marketability, and competitiveness of the Anchor Glass Business), prevent the destruction, removal, wasting, deterioration, or impairment of the Anchor Glass Business, except for ordinary wear and tear, and enable the Anchor Glass Business to operate in the regular and ordinary course of business as provided for in this Hold Separate Order.

4. Respondent Ardagh shall not sell, transfer, encumber, or otherwise impair the Anchor Glass Business (except as directed by the Hold Separate Monitor or required by the Order or the Hold Separate Order);

5. Respondent Ardagh shall provide the Anchor Glass Business with sufficient funding and financial resources necessary to maintain the full economic viability, marketability, and competitiveness of the Anchor Glass Business, including, but not limited to, all funding and financing necessary to: (i) operate the Anchor Glass Business in a manner consistent with how it has been operated, and is currently operated, in the normal course of business, and consistent with business, capital and strategic plans and operating budgets as of January 1, 2014; (ii) carry out any planned or existing capital projects and physical improvements; (iii) perform maintenance, replacement, or remodeling of assets in the ordinary course of business; and (iv) provide capital, working capital, and reimbursement for any operating expenses, losses, capital losses, or other losses.

B. The purpose of this Hold Separate Order is to: (1) maintain and preserve the Anchor Glass Business as

viable, marketable, competitive, and ongoing businesses independent of Respondent Ardagh until the divestiture required by the Decision and Order is achieved; (2) ensure that no Confidential Business Information is exchanged between Respondent Ardagh and the Anchor Glass Business, except in accordance with the provisions of the Orders; (3) prevent interim harm to competition pending the divestiture and other relief; and (4) remedy any anticompetitive effects of the Acquisition.

III.

IT IS FURTHER ORDERED that:

A. Mr. Edward C. White shall serve as Hold Separate Monitor to monitor and supervise the management of the Anchor Glass Business and ensure that Respondent Ardagh complies with its obligations under the Orders.

B. Respondent Ardagh shall enter into the Hold Separate Monitor Agreement with the Hold Separate Monitor that is attached as Appendix A. The compensation for the Hold Separate Monitor is attached as Non-Public Appendix A-1. The Hold Separate Monitor Agreement shall become effective on the date this Hold Separate Order becomes final. The Hold Separate Monitor Agreement shall transfer to and confer upon the Hold Separate Monitor all rights, powers, and authority necessary to permit the Hold Separate Monitor to perform his duties and responsibilities pursuant to this Hold Separate Order in a manner consistent with the purposes of the Orders and in consultation with Commission staff, and shall require that the Hold Separate Monitor act in a fiduciary capacity for the benefit of the Commission. Further, the Hold Separate Monitor Agreement shall provide that:

1. The Hold Separate Monitor shall have the responsibility for monitoring the organization of

the Anchor Glass Business; supervising the management of the Anchor Glass Business by the Hold Separate Manager; maintaining the independence of the Anchor Glass Business; supervising and approving Hold Separate Services; ensuring continued and adequate funding of the Anchor Glass Business and its operation in the ordinary course of business as provided for in this Hold Separate Order; and monitoring Respondent Ardagh's compliance with its obligations pursuant to the Orders.

2. The Hold Separate Monitor shall act in a fiduciary capacity for the benefit of the Commission.

3. The Hold Separate Monitor shall have full and complete access to all of Respondent Ardagh's facilities, personnel, and books and records relating to the Anchor Glass Business as may be necessary for or relate to the performance of the Hold Separate Monitor's duties under the Orders and the Hold Separate Monitor Agreement. The books and records to which the Hold Separate Monitor shall have access include, but are not limited to, any and all:

   a. Data and databases, including, but not limited to, databases with financial information relating to the Anchor Glass Business;

   b. Regularly-prepared reports relating to the Anchor Glass Business, including, but not limited to, financial, revenue, customer or operating statements or reports prepared daily, weekly, monthly, or on some other regular interval;

   c. Regularly-prepared or periodic reports prepared and filed with any Governmental Agency;

d. Reports or summaries of marketing and promotional activities by Respondent Ardagh that relate to the Anchor Glass Business;

e. Reports, summaries, records, or documents from the past operations of the Anchor Glass Business sufficient to allow the Hold Separate Monitor to evaluate the performance of the Anchor Glass Business during the Hold Separate Period in comparison to the past performance of the Anchor Glass Business;

f. Other relevant reports, summaries, records documents, or information relating to the Anchor Glass Business as the Hold Separate Monitor may request; and

g. Financial summaries or reports, or other information, reports, or summaries relating to the Anchor Glass Business as the Hold Separate Monitor may request Respondent Ardagh to locate, collect, organize, and develop for the Hold Separate Monitor.

4. The Hold Separate Monitor shall have the authority to employ, at the cost and expense of Respondent Ardagh, such consultants, accountants, attorneys, and other representatives and assistants as are reasonably necessary to carry out the Hold Separate Monitor's duties and responsibilities.

5. The Hold Separate Monitor shall serve, without bond or other security, at the cost and expense of Respondent Ardagh, on reasonable and customary terms commensurate with the person's experience and responsibilities. Respondent Ardagh shall provide compensation to the Hold Separate Monitor, and pay the Hold Separate Monitor's costs and expenses (including, but not limited to, those related to consultants, accountants, attorneys,

and other representatives and assistants) on a monthly or other reasonable periodic basis.

6. Respondent Ardagh shall indemnify the Hold Separate Monitor and hold him harmless against any losses, claims, damages, liabilities, or expenses arising out of, or in connection with, the performance of the Hold Separate Monitor's duties, including all reasonable fees of counsel and other expenses incurred in connection with the preparation for, or defense of, any claim, whether or not resulting in any liability, except to the extent that such losses, claims, damages, liabilities, or expenses result from the Hold Separate Monitor's gross negligence, willful or wanton acts, or bad faith. For purposes of this Paragraph III.B.6., the term "Hold Separate Monitor" shall include all persons retained by the Hold Separate Monitor pursuant to Paragraph III.B.4. of this Hold Separate Order.

7. The Commission may require the Hold Separate Monitor and each of the Hold Separate Monitor's consultants, accountants, attorneys, and other representatives and assistants to sign an appropriate confidentiality agreement relating to materials and information received from the Commission in connection with performance of the Hold Separate Monitor's duties.

8. Respondent Ardagh may require the Hold Separate Monitor and each of the Hold Separate Monitor's consultants, accountants, attorneys, and other representatives and assistants to sign an appropriate confidentiality agreement. *Provided, however,* that such agreement shall not restrict the Hold Separate Monitor from providing any information to the Commission.

9. Thirty (30) days after the Hold Separate Order becomes final, and every thirty (30) days thereafter

until the Hold Separate Order terminates, and as requested by the Commission or staff, the Hold Separate Monitor shall report in writing to the Commission concerning Respondent Ardagh's efforts to comply with the terms of the Hold Separate Order. Each report shall include, but not be limited to, the Hold Separate Monitor's assessment of the extent to which the Anchor Glass Business is meeting (or exceeding or failing to meet) its projected goals as reflected in business planning documents, budgets, projections, or any other regularly prepared financial statements.

10. Respondent Ardagh shall comply with all terms of the Monitor Agreement, and any breach by Respondent Ardagh of any term of the Monitor Agreement shall constitute a violation of this Hold Separate Order. Notwithstanding any paragraph, section, or other provision of the Monitor Agreement, any modification of the Monitor Agreement, without the prior approval of the Commission, shall constitute a failure to comply with the Orders.

C. If the Hold Separate Monitor ceases to act or fails to act diligently and consistently with the purposes of this Hold Separate Order, the Commission may appoint a substitute Hold Separate Monitor, subject to the consent of Respondent Ardagh, which consent shall not be unreasonably withheld, as follows:

1. If Respondent Ardagh has not opposed in writing, including the reasons for opposing, the selection of the proposed substitute Hold Separate Monitor within five (5) business days after notice by the staff of the Commission to Respondent Ardagh of the identity of the proposed substitute Hold Separate Monitor, then Respondent Ardagh shall be deemed to have consented to the selection of the proposed substitute Monitor.

2. Respondent Ardagh shall, no later than five (5) business days after the Commission appoints a substitute Hold Separate Monitor, enter into an agreement with the substitute Hold Separate Monitor that, subject to the prior approval of the Commission, confers on the substitute Hold Separate Monitor all the rights, powers, and authority necessary to permit the substitute Hold Separate Monitor to perform his or her duties and responsibilities on the same terms and conditions as provided in Paragraph III of this Hold Separate Order.

D. The Hold Separate Monitor shall serve through the Hold Separate Period; *provided, however,* that the Commission may extend or modify this period as may be necessary or appropriate to accomplish the purposes of the Orders.

E. The Commission may on its own initiative or at the request of the Hold Separate Monitor issue such additional orders or directions as may be necessary or appropriate to assure compliance with the requirements of this Hold Separate Order.

IV.

IT IS FURTHER ORDERED that:

A. Effective on the Acquisition Date, Respondent Ardagh shall appoint James Fredlake as the Hold Separate Manager to manage and maintain the operations of the Anchor Glass Business in the regular and ordinary course of business beginning on the Acquisition Date.

B. Respondent Ardagh shall transfer all rights, powers, and authority necessary to permit the Hold Separate Manager to perform his duties and responsibilities pursuant to this Hold Separate Order to manage the Anchor Glass Business:

1. The Hold Separate Manager shall be responsible for managing the operations of the Anchor Glass Business through the Hold Separate Period, and shall report directly and exclusively to the Hold Separate Monitor and shall manage the Anchor Glass Business independently of the management of Respondent Ardagh and its other businesses;

2. The Hold Separate Manager, with the approval of the Hold Separate Monitor, shall have the authority to employ such persons as are reasonably necessary to assist the Hold Separate Manager in managing the Anchor Glass Business, including, without limitation, consultants, accountants, attorneys, and other representatives, assistants, and employees.

3. Respondent Ardagh shall provide the Hold Separate Manager with reasonable financial incentives to undertake these positions. Such incentives shall include a continuation of all employee benefits, including regularly scheduled raises, bonuses, vesting of pension benefits (as permitted by law), and additional incentives as may be necessary to assure the continuation, and prevent any diminution, of the viability, marketability, and competitiveness of the Anchor Glass Business, and as may otherwise be necessary to secure the Hold Separate Manager's agreement to achieve the purposes of this Hold Separate Order.

4. The Hold Separate Manager shall serve, without bond or other security, at the cost and expense of Respondent Ardagh, on reasonable and customary terms commensurate with the person's experience and responsibilities, and with any financial incentives that may be reasonable or necessary as described in this Paragraph IV. Respondent Ardagh shall pay the Hold Separate Manager's costs and expenses (including, but not limited to,

those related to consultants, accountants, attorneys, and other representatives and assistants) on a monthly or other reasonable periodic basis.

5. Respondent Ardagh shall indemnify the Hold Separate Manager and hold him harmless against any losses, claims, damages, liabilities, or expenses arising out of, or in connection with, the performance of the Manager's duties, including all reasonable fees of counsel and other expenses incurred in connection with the preparation for, or defense of, any claim, whether or not resulting in any liability, except to the extent that such losses, claims, damages, liabilities, or expenses result from the Manager's gross negligence, willful or wanton acts, or bad faith. For purposes of this Paragraph IV.B.5., the term "Hold Separate Manager" shall include all persons retained by the Hold Separate Manager pursuant to Paragraph IV.B.2. of this Hold Separate Order.

6. Nothing contained herein shall preclude the Hold Separate Manager from contacting or communicating directly with the staff of the Commission, either at the request of the staff of the Commission or the Hold Separate Monitor, or in the discretion of the Hold Separate Manager.

7. The Hold Separate Manager shall have the authority, in consultation with the Hold Separate Monitor, to staff the Anchor Glass Business with sufficient employees to maintain the viability and competitiveness of the Anchor Glass Business, including:

    a. Replacing any departing or departed Anchor Glass Business employee with a person who has similar experience and expertise or determine not to replace such departing or departed employee;

b. Removing any Anchor Glass Business employee who ceases to act or fails to act diligently and consistent with the purposes of this Hold Separate Order, and replacing or not replacing such employee with another person of similar experience or skills;

c. Ensuring that no Anchor Glass Business employee shall be (i) involved in any way in the operations of Ardagh Retained Business, or (ii) receive or have access to, or use or continue to use, any confidential information relating to the Ardagh Retained Business, unless allowed or required under the Orders.

d. Providing each Anchor Glass Business employee with reasonable financial incentives, including continuation of all salaries, employee benefits, and regularly scheduled raises and bonuses, to continue in his or her position during the Hold Separate Period.

C. The Hold Separate Manager may be removed for cause by the Hold Separate Monitor, in consultation with the Commission staff. If the Hold Separate Manager is removed, resigns, or otherwise ceases to act as Hold Separate Manager, the Hold Separate Monitor shall, within three (3) business days of such action, subject to the prior approval of Commission staff, appoint a substitute Hold Separate Manager, and Respondent Ardagh shall enter into an agreement with the substitute Hold Separate Manager on the same terms and conditions as provided in this Hold Separate Order.

V.

IT IS FURTHER ORDERED that:

A. Respondent Ardagh shall cooperate with, and take no action to interfere with or impede the ability of: (i) the

Hold Separate Monitor: (ii) the Hold Separate Manager; or (iii) any Anchor Glass Designated Employee, to perform his or her duties and responsibilities consistent with the terms of the Orders.

B. Respondent Ardagh shall continue to offer and provide any support services and goods (directly or through third-party contracts) to the Anchor Glass Business.

1. For support services and goods that Respondent Ardagh provides to the Anchor Glass Business, Respondent Ardagh may charge no more than the same price, if any, charged by Respondent Ardagh for such support services and goods as of the Acquisition Date.

2. Ardagh Retained Employees who provide support to the Anchor Glass Business:

   a. shall retain and maintain all Confidential Business Information of the Anchor Glass Business on a confidential basis;

   b. shall not provide, discuss, exchange, circulate, or otherwise furnish any such information to or with any Person or any Ardagh Retained Employee whose employment involves any of Respondent Ardagh's businesses, other than the Anchor Glass Business, except as is permitted by the Orders; and

   c. shall also execute confidentiality agreements prohibiting the disclosure of any Confidential Business Information of the Anchor Glass Business.

3. The services and goods that Respondent Ardagh shall offer the Anchor Glass Business, at the Anchor Glass Business's option, shall include, but not be limited to, the following:

a. Environmental health and safety services, which are used to ensure compliance with federal and state regulations and corporate policies;

b. Legal, licensing, and audit services;

c. Federal and state regulatory compliance;

d. Maintenance and oversight of all information technology systems and databases, including, but not limited to, all hardware, software, electronic mail, word processing, document retention, enterprise management systems, financial management systems and databases, and customer databases;

e. Procurement and renewal of insurance and related services; and

f. Technical support for implementation of the batch reformulation project.

4. Notwithstanding the above, the Anchor Glass Business shall have, at the option of the Hold Separate Manager and with the approval of the Hold Separate Monitor following consultation with Commission staff, the right to acquire support services from third parties unaffiliated with Respondent Ardagh.

C. Respondent Ardagh shall not permit:

1. Any of its employees, officers, agents, or directors, other than: (i) the Hold Separate Monitor; (ii) the Hold Separate Managers; and (iii) any Anchor Glass Business employee, to be involved in the operations of the Anchor Glass Business, except to the extent otherwise provided in this Hold Separate Order; and

2. The Hold Separate Manager or any Anchor Glass Designated Employee to be involved in the operations of the Ardagh Retained Business, except for the provision of Hold Separate Services, as provided for in this Hold Separate Order.

D. Respondent Ardagh shall provide the Anchor Glass Business with sufficient financial and other resources as are appropriate in the judgment of the Hold Separate Monitor, consistent with his obligations and responsibilities in this Hold Separate Order, to:

1. Operate the Anchor Glass Business at least as it is currently operated (including efforts to generate new business, renew current customers, and complete development, furnace rebuilding and maintenance, and construction projects) consistent with the practices of the Anchor Glass Business, and Respondent Ardagh's business, capital, and strategic plans, in place as of January 1, 2014. Additionally, Respondent Ardagh shall provide sufficient capital expenditures for furnace rebuilds, if the Hold Separate Manager and Hold Separate Monitor, after consultation with the Commission staff, believe it is necessary to do so.

2. Provide each Anchor Glass Designated Employee with reasonable financial incentives to continue in his or her position consistent with past practices and/or as may be necessary to preserve the marketability, viability, and competitiveness of the Anchor Glass Business pending divestiture. Such incentives shall include a continuation of all salaries, employee benefits, including funding of regularly scheduled raises and bonuses, vesting of pension benefits (as permitted by law), and additional incentives as may be necessary to assure the continuation, and prevent any diminution, of the viability, marketability, and competitiveness of the Anchor Glass Business during the Hold Separate Period, and as may otherwise be

necessary to achieve the purposes of this Hold Separate Order;

3. Perform all maintenance to, and replacements or remodeling of, the assets of the Anchor Glass Business in the ordinary course of business, in accordance with past practice, and Respondent Ardagh's business, capital, and strategic plans in place as of January 1, 2014.

4. Carry on such capital projects, physical plant improvements, and business plans as are already under way or planned, including, but not limited to, existing or planned renovation, remodeling, and expansion projects, all in accordance with Respondent Ardagh's business, capital, and strategic plans in place as of January 1, 2014; and

5. Maintain the viability, competitiveness, and marketability of the Anchor Glass Business.

Such financial resources to be provided to the Anchor Glass Business shall include, but shall not be limited to: (i) general funds; (ii) capital; (iii) working capital; and (iv) reimbursement for any operating expenses, losses, capital losses, or other losses, *Provided, however* that, consistent with the purposes of the Decision and Order and this Hold Separate Order, the Hold Separate Monitor may, after consultation with Commission staff and Hold Separate Manager, substitute any capital or development project for another of like cost.

E. No later than two (2) business days after the Acquisition Date, Respondent Ardagh shall establish and implement written procedures, subject to the approval of the Hold Separate Monitor and in consultation with Commission staff, regarding the operational independence of the Anchor Glass Business and the independent management by the

Hold Separate Monitor and Hold Separate Manager, consistent with the provisions of the Orders.

VI.

IT IS FURTHER ORDERED that:

A. During the Hold Separate Period, Respondent Ardagh shall:

1. Not provide, disclose, or otherwise make available any Confidential Business Information to any Person except as required or permitted by the Orders; and

2. Not use any Confidential Business Information for any reason or purpose other than as required or permitted by the Orders.

Provided, however, that nothing in this Paragraph VI shall prevent Respondent Ardagh from using any tangible or intangible property that Respondent Ardagh retains the right to use pursuant to the Orders. *Provided, further, however*, that to the extent that the use of such property involves disclosure of Confidential Business Information to another Person, Respondent Ardagh shall require such Person to maintain the confidentiality of such Confidential Business Information under terms no less restrictive than Respondent Ardagh's obligations under the Orders.

B. Ardagh Retained Employees shall not receive, have access to, use or continue to use, or disclose any Confidential Business Information pertaining to the Anchor Glass Business. *Provided, however*, that Respondent Ardagh is permitted to retain a copy of any Business Records used by, necessary for, or relating to the Ardagh Retained Business, or necessary for the provision of the Hold Separate Services, or as otherwise permitted pursuant to the Orders, and may

use Confidential Business Information, or disclose Confidential Business Information to Ardagh Retained Employees:

1. For the purpose of performing Respondent Ardagh's obligations under the Orders, or the Divestiture Agreements;

2. To ensure compliance with legal and regulatory requirements, as reasonably determined by Respondent Ardgah;

3. To provide accounting, information technology, and credit-underwriting services;

4. To provide legal services associated with actual or potential litigation and transactions;

5. As is necessary to receive Hold Separate Services; and

6. To monitor and ensure compliance with financial, tax reporting, governmental, environmental, health, and safety requirements.

C. If access to or disclosure of Confidential Business Information of the Anchor Glass Business to Ardagh Retained Employees and Respondent Ardagh's agents is necessary and permitted under Paragraph VI.B. of this Hold Separate Order, Respondent Ardagh shall:

1. Implement and maintain processes and procedures, as approved by the Hold Separate Monitor and in consultation with Commission staff, pursuant to which Confidential Business Information of the Anchor Glass Business may be disclosed or used by Ardagh Retained Employees and Respondent Ardagh's agents;

2. Limit disclosure or use by Ardagh Retained Employees and Respondent Ardagh's agents to

those who require access to such Confidential Business Information for uses permitted by the Orders;

3. Maintain and make available for inspection and copying by the Hold Separate Monitor and Commission staff records of Ardagh Retained Employees and Respondent Ardagh's agents who have accessed or used Confidential Business Information, a reasonable description of the Confidential Business Information to which they had access or used, and the dates upon which they accessed or used such information;

4. Require Ardagh Retained Employees and Respondent Ardagh's agents to sign, and maintain and make available for inspection and copying by the Hold Separate Monitor and Commission staff, appropriate written agreements to maintain the confidentiality of such information and to use such information only as permitted by the Orders; and,

5. Enforce the terms of this Paragraph VI as to any of Ardagh Retained Employees and Respondent Ardagh's agents and take such action as is necessary to cause each such employee or agent to comply with the terms of this Paragraph VI, including:

    a. Training of Ardagh Retained Employees and Respondent Ardagh's agents who are permitted access to and use of Confidential Business Information;

    b. Appropriate discipline of Ardagh Retained Employees and Respondent Ardagh's agents who fail to comply with processes and procedures established by Respondent Ardagh pursuant to this Paragraph VI or any confidentiality agreement; and

c. All other actions that Respondent Ardagh would take to protect its own trade secrets, proprietary, and other non-public information.

D. Respondent Ardagh shall implement and maintain in operation a system, approved by the Hold Separate Monitor and in consultation with Commission staff, of written procedures covering access and data controls to prevent unauthorized access to, or dissemination or use of, Confidential Business Information of the Anchor Glass Business, including, but not limited to, the opportunity by the Hold Separate Monitor to audit Respondent Ardagh's networks and systems to verify compliance with Respondent Ardagh's system and the Orders.

E. Neither the Hold Separate Manager nor any Anchor Glass Designated Employee shall receive or have access to, or use or continue to use, any confidential information relating to the Ardagh Retained Business, Saint-Gobain Containers, Inc., or Compagnie de Saint Gobain, except and only for the time such information is necessary to maintain and operate the Anchor Glass Business, to provide Hold Separate Services, or as otherwise permitted pursuant to the Orders.

F. Respondent Ardagh shall enforce the terms of this Paragraph VI as to any Person other than a proposed Acquirer of the Anchor Glass Business and take such action as is necessary to cause each such Person to comply with the terms of this Paragraph VI, including training of employees and all other actions that Respondent Ardagh would take to protect its own trade secrets and proprietary information.

VII.

IT IS FURTHER ORDERED that:

A. Respondent Ardagh shall cooperate with and assist any proposed Acquirer of the Anchor Glass Business to

evaluate independently and retain any of the Anchor Glass Designated Employees, such cooperation to include at least to implement the provisions of the Decision and Order relating to employee interviewing and hiring.

B. During the Hold Separate Period, Respondent Ardagh shall waive any corporate policy, rules, and regulations, and waive any written or oral agreement or understanding, that might prevent or limit any Hold Separate Monitor, Hold Separate Manager, or Anchor Glass Designated Employee from performing any services, engaging in any activities, or other conduct reasonably related to achieving the purposes of the Orders.

VIII.

IT IS FURTHER ORDERED that, within thirty (30) days after this Hold Separate Order becomes final, and every thirty (30) days thereafter until this Hold Separate Order terminates, Respondent Ardagh shall submit to the Commission, with a copy to the Hold Separate Monitor, a verified written report setting forth in detail the manner and form in which it intends to comply, is complying, and has complied with all provisions of this Hold Separate Order. Respondent Ardagh shall include in its reports, among other things that are required from time to time:

A. A description in reasonable detail of any claim (whether Respondent Ardagh agrees or disagrees with the claim) by any person (including, but not limited to, any of Respondent Ardagh's employees or agents) that Respondent Ardagh has failed to comply fully with the Orders, and the name, address, phone number, and email address of such person; and

B. A description in reasonable detail of any information in Respondent Ardagh's possession, custody, or control (including, but not limited to, information obtained from Respondent Ardagh's monitoring of the compliance of its employees and agents with

processes, procedures, and agreements intended to secure Respondent Ardagh's compliance with its obligations under the Orders) relevant to any failure by Respondent Ardagh, its employees, or its agents to comply fully with Respondent Ardagh's obligations under the Orders; and

C. A full description of the efforts being made to comply with the Decision and Order's divestiture obligation including a description of all substantive contacts or negotiations relating to the divestiture and approval, and the identities of all parties contacted. Respondent Ardagh shall include in its compliance reports copies, other than of privileged materials, of all written communications to and from such parties, all internal memoranda, and all reports and recommendations concerning the divestiture.

IX.

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

A. any proposed dissolution of Respondent Ardagh;

B. any proposed acquisition, merger, or consolidation of Respondent Ardagh; or

C. any other change in the Respondent Ardagh, including, but not limited to, assignment and the creation or dissolution of subsidiaries, if such change might affect compliance obligations arising out of the Order.

X.

IT IS FURTHER ORDERED that, for the purpose of determining or securing compliance with this Order, and subject to any legally recognized privilege, and upon written request with reasonable notice to Respondent Ardagh, with respect to any matter contained in this Order, Respondent Ardagh shall permit any duly authorized representative of the Commission:

A. Access, during office hours and in the presence of counsel, to all facilities and access to inspect and copy all non-privileged books, ledgers, accounts, correspondence, memoranda and other records and documents in the possession or under the control of Respondent Ardagh related to compliance with the Consent Agreement and/or this Order and the Hold Separate Order, which copying services shall be provided by Respondent Ardagh at the request of the authorized representative of the Commission and at the expense of Respondent Ardagh;

B. Upon five (5) days' notice to Respondent Ardagh and without restraint or interference from them, to interview officers, directors, or employees of Respondent Ardagh, who may have counsel present.

XI.

IT IS FURTHER ORDERED that this Hold Separate Order shall terminate at the end of the Hold Separate Period.

By the Commission, Commissioner Wright dissenting.

APPENDIX A

HOLD SEPARATE MONITOR AGREEMENT

NON-PUBLIC APPENDIX A-1

HOLD SEPARATE MONITOR COMPENSATION

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

NON-PUBLIC APPENDIX B

HOLD SEPARATE SERVICES

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

DECISION AND ORDER
[Public Record Version]

The Federal Trade Commission ("Commission"), having heretofore issued its Complaint charging Ardagh Group, S.A. ("Respondent Ardagh"), Saint-Gobain Containers, Inc. (also known as Verallia North America ("VNA"), and Compagnie de Saint-Gobain ("CSG"), with a violation of Section 5 of the Federal Trade Commission Act, as amended, 15 U.S.C. § 45, and Section 7 of the Clayton Act, as amended, 15 U.S.C. § 18, and Respondents having been served with a copy of that Complaint,

together with a notice of contemplated relief and having filed their answers denying said charges; and

Respondents, their attorneys, and counsel for the Commission having thereafter executed an Agreement Containing Consent Orders ("Consent Agreement"), containing an admission by Respondents of all the jurisdictional facts set forth in the aforesaid 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 withdrawn the matter from adjudication in accordance with § 3.25(c) of its Rules; and the Commission having thereafter considered the matter and having thereupon accepted the executed Consent Agreement and placed such agreement on the public record for a period of thirty (30) days, and having duly considered the comment filed by an interested party pursuant to Commission Rule 2.34, 16 C.F.R. § 2.34, now in conformity with the procedure prescribed in § 3.25(f) of its Rules, the Commission hereby makes the following jurisdictional findings and factual findings and enters the following Order ("Order"):

1. Respondent Ardagh Group, S.A., is a limited liability corporation organized, existing, and doing business under, and by virtue of, the laws of Luxembourg with its office and principal place of business at 56, rue Charles Martel, Luxembourg, and operates its glass container business in the United States through its subsidiary Ardagh Glass, Inc., which has its office and principal place of business located at 401 E. Jackson Street, Suite 2800, Tampa, FL 33602.

2. Respondent Saint-Gobain Containers, Inc., 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 1509 S. Macedonia Ave, Muncie, IN 47302.

3. Respondent Compagnie de Saint-Gobain is a corporation organized, existing, and doing business under, and by virtue of, the laws of France with its office and principal place of business located at "Les Miroirs," 18 avenue d'Alsace, Courbevoie, France, and its United States office and principal place of business located at 750 E. Swedesford Rd, Valley Forge, PA 19482.

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

I.

IT IS HEREBY ORDERED that, as used in this Order, the following definitions, and all other definitions used in the Hold Separate Order, shall apply:

A. "Ardagh" means Ardagh Group, S.A., its directors, officers, employees, agents, representatives, successors, and assigns; and the joint ventures, subsidiaries, partnerships, divisions, groups, and affiliates in each case controlled by Ardagh Group, S.A., and the respective directors, officers, employees, agents, representatives, successors, and assigns of each. Ardagh includes VNA, after the Acquisition Date.

B. "Commission" means the Federal Trade Commission.

C. "Acquirer" means any Person that receives the prior approval of the Commission to acquire the Anchor Glass Business pursuant to this Decision and Order.

D. "Acquisition" means the proposed acquisition by Respondent Ardagh of VNA as described in the Share

Purchase Agreement, dated as of January 17, 2013, between Respondent Ardagh and CSG.

E. "Acquisition Date" means the date the Acquisition is consummated.

F. "Anchor Glass Business" means all of Respondent Ardagh's assets, including Tangible Personal Property and intangible assets, businesses and goodwill, related to the research, development, manufacture, distribution, marketing or sale of Anchor Glass Products including, but not limited to:

1. The Anchor Glass Manufacturing Facilities;

2. The Anchor Glass Corporate Facility;

3. The Anchor Glass Molds;

4. The Anchor Glass Molds Facility;

5. The Anchor Glass Engineering Facility;

6. The Anchor Glass Contracts;

7. Intellectual Property relating to the research, development, manufacture, distribution, marketing or sale of Anchor Glass Products;

8. The non-exclusive rights to use Respondent Ardagh's process, method, techniques, and know-how for soda ash reduction in the manufacture of glass containers that is used by Respondent Ardagh in the Ardagh Retained Business;

9. All inventories relating to Anchor Glass Products, wherever located;

10. All (a) trade accounts receivable and other rights to payment from customers of the Anchor Glass Business and the full benefit of all security for

such accounts or rights to payment, (b) all other accounts or notes receivable in respect of the Anchor Glass Business and the full benefit of all security for such accounts or notes and (c) any claim, remedy, or other right related to any of the foregoing;

11. All consents, licenses, certificates, registrations, or permits issued, granted, given, or otherwise made available by or under the authority of any governmental body or pursuant to any legal requirement relating to the research, development, manufacture, distribution, marketing or sale of Anchor Glass Products, and all pending applications therefor or renewals thereof;

12. All Business Records relating to the research, development, manufacture, distribution, marketing or sale of Anchor Glass Products; *provided, however,* that where documents or other materials included in the Business Records to be divested contain information: (a) that relates both to the Anchor Glass Business to be divested and to the Ardagh Retained Business or other products or businesses and cannot be segregated in a manner that preserves the usefulness of the information as it relates to the Anchor Glass Business to be divested; or (b) for which the relevant party has a legal obligation to retain the original copies, the relevant party shall be required to provide only copies or relevant excerpts of the documents and materials containing this information. In instances where such copies are provided to the Acquirer, the relevant party shall provide the Acquirer access to original documents under circumstances where copies of the documents are insufficient for evidentiary or regulatory purposes.

G. "Anchor Glass Contracts" means all agreements and contracts with customers (including, but not limited to, contracts, purchasing agreements, and rebate

agreements with customers who will be served from both the Anchor Glass Manufacturing Facilities and facilities retained by Respondent Ardagh, and agreements, contracts, and understandings for transportation, storage, and other services), suppliers, vendors, representatives, agents, licensees and licensors; and all leases, mortgages, notes, bonds, and other binding commitments, whether written or oral, and all rights thereunder and related thereto related to the Anchor Glass Business from the Anchor Glass Manufacturing Facilities;

H. "Anchor Glass Corporate Facility" means the facility located at 401 E Jackson Street # 2800, Tampa, FL 33602-5216, including, but not limited to, information technology systems, all physical assets and equipment related to the research, development, manufacture, sale, and distribution of products from the Anchor Glass Manufacturing Facilities. *Provided, however,* that parts, inventory, designs, or other assets held for use exclusively by or for the Ardagh Retained Business may be excluded.

I. "Anchor Glass Designated Employee" means any person employed by Respondent Ardagh (1) at the Anchor Glass Manufacturing Facilities; (2) working at or out of the Anchor Glass Corporate Facility; (3) at the Anchor Glass Engineering Facility; (4) at the Anchor Glass Molds Facility; (5) who has spent over twenty-five percent (25%) of his or her time, from January 2013 to December 2013, working for or on behalf of the Anchor Glass Business, wherever located; and (6) identified by agreement between Respondent Ardagh and an Acquirer and made a part of a Divestiture Agreement. *Provided, however,* that, if approved by the Commission, an Anchor Glass Designated Employee described in this Paragraph may be excluded from this definition by agreement between Respondent Ardagh and the Acquirer. *Provided further, however,* that the employees listed on Non-Public Appendix A to this Order shall be excluded for

purposes of the Hold Separate Order in this matter, but at the option of the Acquirer, may be recruited, interviewed and hired pursuant to the provisions of this Order.

J. "Anchor Glass Engineering Facility" means the Anchor Glass engineering facility located at 1901 N Shabbona St, Streator, IL 61364, including, but not limited to, all real property interests (including fee simple interests and real property leasehold interests), including all easements, appurtenances, licenses, and permits, together with all buildings and other structures, facilities, and improvements located thereon, owned, leased, or otherwise held by Respondent Ardagh, and all Tangible Personal Property therein, and parts, inventory, and all other assets relating to the Anchor Glass Business. *Provided, however,* that parts, inventory, designs, or other assets held for use exclusively by or for the Ardagh Retained Business may be excluded.

K. "Anchor Glass Manufacturing Facilities" means all real property interests (including fee simple interests and real property leasehold interests), including all easements, appurtenances, licenses, and permits, together with all buildings and other structures, facilities, and improvements located thereon, owned, leased, or otherwise held by Respondent Ardagh, and all Tangible Personal Property, therein, at the Elmira Facility, Jacksonville Facility, Warner Robins Facility, Henryetta Facility, Lawrenceburg Facility and the Shakopee Facility. *Provided, however,* that parts, inventory, designs, or other assets held for use exclusively by or for the Ardagh Retained Business may be excluded.

L. "Anchor Glass Molds" means all molds, including designs and drawings for molds in existence or in development, owned by Respondent Ardagh wherever located and used, intended for use, or designed or in development for use, by the Anchor Glass

Manufacturing Facilities or relating to development, manufacture, or sale of Anchor Glass Products

M. "Anchor Glass Molds Facility" means the Zanesville mold facility located at 1555 Fairview Road, Zanesville, OH 43701, including, but not limited to, all real property interests (including fee simple interests and real property leasehold interests), including all easements, appurtenances, licenses, and permits, together with all buildings and other structures, facilities, and improvements located thereon, owned, leased, or otherwise held by Respondent Ardagh, and all Tangible Personal Property therein, and parts, inventory, and all other assets relating to the research, development, manufacture, distribution, marketing or sale of Anchor Glass Products. *Provided, however*, that parts, inventory, designs, or other assets held for use exclusively by or for the Ardagh Retained Business may be excluded.

N. "Anchor Glass Products" means the glass containers:

1. manufactured by Respondent Ardagh at the Anchor Glass Manufacturing Facilities; or

2. designed, researched and developed, but not yet commercialized, by Respondent Ardagh, anywhere in the world, and that are intended to be manufactured at the Anchor Glass Manufacturing Facilities.

O. "Ardagh Retained Business" means the assets and businesses of Respondent Ardagh other than the Anchor Glass Business.

P. "Business Records" means all originals and all copies of any operating, financial or other information, documents, data, computer files (including files stored on a computer's hard drive or other storage media), electronic files, books, records, ledgers, papers, instruments, and other materials, whether located,

stored, or maintained in traditional paper format or by means of electronic, optical, or magnetic media or devices, photographic or video images, or any other format or media, including, without limitation: distributor files and records; customer files and records, customer lists, customer product specifications, customer purchasing histories, customer service and support materials, customer approvals, and other information; credit records and information; correspondence; referral sources; supplier and vendor files and lists; advertising, promotional, and marketing materials, including website content; sales materials; research and development data, files, and reports; technical information; data bases; studies; designs, drawings, specifications and creative materials; production records and reports; service and warranty records; equipment logs; operating guides and manuals; employee and personnel records; education materials; financial and accounting records; and other documents, information, and files of any kind.

Q. "Confidential Business Information" means information owned by, or in the possession or control of, Respondent Ardagh that is not in the public domain and that is directly related to the conduct of the Anchor Glass Business. The term "Confidential Business Information" *excludes* the following:

1. information relating to any of Respondent Ardagh's general business strategies or practices that does not discuss with particularity the Anchor Glass Business;

2. information specifically excluded from the Anchor Glass Business conveyed to the Acquirer;

3. information that is contained in documents, records, or books of Respondent Ardagh that is provided to an Acquirer that is unrelated to the Anchor Glass Business acquired by that Acquirer

or that is exclusively related to businesses or products retained by Respondent Ardagh;

4. information that is protected by the attorney work product, attorney-client, joint defense, or other privilege prepared in connection with the Acquisition and relating to any United States, state, or foreign antitrust or competition law; and

5. information that Respondent Ardagh demonstrates to the satisfaction of the Commission, in the Commission's sole discretion:

    a. Was or becomes generally available to the public other than as a result of disclosure by Respondent Ardagh;

    b. Is necessary to be included in Respondent Ardagh's mandatory regulatory filings; *provided, however,* that Respondent Ardagh shall make all reasonable efforts to maintain the confidentiality of such information in the regulatory filings;

    c. Was available, or becomes available, to Respondent Ardagh on a non-confidential basis, but only if, to the knowledge of Respondent Ardagh, the source of such information is not in breach of a contractual, legal, fiduciary, or other obligation to maintain the confidentiality of the information;

    d. Is information the disclosure of which is consented to by the Acquirer;

    e. Is necessary to be exchanged in the course of consummating the Acquisition or the transaction under the Divestiture Agreement;

    f. Is disclosed in complying with the Order;

g. Is information the disclosure of which is necessary to allow Respondent Ardagh to comply with the requirements and obligations of the laws of the United States and other countries, and decisions of Government Entities; or

h. Is disclosed in obtaining legal advice.

R. "Divestiture Agreement" means any agreement that receives the prior approval of the Commission between Respondent Ardagh (or between a Divestiture Trustee appointed pursuant to Paragraph IV. of this Order) and an Acquirer to purchase all or any of the Anchor Glass Business, and all amendments, exhibits, attachments, agreements, and schedules thereto that have been approved by the Commission.

S. "Divestiture Date" means the date on which Respondent Ardagh (or a Divestiture Trustee) closes on the divestiture of the Anchor Glass Business as required by Paragraph II (or Paragraph IV) of this Order.

T. "Elmira Facility" means the glass manufacturing plant located at 151 E McCanns Blvd, Elmira Heights, NY 14903.

U. "Henryetta Facility" means the glass manufacturing plant located at 601 E Bollinger Rd, Henryetta, OK 74437.

V. "Hold Separate Business" means the business that Respondent Ardagh shall hold separate pursuant to the Hold Separate Order.

W. "Intellectual Property" means:

1. Patents, and the rights to obtain and file for Patents, trademarks, and copyrights and registrations thereof and to bring suit against a

third party for the past, present or future infringement, misappropriation, dilution, misuse or other violations of any of the foregoing;

2. product manufacturing technology, including process technology, technology for equipment, inspection technology, and research and development of product or process technology;

3. Product and manufacturing copyrights;

4. all plans (including proposed and tentative plans, whether or not adopted or commercialized), research and development, specifications, drawings, and other assets (including the non-exclusive right to use Patents, know-how, and other intellectual property relating to such plans);

5. product trademarks, trade dress, trade secrets, technology, know-how, techniques, data, inventions, practices, methods, and other confidential or proprietary technical, business, research, development, and other information, formulas, and proprietary information (whether patented, patentable or otherwise) related to the manufacture of the products, including, but not limited to, all product specifications, processes, analytical methods, product designs, plans, trade secrets, ideas, concepts, manufacturing, engineering, and other manuals and drawings, standard operating procedures, flow diagrams, chemical, safety, quality assurance, quality control, research records, clinical data, compositions, annual product reviews, regulatory communications, control history, current and historical information associated with any Government Entity approvals and compliance, and labeling and all other information related to the manufacturing process, and supplier lists;

6. licenses including, but not limited to, third party software, if transferrable, and sublicenses to software modified by Respondent Ardagh;

7. formulations and a description of all ingredients, materials, or components used in the manufacture of products; and

8. any other intellectual property used in the past by Respondent Ardagh in the design, manufacture, and sale of products from the Anchor Glass Business.

X. "Jacksonville Facility" means the glass manufacturing plant located at 2121 Huron St., Jacksonville, FL 32254-2052.

Y. "Lawrenceburg Facility" means the glass manufacturing plant located at 200 Belleview Dr., Greendale, IN 47025.

Z. "Patents" means 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.

AA. "Person" means any individual, partnership, firm, corporation, association, trust, unincorporated organization, or other business entity other than Respondent Ardagh.

BB. "Shakopee Facility" means the glass manufacturing plant located at 4108 Valley Industrial Blvd N, Shakopee, MN 55379.

CC. "Tangible Personal Property" means all machinery, equipment, tools, furniture, office equipment, computer hardware, supplies, materials, vehicles, rolling stock, and other items of tangible personal property (other than inventories) of every kind owned or leased by Respondent Ardagh, together with any express or implied warranty by the manufacturers or sellers or lessors of any item or component part thereof and all maintenance records and other documents relating thereto.

DD. "Transitional Assistance" means any transitional services required by the Acquirer for the operation of the divested business including, but not limited to administrative assistance (including, but not limited to, order processing, shipping, accounting, and information transitioning services), technical assistance, and supply agreements.

EE. "Warner Robins Facility" means the glass manufacturing plant located at 1044 Booth Rd, Warner Robins, GA 31088.

II.

IT IS FURTHER ORDERED that:

A. Respondent Ardagh shall divest the Anchor Glass Business at no minimum price, absolutely and in good faith, as an on-going business, no later than one-hundred eighty (180) days from the date Respondent Ardagh signs the Agreement Containing Consent Orders, to an Acquirer that receives the prior approval of the Commission and in a manner (including an asset or stock sale) that receives the prior approval of the Commission.

B. At the request of the Acquirer, pursuant to an agreement that receives the prior approval of the Commission, Respondent Ardagh shall, for a period not to exceed one (1) year from the date Respondent

Ardagh divests the Anchor Glass Business, provide Transitional Assistance to the Acquirer:

1. Sufficient to enable the Acquirer to operate the divested business in substantially the same manner that Respondent Ardagh conducted the divested assets and business prior to the divestiture; and

2. At substantially the same level and quality as such services are provided by Respondent Ardagh in connection with its operation of the divested assets and business prior to the divestiture.

   Provided, however, that Respondent Ardagh shall not (i) require the Acquirer to pay compensation for Transitional Assistance that exceeds the direct cost of providing such goods and services, or (ii) seek to limit the damages (such as indirect, special, and consequential damages) which an Acquirer would be entitled to receive in the event of Respondent Ardagh's breach of any agreement to provide Transitional Assistance.

C. Respondent Ardagh shall not terminate or modify any agreement that is part of the Divestiture Agreement before the end of the term approved by the Commission without:

1. Prior approval of the Commission;

2. The written agreement of the Acquirer and thirty (30) days prior notice to the Commission; or

3. In the case of a proposed unilateral termination by Respondent Ardagh due to an alleged breach of an agreement by the Acquirer, sixty (60) days notice of such termination. *Provided, however,* that such sixty (60) days notice shall be given only after the parties have:

a. Attempted to settle the dispute between themselves, and

b. Either engaged in arbitration and received an arbitrator's decision, or received a final court decision after all appeals.

D. Until Respondent Ardagh or the Divestiture Trustee complete the divestitures and other obligations to transfer the Anchor Glass Business as required by this Order:

Respondent Ardagh shall take actions as are necessary to:

1. maintain the full economic viability and marketability of the Anchor Glass Business;

2. minimize any risk of loss of competitive potential for the Anchor Glass Business;

3. prevent the destruction, removal, wasting, deterioration, or impairment of any of the assets related to the Anchor Glass Business; and

4. not sell, transfer, encumber, or otherwise impair the Anchor Glass 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 Anchor Glass Business.

E. From the date Respondent Ardagh executes the Divestiture Agreement, Respondent Ardagh shall provide a proposed Acquirer with the opportunity to recruit and employ any Anchor Glass Designated Employee in conformance with the following:

1. No later than ten (10) days after a request from a proposed Acquirer, or staff of the Commission, Respondent Ardagh shall provide a proposed

Acquirer with the following information for each Anchor Glass Designated Employee, as and to the extent permitted by law:

a. name, job title or position, date of hire and effective service date;

b. a specific description of the employee's responsibilities;

c. the base salary or current wages;

d. the most recent bonus paid, aggregate annual compensation for Respondent Ardagh's last fiscal year and current target or guaranteed bonus, if any;

e. employment status (*i.e.*, active or on leave or disability; full-time or part-time);

f. any other material terms and conditions of employment in regard to such employee that are not otherwise generally available to similarly-situated employees; and

g. at a proposed Acquirer's option, copies of all employee benefit plans and summary plan descriptions (if any) applicable to the relevant Anchor Glass Designated Employee(s).

2. No later than ten (10) days after a request from a proposed Acquirer, Respondent Ardagh shall provide the proposed Acquirer with:

a. an opportunity to meet, personally and outside the presence or hearing of any employee or agent of Respondent Ardagh, with any Anchor Glass Designated Employee;

b. an opportunity to inspect the personnel files and other documentation relating to any such

employee, to the extent permissible under applicable laws; and

c. to make offers of employment to any Anchor Glass Designated Employee.

3. Respondent Ardagh shall (i) not interfere, directly or indirectly, with the hiring or employing by a proposed Acquirer of any Anchor Glass Designated Employee, (ii) not offer any incentive to any Anchor Glass Designated Employee to decline employment with a proposed Acquirer, (iii) not make any counteroffer to any Anchor Glass Designated Employee who receives a written offer of employment from a proposed Acquirer; *Provided, however,* that nothing in this Order shall be construed to require Respondent Ardagh to terminate the employment of any employee or prevent Respondent Ardagh from continuing the employment of any employee; and (iv) remove any impediments within the control of Respondent Ardagh that may deter any Anchor Glass Designated Employee from accepting employment with a proposed Acquirer, including, but not limited to, any non-compete or confidentiality provisions of employment or other contracts with Respondent Ardagh that would affect the ability of such employee to be employed by a proposed Acquirer.

F. For a period of two (2) years after the Divestiture Date, Respondent Ardagh shall not, directly or indirectly, solicit, induce, or attempt to solicit or induce any Person employed by an Acquirer of the Anchor Glass Business, to terminate his or her employment relationship with an Acquirer; *Provided, however,* Respondent Ardagh may:

1. Advertise for employees in newspapers, trade publications, or other media, or engage recruiters to conduct general employee search activities, so

long as these actions are not targeted specifically at any Anchor Glass Designated Employees; and

2. Hire employees of the Anchor Glass Business who apply for employment with Respondent Ardagh, so long as such individuals were not solicited by Respondent Ardagh in violation of this paragraph; *provided, further, however,* that this sub-Paragraph shall not prohibit Respondent Ardagh from making offers of employment to or employing any employee of the Anchor Glass Business if an Acquirer has notified Respondent Ardagh in writing that an Acquirer does not intend to make an offer of employment to that employee, or where such an offer has been made and the employee has declined the offer, or where the individual's employment has been terminated by an Acquirer.

G. The purpose of this Paragraph II is to ensure the continued use of the assets in the same businesses in which such assets were engaged at the time of the announcement of the Acquisition by Respondent Ardagh, minimize the loss of competitive potential for the Anchor Glass Business, minimize the risk of disclosure of unauthorized use of Confidential Business Information related to the Anchor Glass Business; to prevent the destruction, removal, wasting, deterioration, or impairment of the Anchor Glass Business, except for ordinary wear and tear and to remedy the lessening of competition resulting from the Acquisition as alleged in the Commission's Complaint.

III.

IT IS FURTHER ORDERED that:

A. Employees of the Ardagh Retained Business shall not receive, have access to, use or continue to use, or disclose any Confidential Business Information

pertaining to the Anchor Glass Business except in the course of:

1. Performing their obligations as permitted under this Order or the Order to Hold Separate;

2. Performing their obligations under any Divestiture Agreement; or

3. Complying with financial reporting requirements or environmental, health, and safety policies and standards, ensuring the integrity of the financial and operational controls on the Anchor Glass Business, obtaining legal advice, defending legal claims, investigations, or enforcing actions threatened or brought against the Anchor Glass Business, or as required by law.

For purposes of this Paragraph III.A., Respondent Ardagh's employees who provide or are involved in the receipt of support services under the Hold Separate Order or staff the Hold Separate Business shall be deemed to be performing obligations under the Order to Hold Separate.

B. If the receipt, access to, use, or disclosure of Confidential Business Information pertaining to the Anchor Glass Business is permitted to Respondent Ardagh's employees under Paragraph III.A. of this Order, Respondent Ardagh shall limit such information (1) only to those Persons who require such information for the purposes permitted under Paragraph III.A., (2) only to the extent such Confidential Business Information is required, and (3) only after such Persons have signed an appropriate agreement in writing to maintain the confidentiality of such information.

C. Respondent Ardagh shall enforce the terms of this Paragraph III as to any Person other than the Acquirer of the Anchor Glass Business and take such action as

is necessary to cause each such Person to comply with the terms of this Paragraph III, including training of Respondent Ardagh's employees and all other actions that Respondent Ardagh would take to protect its own trade secrets and proprietary information.

IV.

IT IS FURTHER ORDERED that:

A. If Respondent Ardagh has not divested the Anchor Glass Business and otherwise fully complied with the obligations as required by Paragraph II.A of this Order, the Commission may appoint a Divestiture Trustee to divest the Anchor Glass Business in a manner that satisfies the requirements of this Order. The Divestiture Trustee appointed pursuant to this Paragraph may be the same Person appointed as Hold Separate Monitor pursuant to the relevant provisions of the Hold Separate Order.

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

C. The Commission shall select the Divestiture Trustee, subject to the consent of Respondent Ardagh, which

consent shall not be unreasonably withheld. The Divestiture Trustee shall be a person with experience and expertise in acquisitions and divestitures. If Respondent Ardagh 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 Ardagh of the identity of any proposed Divestiture Trustee, Respondent Ardagh shall be deemed to have consented to the selection of the proposed Divestiture Trustee.

D. Within ten (10) days after appointment of a Divestiture Trustee, Respondent Ardagh shall execute an agreement that, subject to the prior approval of the Commission, transfers to the Divestiture Trustee all rights and powers necessary to permit the Divestiture Trustee to effect the relevant divestiture or transfer required by the Order.

E. If a Divestiture Trustee is appointed by the Commission or a court pursuant to this Order, Respondent Ardagh shall consent to the following terms and conditions regarding the Divestiture Trustee's powers, duties, authority, and responsibilities:

1. Subject to the prior approval of the Commission, the Divestiture Trustee shall have the exclusive power and authority to assign, grant, license, divest, transfer, deliver, or otherwise convey the relevant assets that are required by this Order to be assigned, granted, licensed, divested, transferred, delivered, or otherwise conveyed, and to enter into Transitional Assistance agreements

2. The Divestiture Trustee shall have twelve (12) months from the date the Commission approves the agreement described herein to accomplish the divestiture, which shall be subject to the prior approval of the Commission. If, however, at the

end of the twelve (12) month period, the Divestiture Trustee has submitted a plan of divestiture or believes that the divestiture can be achieved within a reasonable time, the divestiture period may be extended by the Commission, or in the case of a court-appointed Divestiture Trustee, by the court; *Provided, however,* that the Commission may extend the divestiture period only two (2) times.

3. Subject to any demonstrated legally recognized privilege, the Divestiture Trustee shall have full and complete access to the personnel, books, records, and facilities related to the relevant assets that are required to be assigned, granted, licensed, divested, delivered, or otherwise conveyed by this Order and to any other relevant information, as the Divestiture Trustee may request. Respondent Ardagh shall develop such financial or other information as the Divestiture Trustee may request and shall cooperate with the Divestiture Trustee. Respondent Ardagh shall take no action to interfere with or impede the Divestiture Trustee's accomplishment of the divestiture. Any delays in divestiture caused by Respondent Ardagh 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 Divestiture Trustee, by the court.

4. The Divestiture Trustee shall use commercially reasonable best efforts to negotiate the most favorable price and terms available in each contract that is submitted to the Commission, subject to Respondent Ardagh'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, 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 Ardagh from among those approved by the Commission; *provided, further, however*, that Respondent Ardagh shall select such entity within five (5) days of receiving notification of the Commission's approval.

5. The Divestiture Trustee shall serve, without bond or other security, at the cost and expense of Respondent Ardagh, 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 Ardagh, such consultants, accountants, attorneys, investment bankers, business brokers, appraisers, and other representatives and assistants as are necessary to carry out the Divestiture Trustee's duties and responsibilities. The Divestiture Trustee shall account for all monies derived from the divestiture and all expenses incurred. After approval by the Commission and, in the case of a court-appointed Divestiture Trustee, by the court, of the account of the Divestiture Trustee, including fees for the Divestiture Trustee's services, all remaining monies shall be paid at the direction of Respondent Ardagh, 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 Ardagh 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. For purposes of this Paragraph IV.E.6., the term "Divestiture Trustee" shall include all persons retained by the Divestiture Trustee pursuant to Paragraph IV.E.5. of this Order.

7. The Divestiture Trustee shall have no obligation or authority to operate or maintain the relevant assets required to be divested by this Order.

8. The Divestiture Trustee shall report in writing to Respondent Ardagh and to the Commission every thirty (30) days concerning the Divestiture Trustee's efforts to accomplish the divestiture.

9. Respondent Ardagh 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.

10. The Commission may require, among other things, the Divestiture Trustee and each of the Divestiture Trustee'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 Divestiture Trustee's duties.

F. If the Commission determines that a Divestiture Trustee has ceased to act or failed to act diligently, the Commission may appoint a substitute Divestiture Trustee in the same manner as provided in this Paragraph IV.

G. The Commission or, in the case of a court-appointed Divestiture Trustee, the court, may on its own initiative or at the request of the Divestiture Trustee issue such additional orders or directions as may be necessary or appropriate to accomplish the divestiture required by this Order.

V.

IT IS FURTHER ORDERED that:

A. The Divestiture Agreement shall not limit or contradict, or be construed to limit or contradict, the terms of this Order, it being understood that nothing in this Order shall be construed to reduce any rights or benefits of an Acquirer or to reduce any obligations of the Respondent Ardagh under such agreement.

B. The Divestiture Agreement shall be incorporated by reference into this Order and made a part hereof.

C. Respondent Ardagh shall comply with all provisions of the Divestiture Agreement, and any breach by Respondent Ardagh of any term of such agreement shall constitute a violation of this Order. If any term of the Divestiture Agreement varies from the terms of this Order ("Order Term"), then to the extent that Respondent Ardagh cannot fully comply with both terms, the Order Term shall determine Respondent Ardagh's obligations under this Order. Any failure by the Respondent Ardagh to comply with any term of such Divestiture Agreement shall constitute a failure to comply with this Order.

VI.

IT IS FURTHER ORDERED that:

A. At any time after Respondent Ardagh signs the Consent Agreement in this matter, the Commission may appoint a Monitor to assure that Respondent Ardagh expeditiously complies with all of its obligations and performs all of its responsibilities as required by this Order;

B. The Commission shall select the Monitor, subject to the consent of Respondent Ardagh, which consent shall not be unreasonably withheld. If Respondent Ardagh 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 Ardagh of the identity of any proposed Monitor, Respondent Ardagh shall be deemed to have consented to the selection of the proposed Monitor.

C. Not later than ten (10) days after appointment of the Monitor, Respondent Ardagh 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 Ardagh's compliance with the relevant terms of the Order in a manner consistent with the purposes of the Order.

D. If a Monitor is appointed pursuant to this Paragraph VI, Respondent Ardagh 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 Ardagh'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 Ardagh expeditiously complies with all of its obligations and perform all of its responsibilities as required by the Decision and Order in this matter;

b. Monitoring any transition services agreements;

c. Assuring that Confidential Business Information is not received or used by Respondent Ardagh or the Acquirer, except as allowed in the Order in this matter.

2. The Monitor shall have the power and authority to monitor Respondent Ardagh's compliance with the divestiture and related requirements of the Order, and shall exercise such power and authority and carry out the duties and responsibilities of the Monitor in a manner consistent with the purposes of the Order and in consultation with the Commission.

3. The Monitor shall act in a fiduciary capacity for the benefit of the Commission.

E. Subject to any demonstrated legally recognized privilege, the Monitor shall have full and complete access to Respondent Ardagh's personnel, books, documents, records kept in the ordinary course of business, facilities and technical information, and such other relevant information as the Monitor may reasonably request, related to Respondent Ardagh's compliance with its obligations under the Order, including, but not limited to, its obligations related to the Anchor Glass Business.

F. Respondent Ardagh 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 Ardagh's compliance with the Order.

G. The Monitor shall serve, without bond or other security, at the expense of Respondent Ardagh, on such reasonable and customary terms and conditions as the Commission may set. The Monitor shall have the authority to employ, at the expense of Respondent Ardagh, such consultants, accountants, attorneys and other representatives and assistants as are reasonably necessary to carry out the Monitor's duties and responsibilities.

H. Respondent Ardagh shall indemnify the Monitor and hold the Monitor harmless against any losses, claims, damages, liabilities, or expenses arising out of, or in connection with, the performance of the Monitor's duties, including all reasonable fees of counsel and other reasonable expenses incurred in connection with the preparations for, or defense of, any claim, whether or not resulting in any liability, except to the extent that such losses, claims, damages, liabilities, or expenses result from gross negligence, willful or wanton acts, or bad faith by the Monitor. For purposes of this Paragraph VI.H., the term "Monitor" shall include all persons retained by the Monitor pursuant to Paragraph VI.G. of this Order.

I. Respondent Ardagh shall report to the Monitor in accordance with the requirements of this Order and as otherwise provided in the agreement approved by the Commission. The Monitor shall evaluate the reports submitted to the Monitor by the Respondent Ardagh, and any reports submitted by the Acquirer with respect to the performance of Respondent Ardagh's obligations under the Order or the Remedial Agreement(s). Within thirty (30) days from the date the Monitor receives these reports, the Monitor shall

report in writing to the Commission concerning performance by Respondent Ardagh of its obligations under the Order.

J. Respondent Ardagh may require the Monitor and each of the Monitor's consultants, accountants and other representatives and assistants to sign a customary confidentiality agreement. *Provided, however,* that such agreement shall not restrict the Monitor from providing any information to the Commission.

K. The Commission may require, among other things, the Monitor and each of the Monitor's consultants, accountants, attorneys and other representatives and assistants to sign an appropriate confidentiality agreement related to Commission materials and information received in connection with the performance of the Monitor's duties.

L. If the Commission determines that the Monitor has ceased to act or failed to act diligently, the Commission may appoint a substitute Monitor in the same manner as provided in this Paragraph VI.

M. 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.

N. The Monitor appointed pursuant to this Order may be the same Person appointed as a Divestiture Trustee pursuant to the relevant provisions of this Order, or the same Person appointed as Hold Separate Monitor pursuant to the relevant provisions of the Order to Hold Separate in this matter.

VII.

IT IS FURTHER ORDERED that for a period of ten (10) years from the date this Order becomes final, Respondent Ardagh shall not, without providing advance written notification to the

Commission in the manner described in this Paragraph VII, directly or indirectly, acquire:

A. any stock, share capital, equity, or other interest in any Person, corporate or non-corporate, that manufactures or sells glass containers 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 manufacture, production, or sale of glass containers 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 Ardagh and not of any other party to the transaction. Respondent Ardagh 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 Ardagh 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 VII for any acquisition after which Respondent Ardagh would hold no more than one percent (1%) of the outstanding securities or other equity interest in any Person described in this Paragraph VII.

VIII.

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 Ardagh has fully complied with the provisions of Paragraph II of this Order, Respondent Ardagh 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 and the Hold Separate Order. Respondent Ardagh 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 this Order and the Hold Separate Order, including a description of all substantive contacts or negotiations relating to the divestiture and approval, and the identities of all parties contacted. Respondent Ardagh shall include in its compliance reports copies of, other than of privileged materials, all written communications to and from such parties, all internal memoranda, and all reports and recommendations concerning the divestiture and approval, and, as applicable, a statement that any divestiture approved by the Commission has been accomplished, including a description of the manner in which Respondent Ardagh completed such divestiture and the date the divestiture was accomplished.

B. One (1) year after the date this Order becomes final and annually thereafter until this Order terminates, and at such other times as the Commission may request, Respondent Ardagh shall submit to the Commission a

verified written report setting forth in detail the manner and form in which it has complied and is complying with this Order and any Divestiture Agreement.

IX.

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

A. to any proposed dissolution of Respondent Ardagh;

B. to any proposed acquisition, merger, or consolidation of Respondent Ardagh; or

C. any other change in the Respondent Ardagh, including, but not limited to, assignment and the creation or dissolution of subsidiaries, if such change might affect compliance obligations arising out of the Order.

X.

IT IS FURTHER ORDERED that, for the purpose of determining or securing compliance with this Order, and subject to any legally recognized privilege, and upon written request with reasonable notice to Respondent Ardagh, with respect to any matter contained in this Order, Respondent Ardagh shall permit any duly authorized representative of the Commission:

A. Access, during office hours and in the presence of counsel, to all facilities and access to inspect and copy all non-privileged books, ledgers, accounts, correspondence, memoranda and other records and documents in the possession or under the control of Respondent Ardagh related to compliance with the Consent Agreement and/or this Order and the Hold Separate Order, which copying services shall be provided by Respondent Ardagh at the request of the authorized representative of the Commission and at the expense of Respondent Ardagh;

B. Upon five (5) days' notice to Respondent Ardagh and without restraint or interference from them, to interview officers, directors, or employees of Respondent Ardagh, who may have counsel present.

XI.

IT IS FURTHER ORDERED that this Order shall terminate on June 17, 2024.

XII.

IT IS FURTHER ORDERED that the Complaint is dismissed as to Respondent Saint-Gobain Containers, Inc. and Respondent Compagnie de Saint-Gobain.

By the Commission, Commissioner Wright dissenting and Commissioner McSweeny not participating.

NON-PUBLIC APPENDIX A

HSO EXCLUDED EMPLOYEES BUT SUBJECT TO INTERVIEW AND HIRE UNDER DECISION AND ORDER

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

ANALYSIS OF CONSENT ORDER TO AID PUBLIC COMMENT

I. Introduction

The Federal Trade Commission ("Commission") has accepted, subject to final approval, an Agreement Containing Consent Orders ("Consent Agreement") with Ardagh Group S.A. ("Ardagh"). The purpose of the Consent Agreement is to remedy the anticompetitive effects of Ardagh's proposed acquisition of Saint-Gobain Containers, Inc. ("Saint-Gobain") from Compagnie de Saint-Gobain. Under the terms of the Consent Agreement, Ardagh must divest six of its nine United States glass container manufacturing plants to an acquirer approved by the Commission. The Consent Agreement provides the acquirer the manufacturing plants and other tangible and intangible assets it needs to effectively compete in the markets for the manufacture and sale of glass containers to both beer brewers and spirits distillers in the United States. Ardagh must complete the divestiture within six months of the date it signs the Consent Agreement.

On January 17, 2013, Ardagh agreed to acquire Saint-Gobain from its French parent company, Compagnie de Saint-Gobain, for approximately $1.7 billion. This acquisition would concentrate most of the $5 billion U.S. glass container industry in two major competitors – Owens-Illinois, Inc. ("O-I") and the combined Ardagh/Saint-Gobain. These two major competitors would also control the vast majority of glass containers sold to beer brewers and spirits distillers in the United States. On June 28, 2013, the Commission issued an administrative complaint alleging that the acquisition, if consummated, may substantially lessen competition in the markets for the manufacture and sale of glass containers to brewers and distillers in the United States 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.

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 a part of the

public record. After 30 days, the Commission will review the Consent Agreement and comments received, and decide whether it should withdraw, modify, or make the Consent Agreement final.

II. The Parties

Ardagh, headquartered in Luxembourg, is a global leader in glass and metal packaging. Ardagh entered the United States glass container industry through two 2012 acquisitions – first acquiring a single-plant glass container manufacturer, Leone Industries, and then an eight-plant manufacturer, Anchor Glass Container Corporation ("Anchor"). Through the Anchor acquisition, Ardagh became the third-largest glass container manufacturer in the country, supplying glass containers for beer, spirits, non-alcoholic beverages, and food. Ardagh's nine glass container manufacturing plants are located in seven U.S. states.

Saint-Gobain is a wholly-owned U.S. subsidiary of Compagnie de Saint-Gobain, a French company which, among other businesses, manufactures and sells glass containers throughout the world. In the United States, Saint-Gobain is the second-largest glass container manufacturer, supplying beer, spirits, wine, non-alcoholic beverages, and food containers. Saint-Gobain operates 13 glass container manufacturing plants located in 11 U.S. states. Saint-Gobain, operates under the name "Verallia North America" or "VNA."

III. The Manufacture and Sale of Glass Containers to Brewers and Distillers in the United States

Absent the remedy, Ardagh's acquisition would harm competition in two relevant lines of commerce: the manufacture and sale of glass containers to (1) beer brewers, and (2) spirits distillers in the United States. Currently, only three firms – Owens-Illinois, Inc., Saint-Gobain, and Ardagh – manufacture and sell most glass containers to brewers and distillers in the United States. Collectively, these three firms control approximately 85 percent of the United States glass container market for brewers, and approximately 77 percent of the market for distillers.

The Commission often calculates the Herfindahl-Hirschman Index ("HHI") to assess market concentration. Under the Federal Trade Commission and Department of Justice Horizontal Merger Guidelines, markets with an HHI above 2,500 are generally classified as "highly concentrated," and acquisitions "resulting in highly concentrated markets that involve an increase in the HHI of more than 200 points will be presumed to be likely to enhance market power." In this case, both relevant product markets are already concentrated and the acquisition would increase the HHIs substantially. Absent the proposed remedy, the acquisition would increase the HHI by 782 points to 3,657 for glass beer containers, and by 1,072 points to 3,138 for glass spirits containers. With the proposed remedy, however, Ardagh's acquisition of Saint-Gobain will result in no increase in HHI in the glass container market for beer brewers and a 33 point HHI increase in the glass container market for distillers.

The relevant product markets in which to analyze the effects of the acquisition do not include other packaging materials, such as aluminum cans for beer or plastic bottles for spirits for several reasons. First, Ardagh and Saint-Gobain routinely identify each other and O-I as their most direct competitors, focusing their business strategies, market analysis, and pricing on glass container competition. Indeed, glass container pricing is not responsive to the pricing of other types of containers. Second, although brewers and distillers use aluminum and plastic packaging, respectively, for their products, these customers solicit and evaluate glass container bids independently of their can and plastic procurement efforts. Third, brewers and distillers demand glass so that they may maintain a premium image and brand equity and meet their consumers' expectations. Thus, brewers and distillers cannot easily or quickly substitute their glass container purchases with other packaging materials without jeopardizing the sale of their own products. Finally, Ardagh and Saint-Gobain distinguish glass containers from containers made with other materials based on qualities including oxygen impermeability, chemical inertness, and glass' ability to be recycled.

The United States is the appropriate geographic market in which to evaluate the likely competitive effects of the

acquisition. Ardagh and Saint-Gobain each maintain geographically diverse networks of plants that manufacture and sell glass containers to brewers and distillers throughout the country. Most U.S. brewers and distillers have similar competitive glass container alternatives from which to choose, regardless of their geographic location. The relevant geographic market is no broader than the United States because product weight and logistics constraints limit brewers' and distillers' ability to purchase significant volumes of glass containers from outside the country.

IV. Effects of the Acquisition

Absent relief, the acquisition would result in an effective duopoly likely to cause significant competitive harm in the markets for the manufacture and sale of glass containers to brewers and distillers. The glass container industry is a highly consolidated, stable industry, with low growth rates and high barriers to entry. The acquisition would increase the ease and likelihood of anticompetitive coordination between the only two remaining major suppliers. The acquisition would also eliminate direct competition between Ardagh and Saint-Gobain. Thus, the acquisition would likely result in higher prices and a reduction in services and other benefits to brewers and distillers.

V. Entry

Entry into the markets for the manufacture and sale of glass containers to brewers and distillers would not be timely, likely, or sufficient in magnitude, character, and scope to deter or counteract the likely competitive harm from the acquisition. The glass container industry in the United States enjoys significant barriers to entry and expansion including the high cost of building glass manufacturing plants, high fixed operating costs, the need for substantial technological and manufacturing expertise, and long-term customer contracts. For these reasons, entry by a new market participant or expansion by an existing one, would not deter the likely anticompetitive effects from the acquisition.

VI. The Consent Agreement

The proposed Consent Agreement remedies the competitive concerns raised by the acquisition by requiring Ardagh to divest six of its nine glass container manufacturing plants in the United States to an acquirer within six months of executing the Consent Agreement. In addition, the Consent Agreement requires Ardagh to transfer all customer contracts currently serviced at those six plants to an acquirer through an agreement approved by the Commission.

Under the proposed Consent Agreement, Ardagh will divest six of the manufacturing plants that it acquired when it purchased Anchor in 2012, along with Anchor's corporate headquarters, mold and engineering facilities. The six plants produce glass containers for brewers and distillers and are located in: Elmira, NY; Jacksonville, FL; Warner Robins, GA; Henryetta, OK; Lawrenceburg, IN; and Shakopee, MN. Anchor's corporate headquarters, mold and engineering facilities are located in Tampa, FL, Zanesville, OH, and Streator, IL, respectively. Other assets that Ardagh will divest include customer contracts, molds, intellectual property, inventory, accounts receivable, government licenses and permits, and business records. In addition, the Consent Agreement limits Ardagh's use of, and access to, confidential business information pertaining to the divestiture assets.

Through the proposed Consent Agreement, the acquirer of these assets will be the third-largest glass container manufacturer in the United States. These assets replicate the amount of glass containers for beer and spirits that the third largest supplier offers today. The acquirer will own plants that span a broad geographic footprint, offer a well-balanced product mix, and have flexible manufacturing capabilities. Its presence will preserve the three-way competition that currently exists in the relevant markets and moderate the potential for coordination.

Ardagh must complete the divestiture within six months of signing the Consent Agreement. Pending divestiture, Ardagh is obligated to hold the divestiture assets separate and to maintain the viability, marketability and competitiveness of the assets.

With the hold separate in place, the divested assets, under the direction of an experienced senior management team, will be in a position to compete in the glass industry, independent from Ardagh. A hold separate monitor will supervise the management of the divestiture assets until Ardagh completes the divestiture.

The purpose of this analysis is to facilitate public comment on the proposed Consent Agreement, and 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[1]

In June 2013, the Commission issued a complaint alleging that Ardagh Group, S.A.'s proposed $1.7 billion acquisition of Saint-Gobain Containers, Inc. would reduce competition in the U.S. markets for glass containers for beer and spirits. Specifically, the Commission alleges that the acquisition would have eliminated head-to-head competition between the parties and resulted in a near duopoly in markets already vulnerable to coordination. If the Commission had not challenged the deal, the merged firm and its only remaining significant competitor, Owens-Illinois would have controlled more than 75 percent of the relevant markets. The Commission staff developed evidence to prove at trial that the acquisition would likely have substantially lessened competition in violation of Section 7 of the Clayton Act. After the start of litigation, the parties chose to settle the matter by divesting six of the nine U.S. plants currently owned by Ardagh. The Commission has now accepted the proposed consent order for public comment and believes it addresses the competitive issues here, as well as the widespread customer concerns expressed by brewers and distillers who depend on a steady and competitively- priced

[1] Chairwoman Ramirez and Commissioners Brill and Ohlhausen join in this statement.

supply of glass containers. We outline below our concerns with this deal and the benefits of the proposed consent.

The 2010 Merger Guidelines explain that the Commission will likely challenge a transaction where "(l) the merger would significantly increase concentration and lead to a moderately or highly concentrated market; (2) that market shows signs of vulnerability to coordinated conduct. .. ; and (3) the Agencies have a credible basis on which to conclude that the merger may enhance that vulnerability."[2] We have reason to believe each of these factors is present here. The transaction would have dramatically increased concentration in already highly-concentrated markets. The glass container markets for beer and spirits are vulnerable to post-acquisition coordination, exhibiting features such as low demand growth, tight capacity, high and stable market shares, and high barriers to entry that typify markets that have experienced coordination. The existing three major glass manufacturers already have access to a wealth of information about the markets and each other, including plant-by-plant production capabilities, profitability, the identities of each other's customers, and details regarding each other's contracts and negotiations with customers. Customers, industry analysts, public statements, and distributors all serve as conduits for market information. The Commission found evidence that companies in this industry understand their shared incentives to keep capacity tight, avoid price wars, and follow a "price over volume" strategy. We believe this transaction would have made it easier for the remaining two dominant manufacturers to coordinate with one another on price and non-price terms to achieve supracompetitive prices or other anticompetitive outcomes.

As noted in the 2010 Merger Guidelines, the Commission will also likely challenge a transaction producing harmful unilateral effects. For instance, this could occur where the merged firm would no longer have to negotiate against other

[2] U.S. Dep't of Justice & Fed. Trade Comm'n, Horizontal Merger Guidelines§ 7.1 (2010) [hereinafter 2010 Horizontal Merger Guidelines], *available at* http://www.ftc.gov/sites/default/files/attachments/merger-review/I008l9hmg.pdf.

competitors for customer supply contracts, or where the transaction would eliminate a competitor that otherwise could have expanded output in response to a price increase.[3] The Commission charges that Ardagh's acquisition of Saint-Gobain would have eliminated head-to-head competition between the two merging firms, which are the second- and third-largest U.S. glass container manufacturers in the relevant product markets. Brewers and distillers have reaped substantial benefits from the rivalry between the two, often playing one against the other in supply negotiations.

Once a prima facie showing of competitive harm is made, the Commission will consider evidence from the parties of verifiable, merger-specific efficiencies that could offset this harm.[4] In highly concentrated markets with high barriers to entry, as here, the parties can rebut the evidence of harm only with evidence of "extraordinary efficiencies."[5] Efficiencies represent an important aspect of the Commission's merger analysis, with a recent study showing that over a ten-year period 37 of 48 closed investigations involved internal staff memoranda examining efficiencies.[6] Similarly, a recent survey analyzing evidence considered by Commission staff prior to issuing second requests concluded that staff credited parties' detailed efficiency claims "[i]n most cases," even if they proved insufficient to offset competitive concerns about the transaction.[7]

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[3] *See* 2010 Horizontal Merger Guidelines§§ 6, 6.2-6.3.

[4] *See id.* § 10.

[5] *Fed Trade Comm'n v. Heinz,* 246 F.3d 708, 720 (D.C. Cir. 2001); *In re Polypore Int'l, Inc.,* Initial Decision, No. 9327, 2010 WL 866178, at *184-85 (FTC Mar. 1, 2010).

[6] Malcolm B. Coate & Andrew J. Heimert, *Merger Efficiencies at the Federal Trade Commission: 1997- 2007* 14 n.31 (2009), *available at* http://www.ftc.gov/sites/default/files/documents/reports/merger-efficiencies-federal-trade-commission-l997%E2%80%932007/0902mergerefficiencies.pdf.

[7] Darren S. Tucker, *A Survey of Evidence Leading to Second Requests at the FTC,* 78 Antitrust L.J. 591, 602 (2013).

In this matter, many of Ardagh's proffered synergies were not merger-specific and could have been achieved absent the acquisition. For instance, the parties claimed the merger would allow them to reduce overhead within the Saint-Gobain organization. However, this claim related to the staffing of the current Saint-Gobain organization alone and is separate from any additional savings to be reaped from eliminating staff positions made redundant by the combination of Ardagh and Saint-Gobain. Thus, the claim is not merger specific. In addition, Ardagh made broad claims of additional operational efficiencies, and likely would have achieved some. However, the parties put forward insufficient evidence showing that the level of synergies that could be substantiated and verified would outweigh the clear evidence of consumer harm.

For these reasons, we respectfully disagree with Commissioner Wright's conclusion that there is no reason to believe the transaction violates Section 7 of the Clayton Act. We also disagree with Commissioner Wright's suggestion that the Commission imposed an unduly high evidentiary standard in analyzing the parties' efficiency claims here and believe he overlooks several important points in his analysis. We are mindful of our responsibility to weigh appropriately all evidence relevant to a transaction and, moreover, understand our burden of proof before a trier of fact.

Commissioner Wright expresses concern that competitive effects are estimated whereas efficiencies must be "proven," potentially creating a "dangerous asymmetry" from a consumer welfare perspective.[8] We disagree. Both competitive effects and efficiencies analyses involve some degree of estimation. This is a necessary consequence of the Clayton Act's role as an incipiency statute. In addition, while competitive effects data and information tends to be available from a variety of sources, the data and information feeding efficiencies calculations come almost entirely from the merging parties. Indeed, the 2010 Merger Guidelines observe that"[e]fficiencies are difficult to verify and quantify, in part because much of the information relating to efficiencies is uniquely in the possession of the

[8] Dissenting Statement of Commissioner Wright at 5.

merging firms."[9] The need for independent verification of this party data animates the requirement that, to be cognizable, efficiencies must be substantiated and verifiable.

Courts have repeatedly emphasized that, "while reliance on the estimation and judgment of experienced executives about costs may be perfectly sensible as a business matter, the lack of a verifiable method of factual analysis resulting in the cost estimates renders them not cognizable."[10] This is for good reason. Indeed," if this were not so, then the efficiencies defense might well swallow the whole of Section 7 of the Clayton Act."[11] The merger analysis the Commission undertook in this case is thus entirely consistent with the 2010 Horizontal Merger Guidelines and established case law.

Finally, we also believe the proposed consent order addresses the competitive concerns we have identified. The proposed order requires Ardagh to sell six manufacturing plants and related assets to a single buyer within six months, thereby creating an independent third competitor that fully replaces the competition that would have been lost in both the beer and spirits glass container markets had the merger proceeded unchallenged. In sum, we have ample reason to believe that the proposed merger was anticompetitive and without appropriate efficiency justification, and that the proposed remedy will maintain competition in the market for glass containers for beer and spirits. We commend and thank Commission staff for their hard work on this matter.

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[9] 2010 Horizontal Merger Guidelines§ 10.

[10] *United States v. H&R Block, Inc.*, 833 F. Supp. 2d 36, 46 (D.D.C. 2011); *see also* 2010 Horizontal Merger Guidelines§ 10 (noting that it is "incumbent upon the merging firms to substantiate efficiency claims so that the Agencies can verify [them] by reasonable means.").

[11] *H&R Block*, 833 F. Supp. 2d at 46.

Dissenting Statement of Commissioner Joshua D. Wright

The Commission has voted to issue a Complaint and Decision & Order ("Order") against Ardagh Group ("Ardagh") to remedy the allegedly anticompetitive effects of Ardagh's proposed acquisition of Saint-Gobain Containers Inc. and Compagnie de Saint-Gobain Gointly, "St. Gobain"). I dissented from the Commission's decision because the evidence is insufficient to provide reason to believe Ardagh's acquisition will substantially lessen competition in glass containers manufactured and sold to beer brewers and spirits distillers in the United States, in violation of Section 7 of the Clayton Act. FTC staff and their economic expert should be commended for conducting a thorough investigation of this matter, working diligently to develop and analyze a substantial quantity of documentary and empirical evidence, and providing thoughtful analyses of the transaction's potential competitive effects. Indeed, I agree with the Commission that there is evidence sufficient to give reason to believe the proposed transaction would likely result in unilateral price increases. After reviewing the record evidence, however, I concluded there is no reason to believe the transaction violates Section 7 of the Clayton Act because any potential anticompetitive effect arising from the proposed merger is outweighed significantly by the benefits to consumers flowing from the transaction's expected cognizable efficiencies. It follows, in my view, that the Commission should close the investigation and allow the parties to complete the merger without imposing a remedy.

I write separately today to explain my reasoning for my vote in the matter and to highlight some important issues presented by this transaction relating to the burden of proof facing merging parties seeking to establish cognizable efficiencies.

I. Potential Anticompetitive Effects Are Small At Best Relative to Cognizable Efficiencies

The Commission alleges both unilateral and coordinated price effects will arise from the proposed transaction. The

economic logic of the unilateral effects theory is straightforward: If the merger combines the two glass manufacturers who are the most preferred for a set of customers, there is the potential for a price increase arising from the loss of competition between those two firms. This is because sales previously diverted to the next closest competitor in response to a price increase will now be internalized by the post-merger firm. When analyzing the potential for unilateral price effects, the 2010 Merger Guidelines indicate the Agencies will consider "any reasonably available and reliable information," including "documentary and testimonial evidence, win/loss reports and evidence from discount approval processes, customer switching patterns, and customer surveys."[1] The Merger Guidelines also contemplate a number of quantitative analyses to facilitate the analysis of potential unilateral effects including calculating diversion ratios and the value of diverted sales. Where sufficient data are available, the Merger Guidelines indicate "the Agencies may construct economic models designed to quantify the unilateral price effects resulting from the merger."[2] In my view, the totality of record evidence supports an inference - though a fragile one - that the merger is likely to result in very modest unilateral price effects at best.

With respect to the potential coordinated price effects, I find successful coordination in this market highly unlikely.[3]

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[1] U.S. DEP'T OF JUSTICE & FED. TRADE COMM'N, HORIZONTAL MERGER GUIDELINES § 6.1 (2010), *available at* http://www.justice.gov/atr/public/guidelines/hing-2010.html[hereinafter MERGER GUIDELINES].

[2] *Id.*

[3]Although coordinated effects may be more likely with two rather than three key competitors, I do not find evidence sufficient to conclude coordination is likely. For example, I find that prices are individually negotiated and not particularly transparent, and the incentive to cheat without detection would likely undermine a collusive outcome. In the ordinary course of business, competitive firms collect information and monitor one another's behavior. There is no evidence that the information collected by firms in the glass container market is accurate or that coordination based upon that information has taken place to date.

However, even if coordination was a more plausible concern, I am not persuaded record evidence is probative of the effects that would arise as a result of *this* merger. My view and analysis of the record evidence relied upon to assess the magnitude of any potential coordinated effects is that it is suspect and cannot identify price differences attributable to changes in post-merger incentives to coordinate that would result from the proposed transaction rather than other factors. In addition, even if coordinated effects were likely, any estimated expected effect would need to be discounted by a probability of successful coordination that is less than one.

In summary, given the totality of the available evidence, I am persuaded that the proposed transaction is likely to generate, at best, small unilateral price effects.

The key question in determining whether the proposed transaction is likely to violate Section 7 of the Clayton Act is thus whether any cognizable efficiencies "likely would be sufficient to reverse the merger's potential to harm customers in the relevant market."[4] The 2010 Merger Guidelines and standard cost-benefit principles teach that efficiencies should matter most when competitive effects are smal l.[5] The

[4] MERGER GUIDELINES§ 10.

[5] MERGER GUIDELINES § 10 ("In the Agencies' experience, efficiencies are most likely to make a difference in merger analysis when the likely adverse competitive effects, absent the efficiencies, are not great."). It is sometimes argued, pointing to language in the Merger Guidelines that "efficiencies almost never justify a merger to monopoly or near-monopoly," that the erger Guidelines rule out or render the burden facing merger parties practically insurmountable in the case of mergers to monopoly or "three-to-two" situations. In my view, this is a misreading of the Merger Guidelines in letter and spirit. The sentence prior notes that "efficiencies are most likely to make a difference in merger analysis when the likely adverse competitive effects, absent the efficiencies, are not great." The Merger Guidelines' reference to mergers to monopoly or near-monopoly are illustrations of cases in which likely adverse effects might be large. The Merger Guidelines themselves do not rule out an efficiencies defense when a merger with small anticompetitive effects, with any market structure, generates cognizable efficiencies that are sufficient to prevent the merger from being anticompetitive. Nor do the Merger Guidelines suggest that a merger in a market with many firms that exhibits significant unilateral price effects should face a less serious burden in order to

Commission's view of the record evidence is apparent in the Complaint, which alleges that "nearly all" of the efficiencies proffered by the parties are non-cognizable.[6] However, my own review of the record evidence leads me to disagree with that conclusion. In fact, I find that given reasonable assumptions, cognizable efficiencies are likely to be substantial and more than sufficient to offset any anticompetitive price increase. While reasonable minds can differ with respect to the magnitude of cognizable efficiencies in this case, I do not find the allegation of zero or nearly zero efficiencies plausible. Indeed, my own analysis of the record evidence suggests expected cognizable efficiencies are up to six times greater than any likely unilateral price effects. The relative magnitude of the expected cognizable efficiencies set forth is dispositive of the matter under my own analysis.

II. When Is There an Efficiencies Defense at the FTC?

I would like to highlight some important issues presented by this transaction as they relate to how the Commission analyzes parties' efficiencies claims, and in particular, whether the burden of proof facing parties seeking to establish cognizable efficiencies is or should be meaningfully different than the burden facing the agency in establishing that a proposed merger is likely to substantially lessen competition.

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establish an efficiencies defense. The Merger Guidelines' more general shift toward effects over market structure is also consistent with this analysis and undermines the logic of a position that the comparison of anticompetitive harms to cognizable efficiencies should be conducted differently depending upon the number of firms in the relevant market. To the extent the Commission believes the judicial decisions cited in note 5 of their statement endorse the notion that extraordinary efficiencies are required to justify a merger to monopoly or duopoly even when the anticompetitive effects from that merger are small, this is the analytical equivalent of allowing the counting of the number of firms within a market to trump analysis of competitive effects. The Commission should reject that view as inconsistent with the goal of promoting consumer welfare.

[6] *See, e.g.* Complaint, In the Matter of Ardagh Group S.A., F.T.C. Docket No. 9356 (June 28, 2013), *available at* http://www.ftc.gov/sites/default/files/documents/cases/2013/07/130701ardaghcmpt.pdf.

My view is that the burden facing the agency with respect to the likelihood of anticompetitive effects should be in parity to that faced by the parties with respect to efficiencies. I recognize that this view is at least superficially in tension with the 2010 Merger Guidelines, which appear to embrace an asymmetrical approach to analyzing harms and benefits. Indeed, the 2010 Merger Guidelines declare that "the Agencies will not simply compare the magnitude of the cognizable efficiencies with the magnitude of the likely harm to competition absent the efficiencies."[7] This tension is easily resolved in the instant case because the efficiencies substantially outweigh the potential harms, but it merits greater discussion.

To begin with, it is important to define which issues are up for discussion and which are not with some precision. The issue is not whether the burden-shifting framework embedded within Section 7 of the Clayton Act is a useful way to structure economic and legal analysis of complex antitrust issues.[8] It is. Nor is the pertinent question whether the parties properly bear the burden of proof on efficiencies. They do.[9]

The issues here are twofold. The first issue is whether the magnitude of the burden facing merging parties attempting to demonstrate cognizable efficiencies *should* differ from the burden the Commission must overcome in establishing the likelihood of anticompetitive effects arising from the transaction *in theory.* The second is whether the magnitudes of those burdens differ *in practice.* The Commission appears to answer the first question in the negative.[10] With respect to the

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[7] MERGER GUIDELINES§ 10.

[8] See, e.g., United States v. Baker Hugh es, Inc., 908 F.2d 981 (D.C. Cir. 1990).

[9] *See* MERGER GUIDELINES§ 10.

[10] Statement of the Commission, In the Matter of Ardagh Group S.A., Saint-Gobain Containers, Inc., and Compagnie de Saint-Gobain, File No. 131-0087 (April 11, 2014) ("We also disagree with Commissioner Wright's suggestion that the Commission imposed an unduly high evidentiary standard in analyzing the parties' efficiency claims").

second question, the Commission points to some evidence that the Agency does in fact consider efficiencies claim s when presented in many investigations. There is little dispute, however, that the Commission gives some form of consideration to efficiency claims; the relevant issue is over precisely *how* the Commission considers them. More specifically, must merging parties overcome a greater burden of proof on efficiencies in practice than does the FTC to satisfy its prima fade burden of establishing anticompetitive effects? This question, in my view, merits greater discussion.

Even when the same burden of proof is applied to anticompetitive effects and efficiencies, of course, reasonable minds can and often do differ when identifying .and quantifying cognizable efficiencies as appears to have occurred in this case. My own analysis of cognizable efficiencies in this matter indicates they are significant. In my view, a critical issue highlighted by this case is whether, when, and to what extent the Commission will credit efficiencies generally, as well as whether the burden faced by the parties in establishing that proffered efficiencies are cognizable under the Merger Guidelines is higher than the burden of proof facing the agencies in establishing anticompetitive effects. After reviewing the record evidence on both anticompetitive effects and efficiencies in this case, my own view is that it would be impossible to come to the conclusions about each set forth in the Complaint and by the Commission - and particularly the conclusion that cognizable efficiencies are nearly zero - without applying asymmetric burdens.

Merger analysis is by its nature a predictive enterprise. Thinking rigorously about probabilistic assessment of competitive harms is an appropriate approach from an economic perspective. However, there is some reason for concern that the approach applied to efficiencies is deterministic in practice. In other words, there is a potentially dangerous asymmetry from a consumer welfare perspective of an approach that embraces probabilistic prediction, estimation, presumption, and simulation of anticompetitive effects on the one hand but requires efficiencies to be *proven* on the other.

There is ample discretion in the 2010 Merger Guidelines to allow for this outcome in practice. For example, the merger-specificity requirement could be interpreted narrowly to exclude any efficiency that can be recreated with any form of creative contracting. While the Merger Guidelines assert that Agencies "do not insist upon a less restrictive alternative that is merely theoretical," there is little systematic evidence as to how this requirement is applied in practice. Verifiability, on the other hand, could be interpreted to impose stricter burden of proof than the agency is willing to accept when it comes to predictions, estimates, presumptions, or simulations of anticompetitive effects. There is little guidance as to how these provisions of the Merger Guidelines ought to be interpreted.[11] Neither is further guidance likely forthcoming from the courts given how infrequently mergers are litigated. None of this, of course, is to say that parties should not bear these burdens in practice. Efficiencies, like anticompetitive effects, cannot and should not be presumed into existence. However, symmetrical treatment in both theory and practice of evidence proffered to discharge the respective burdens of proof facing the agencies and merging parties is necessary for consumer-welfare based merger policy.

There are legitimate and widespread concerns that this has not been the case. Academics, agency officials, and practitioners have noted that although efficiencies are frequently a significant part of the business rationale for a transaction, receiving credit for efficiencies in a merger review is often difficult.[12] Professor Daniel Crane has analyzed the perceived asymmetries between competitive effects analysis

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[11] The 2006 Merger Guidelines Commentary provides some guidance on efficiencies, but offer little guidance on the interpretation of these provisions and the type of substantiation required. U.S. DEP'T OF JUSTICE & FED. TRADE COMM'N, COMMENTARY ON THE HORIZONTAL MERGER GUIDELINES (Mar. 2006), *available at* http://www.justice.gov/atr/public/guidelines/2l5247.htm#44.

[12] *See, e.g.*, Michael B. Bernstein & Justin P. Hedge, *Maximizing Efficiencies: Getting Credit Where Credit Is Due*, ANTITRUST SOURCE, Dec. 2012, *available at* http://www.americanbar.org/content/dam/aba/publishing/antitrust_source/dec12_hedge_12_20f.authcheckdam.pdf.

and efficiencies discussed above and their implications for competition systems and consumer welfare.[13] Others have pointed out that recent court cases reveal that "the efficiency defense faces an impossibly high burden."[14] Moreover, testimony from senior agency officials recognize the potential costs of imposing an unnecessarily high burden of proof to demonstrate cognizable efficiencies and states that symmetrical treatment of the evidence as they related to efficiencies versus competitive effects is warranted.

> *Placing too high a burden on the parties to quantify efficiencies and to show that they are merger-specific risks prohibiting transactions that would be efficiency-enhancing. On the other hand, we are not able simply to take the parties' word that the efficiencies they have identified will actually materialize. Ultimately, we evaluate evidence related to efficiencies under the same standard we apply to any other evidence of competitive effects.*[15]

The lack of guidance in analyzing and crediting efficiencies has led to significant uncertainty as to what standard the Agency applies in practice to efficiency claims and led to inconsistent applications of Section 10 of the

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[13] Daniel A. Crane, *Rethinking Merger Efficiencies*, 110 MICH. L. REV. 347, 386-87 (2011). Professor Crane argues that "as a matter of both verbal formulation in the governing legal norms and observed practice of antitrust enforcement agencies and courts, the government is accorded greater evidentiary leniency in proving anticompetitive effects than the merging parties are in proving offsetting efficiencies," *id.* at 348, and rejects a variety of justifications for asymmetrical treatment of merger costs and benefits.

[14] Malcolm B. Coate, *Efficiencies in Merger Analysis: An Institutionalist View*, 13 SUP. CT. ECON. REV. 230 (2005).

[15] Statement of Kenneth Heyer on Behalf of the United States Department of Justice, Antitrust Modernization Commission Hearings on the Treatment of Efficiencies in Merger Enforcement (Nov. 17, 2005), *available at* http://govinfo.library.unt.edu/amc/commission_hearings/pdf/Statement-Heyer.pdf.

Merger Guidelines, even among agency staff.[16] In my view, standard microeconomic analysis should guide how we interpret Section 10 of the 2010 Merger Guidelines, as it does the rest of the antitrust law. To the extent the Merger Guidelines are interpreted or applied to impose asymmetric burdens upon the agencies and parties to establish anticompetitive effects and efficiencies, respectively, such interpretations do not make economic sense and are inconsistent with a merger policy designed to promote consumer welfare.[17] Application of a more symmetric standard is unlikely to allow, as the Commission alludes to, the efficiencies defense to "swallow the whole of Section 7 of the Clayton Act." A cursory read of the cases is sufficient to put to rest any concerns that the efficiencies defense is a mortal threat to agency activity under the Clayton Act. The much more pressing concern at present is whether application of asymmetric burdens of proof in merger review will swallow the efficiencies defense.

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[16] In a recent study examining agency analysis of efficiencies claims, an FTC economist and attorney found significant disparities. Malcolm B. Coate & Andrew J. Heimert, Merger Efficiencies at the Federal Trade Commission: 1997-2007 (2009), *available at* http://www.ftc.gov/sites/default/files/documents/reports/merger-efficiencies-federal-trade-commission-1997%E2%80%932007/0902mergerefficiencies.pdf. Coate and Heimert find that "BE staff endorsed 27 percent of the claims considered, while BC accepted significantly fewer (8.48 percent) of the claims considered during the studied period." The disparity also applies to rejection of efficiencies claims. The Bureau of Economics rejected 11.9 percent of the claims, while the Bureau of Competition rejected a significantly higher 31.9 percent of claims. *Id.* at 26.

[17] For example, Professor Crane explains that "[i]f the government and merging parties were held to the same standard of proof-preponderance of the evidence, for example-then, conceptually, harms and efficiencies would be given equal weight despite the different allocations of burdens of proof." In addition, "[i]f probabilities of harm are easier to demonstrate on an individualized basis than probabilities of efficiencies, even though in the aggregate both harms and efficiencies are similarly likely in the relevant categories of cases, then merger policy will display a bias in favor of theories of harm even if it adopts an explicit symmetry principle." Crane, *supra* note 11, at 387-88.

III. Conclusion

There are many open and important questions with respect to the treatment of efficiencies at the Agencies. While the Agencies' analytical framework applied to diagnosing potential anticompetitive effects got an important update with the 2010 Merger Guidelines, there remains significant room for improvement with respect to the aligning agency analysis of efficiencies with standard principles of economic analysis. Primary among these important questions is whether the burden of proof required to establish cognizable efficiencies should be symmetrical to the burden the Agencies must overcome to establish anticompetitive effects. In my view, issues such as out-of-market efficiencies and the treatment of fixed costs also warrant further consideration.[18]

For the reasons set forth in this statement, I conclude that the harms from the transaction are small at best and, applying a symmetric standard to assessing the expected benefits and harms of a merger, the expected cognizable efficiencies are substantially greater than the expected harms. Accordingly, I believe the merger as proposed would have benefitted consumers. As such, I cannot join my colleagues in supporting today's consent order because I do not have reason to believe the transaction violates Section 7 of the Clayton Act nor that a consent ordering divestiture is in the public interest.

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[18] See, e.g., Jan M. Rybnicek & Joshua D. Wright, *Outside In or Inside Out?: Counting Merger Efficiencies Inside and Out of the Relevant Market*, *in* 2 WILLIAM E. KOVACIC: AN ANTITRUST TRIBUTE - LIBER AMICORUM (2014) (forthcoming}, *available at* ht tp://pa:pers.ssm.com/sol3 /pa:pe rs.cfm?abstract id=2411270; Judd E. Ston & Joshua D. Wright, *The Sound of One Hand Cla pping: The 2010 Merger Guidelines and the Challenge of Judicial Adopt ion*, 39 REV. INDUS. ORG. 145 (2011).

Complaint

IN THE MATTER OF

ADT LLC

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

Docket No. C-4460; File No. 122 3121
Complaint, June 18, 2014 – Decision, June 18, 2014

This consent order addresses ADT LLC, also d/b/a ADT Security Services's use of paid spokespersons to promote the ADT Pulse home security system in appearances on national and local television and radio news programs and talk shows. The complaint alleges that paid spokespersons were identified on air as experts in child safety, home security, or technology. The experts demonstrated and provided favorable reviews of the ADT Pulse as part of news segments on topics related to their expertise. The complaint further alleges ADT represented that the demonstrations and discussions of the features and benefits of the ADT Pulse were independent reviews by impartial experts and failed to disclose that the experts were ADT's paid spokespersons. The consent order requires ADT, in connection with the advertising of any security or monitoring product by means of an endorsement, to disclose clearly and prominently a material connection, if one exists, between the endorser and ADT. The order also prohibits ADT, in connection with the advertising of any security or monitoring product or service, from misrepresenting that a discussion or demonstration of such product or service is an independent review provided by an impartial expert.

Participants

For the *Commission*: *Mary Johnson, Shira Modell*, and *Michelle K. Rusk.*

For the *Respondent*: *William MacLeod* and *Daniel Blynn, Kelley Drye & Warren LLP*.

COMPLAINT

The Federal Trade Commission, having reason to believe that ADT LLC, a limited liability company ("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. ADT LLC, also doing business as ADT Security Services, is a Delaware limited liability company with its principal office or place of business at 1501 Yamato Road, Boca Raton, Florida, 33431.

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. Respondent manufactures, advertises, markets, promotes, offers to sell, sells, and distributes various electronic security products and services, including but not limited to, the ADT Pulse home security and monitoring system ("ADT Pulse").

4. Respondent used paid spokespersons to promote the ADT Pulse in interviews on national and local television and radio news programs and talk shows. Respondent set up these media interviews through its public relations firms and booking agents, often providing the reporters and news anchors with suggested interview questions and b-roll (background video). The paid spokesperson would be identified on air as an expert in child safety, home security, or technology and would be interviewed as part of a news segment on a topic related to his or her expertise. During the course of the interview, the paid spokesperson would demonstrate the ADT Pulse and provide a favorable review of the product. The paid spokesperson sometimes demonstrated other child safety, home security, or technology products, in addition to the ADT Pulse, adding to the impression that the spokesperson was providing an impartial, expert review of products. In most of these media appearances, there was no mention of any connection between the spokesperson and Respondent.

5. Respondent also used these paid spokespersons to promote the ADT Pulse in what appeared to be independent and objective reviews on the spokesperson's own website, in blog posts, and in other online materials.

6. Respondent provided both financial and in-kind compensation to its spokespersons for the activities referred to in Paragraphs 4 and 5. For example, Respondent paid three spokespersons, including a child safety expert, a home security

expert, and a technology expert, a total of approximately $313,000, with one spokesperson receiving more than $200,000. Two of the spokespersons also received a free ADT Pulse security system, valued at approximately $4,000, and free monthly monitoring service. In exchange, the spokespersons appeared on more than 40 different television programs in markets across the country and posted regular blogs and other online material touting the benefits of the ADT Pulse.

7. Through the television and radio appearances and online materials referred to in Paragraphs 4 through 6, Respondent's spokespersons made favorable statements about the features and benefits of the ADT Pulse. The appearances and online materials include but are not limited to those attached as Exhibits A-D. They include the following statements:

A. Today Show (NBC), January 4, 2011 (Video attached as Exhibit A)

(Excerpted from national market television interview of Alison Rhodes by Hoda Kotb and Kathie Lee Gifford)

Kotb: Keeping your kids safe when you're not around is probably the biggest concern worrying most parents.

Gifford: Well now with advances in technology, a parent's job is much easier than it was only a handful of years ago. Here to tell us what is out there is Alison Rhodes. She's a national family and safety expert known as "The Safety Mom" . . . .

[Video Banner: "KEEP YOUR KIDS SAFE
TOOLS FOR AT SCHOOL & AT HOME"]

Kotb: We were captivated by the first thing you have on your table. And it's almost, like I guess, a motion detector for kids at home while you're at work so you can check on them, right?

[Video Banner "CHILD SAFETY
ADT PULSE $399
ADTPULSE.COM"]

Rhodes: This is truly the virtual babysitter. I travel a lot. I'm on the road. This is the ADT Pulse Home Monitoring System. I've got wireless cameras. I've got motion detectors. I've got texts that come into my iPhone if my daughter doesn't walk into the door from school . . . . So I can see my kids if they're not doing their homework after school . . . .

Kotb: How pricey is this whole apparatus?

Rhodes: You know, it's really not that much. It starts at $399 and then it's a monthly fee, but you actually get a discount on your homeowner's insurance because it's your ADT security system.

Gifford: That's a great idea. Smart.

Rhodes: It's amazing!

[News segment continues with Ms. Rhodes discussing three other child safety products.]

B. Daybreak USA (USA Radio Network), Jan. 20, 2011 (Video attached as Exhibit B) (Excerpt of interview of Alison Rhodes on nationally syndicated talk radio show)

Host Scott West: A nationally known family safety and lifestyle expert who often provides tips and advice on keeping moms and kids safe, happy, and healthy, is with us this morning, Alison Rhodes, welcome to Daybreak USA.

. . . .

Now what is it that makes this house, that you're in, there in Windermere, Florida, a busy mom's dream?

Rhodes: [interviewed remotely by phone from KB model home at International Builders Show in Windermere, Florida] ... There are things here like the ADT Pulse home monitoring system. When I'm on the road, I can look in, I can turn the lights on and off. I can turn the thermostat on and off. I can get alerts when my kids walk in the door from school. So I know exactly what's going on in this home.

[interview continues with discussion of other features of the model home]

Rhodes: ... what's also nice about this [ADT] system is: say somebody's coming in the door, I can look on my computer. I can see the cameras. I can see who's coming in. I can see who's going out. So I also have my touch screen for the ADT set up in the bedroom. So this home itself opens up onto a big lake. I'm a little worried about the kids walking right out the door. So I can see everything that's going on anywhere in this house. I can see who's coming and going. I can remember to turn off the lights because, with girls, they never remember to turn off the lights. So literally I can run it. It's completely wired.

C. Blog by Alison Rhodes, Aug. 30, 2010 (posted on www.safetymom.com) (Exhibit C)

Tips to Remember From National Safe at Home Week
by Alison Rhodes, The Safety Mom

Written by Safety Mom August 30, 2010

This blog could go on forever since there are so many things to consider about being safe at home. But, here are a few of the top things to keep in mind:

Get a security and home monitoring system. I'll admit, I never had one before but, now that I have the **ADT Pulse** system, I can't imagine living with out [sic] it. We used to have dogs which made me feel much safer but now I'm a single mom living in a home without dogs and was just informed by a friend that there were three break-ins in our community this past month. Nothing has ever given me greater peace of mind. Not only do I have a "panic" button to get the police immediately but also a medical emergency button and fire button. I have a camera monitoring my driveway so I can see who is driving in and I can lock and unlock the doors remotely from my computer or iPhone. I also get alerts if my daughter hasn't walked in the door at a certain time after school. The ADT Pulse system will save on your energy bill since you can control lights and your thermostat

as well as probably qualify you for a discount on your home owners insurance policy. . . .

[Blog post goes on to discuss other safety tips and products.]

D. News First Early Edition (Fox 29), San Antonio, TX, Jan. 6, 2011 (Video attached as Exhibit D) (Excerpted from local market television interview of David Gregg at the Las Vegas Consumer Electronics Show)

Reporter: We got David Gregg up and early this morning. He is a technology expert with BehindTheBuy.com and he's live with us this morning. ...

[Video Banner: "DAVID GREGG
TECHNOLOGY EXPERT"]

[Segment includes remote interview of David Gregg from the International Consumer Electronics Show in Las Vegas, NV. Mr. Gregg reviews various electronics, including a television set, a smart phone, the ADT Pulse home security system, a remote control for the car, and a hearing aid.]

Reporter: I see you've got the laptop in front of you, or what looks like a laptop. What's that all about?

Gregg: The purpose of the laptop is really more to focus on the video that's on the screen. What it's featuring is a service from ADT, that alarm company that people are familiar with. This kind of impressed us, because it's not just home security. It also features the ability to have full home automation, so while you're away from home, besides operating your security system even having video cameras in your home and seeing what's going on, you can even control your thermostat, your air conditioning, your heat, even your appliances like your coffee maker, too. And the fact is you can control it from any smart phone anywhere in the world. It will even save you money on your insurance because these types of systems are associated with discounts of upwards of 20 per cent on your insurance premiums.

Reporter: And the images look good too. I mean everything looks clear. That's amazing you can do that.

Gregg: It really is incredible and just an added dimension of home automation that you can really control remotely

8. Through the means described in Paragraphs 4 through 7, Respondent has represented, expressly or by implication, that the demonstrations and discussions of the features and benefits of the ADT Pulse by individuals with expertise in child safety, technology, security, or other relevant fields, on various television and radio news programs and talks shows, and in online blogs and other online materials, were independent reviews by impartial experts.

9. In truth and in fact, the demonstrations and discussions of the features and benefits of the ADT Pulse were not independent reviews by impartial experts. The reviews were by experts who were ADT spokespersons who received financial and in-kind compensation for their promotion of the ADT Pulse. Therefore, the representation set forth in Paragraph 8 was, and is, false and misleading.

10. Through the means described in Paragraphs 4 through 7, Respondent has represented, expressly or by implication, that the demonstrations and discussions of the features and benefits of the ADT Pulse reflected the opinions of individuals with relevant expertise. On numerous occasions, Respondent failed to disclose or disclose adequately that these individuals were paid spokespersons for Respondent. These facts would be material to consumers in their decision to purchase the ADT Pulse. The failure to disclose these facts, in light of the representation made, was, and is, a deceptive practice.

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

THEREFORE, the Federal Trade Commission this eighteenth day of June, 2014, has issued this Complaint against Respondent.

By the Commission, Commissioner McSweeny not participating.

Exhibit A

Today Show Appearance – Alison Rhodes-Jacobson
Jan. 4, 2011

Complaint

Exhibit B

Daybreak USA Appearance – Alison Rhodes-Jacobson
Jan. 20, 2011

Complaint

Exhibit C

Alison Rhodes-Jacobson Blog on ADT Pulse
Posted on www.safetymom.com
Aug. 30, 2010

Home Organizing Safety Tips For The New Year

read more

Tips to Remember From National Safe at Home Week by Alison Rhodes, The Safety Mom

Written by Safety Mom August 30, 2010

This blog could go on forever since there are so many things to consider about being safe at home. But, here are a few of the top things to keep in mind:

Get a security and home monitoring system – I'll admit, I never had one before but now that I have the **ADT Pulse system** I can't imagine living with out it. We used to have dogs which made me feel much safer but now I'm a single mom living in a home without dogs and was just informed by a friend that there were three break-ins in our community this past month. Nothing has ever given me greater peace of mind. Not only do I have a "panic" button to get the police immediately but also a medical emergency button and fire button. I have a camera monitoring my driveway so I can see who is driving in and I can lock and unlock the doors remotely from my computer or iPhone. I also get alerts if my daughter hasn't walked in the door at a certain time after school. The ADT Pulse system will save on your energy bill since you can control lights and your thermostat as well as probably qualify you for a discount on your home owners insurance policy.

Check all your baby proofing items – Be sure that hardware mounted gates are still securely in place and that all cabinet and drawer latches are in good working order. If you have not secured furniture to the walls do so immediately. Topple-over accidents have increased over 45% over the last several years. Install furniture straps or corner braces to furniture, including changing tables, and use heavy-duty velcro to secure TV's to their stands.

Practice an emergency evacuation plan – As much as we know that an emergency can occur, we very often don't plan for it. Whether it's a fire, earthquake, hurricane or some other disaster, you need to have a plan as to who would be in charge of grabbing each child, establishing a meeting place away from the home and having a emergency preparedness kit ready to go which includes batteries, flashlights, bottled water and a blanket. Determine a person that each family member could call who lives in a different community that could be the "central point person" to receive information.

Refresh you First Aid kit – Be sure that items in your First Aid kit have been replenished and that your anti-biotic ointment hasn't expired. Stock up bandages, a thermometer, an ice-pack and ibuprofen, and anti-bacterial cream. Be sure that you are CPR and First Aid certified and, if you haven't taken a course in a while, re-certify.

- Post to Twitter
- Post to Facebook

Filed under: Child Safety, Parenting Topics

Recent Comments

December 21, 2011 - 12:12am
My son who is 7 and in first grade is being bullied. Now to my un...

December 5, 2011 - 5:49pm
I'll be there~ :) @lovinmomma88 -Thanks

December 5, 2011 - 4:49pm
Sounds like fun and informative Party! @cin_20

Best of Safety Mom

- Win a Cybex Solution X-Fix HB booster seat this month! By Alison Rhodes, The Safety Mom founder of Safety Mom Solutions: I can't think of any oth...
- Twitter Party Every Expectant Mother Should Attend - Cord Blood Banking – Insurance for the Future: Did you know that over th...
- Happy Birthday Connor! Celebrating the life of my SIDS baby – by Alison Rhodes, The Safety Mom: By The Safety Mom Toda...

Complaint

Exhibit D

News First Early Edition Appearance – David Gregg
Jan. 6, 2011

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") which includes: a statement that the respondent neither admits nor denies any of the allegations in the draft complaint except as specifically stated in the consent agreement; an admission by the respondent of facts necessary to establish jurisdiction for purposes of this action; 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 Commission Rule 2.34, 16 C.F.R. § 2.34, now in further conformity with the procedure prescribed in Commission Rule 2.34, the Commission hereby issues its complaint, makes the following jurisdictional findings, and enters the following order:

1. Respondent ADT LLC ("ADT"), also doing business as ADT Security Services, is a Delaware limited liability company with its principal office or place of business at 1501 Yamato Road, Boca Raton, Florida, 33431.

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

ORDER

DEFINITIONS

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

A. Unless otherwise specified, "Respondent" shall mean ADT LLC, a limited liability company, its successors and assigns, and its officers, agents, representatives, and employees.

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

C. "Material connection" shall mean any relationship that materially affects the weight or credibility of any endorsement and that would not be reasonably expected by consumers.

D. "Endorsement" shall mean as defined in the Commission's Guides Concerning the Use of Endorsements and Testimonials in Advertising, 16 C.F.R. § 255.0.

E. "Endorser" shall mean an individual or organization that provides an Endorsement.

F. "Clearly and prominently" shall mean:

1. In textual communications (e.g., printed publications or words displayed on the screen of a computer), the required disclosures are of a type, size, and location sufficiently noticeable for an ordinary consumer to read and comprehend them, in print that contrasts with the background on which they appear;

2. In communications disseminated orally or through audible means (e.g., radio or streaming audio), the required disclosures are delivered in a volume and cadence sufficient for an ordinary consumer to hear and comprehend them;

3. In communications disseminated through video means (e.g., television or streaming video), the required disclosures are in writing in a form consistent with subparagraph (A) of this definition and shall appear on the screen for a duration sufficient for an ordinary consumer to read and comprehend them, and in the same language as the predominant language that is used in the communication. *Provided, however,* that, for communications disseminated through programming over which Respondent does not have editorial control (e.g., an endorser's appearance on a news program or talk show), the required disclosures may be made in a form consistent with subparagraph (B) of this definition;

4. In communications made through interactive media, such as the Internet, online services, and software, the required disclosures are unavoidable and presented in a form consistent with subparagraph (A) of this definition, in addition to any audio or video presentation of them; and

5. In all instances, the required disclosures are presented in an understandable language and syntax, and with nothing contrary to, inconsistent with, or in mitigation of the disclosures used in any communication of them.

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

H. The terms "and" and "or" in this order shall be construed conjunctively or disjunctively as necessary,

to make the applicable phrase or sentence inclusive rather than exclusive.

I.

IT IS THEREFORE ORDERED that Respondent, directly or through any corporation, partnership, subsidiary, division, trade name, or other means, in connection with the advertising, labeling, promotion, offering for sale, sale, or distribution of any security or monitoring product or service, in or affecting commerce, shall not misrepresent, in any manner, expressly or by implication, that a discussion or demonstration of the security or monitoring product or service is an independent review provided by an impartial expert.

II.

IT IS FURTHER ORDERED that Respondent, directly or through any corporation, partnership, subsidiary, division, trade name, or other means, in connection with the advertising, labeling, promotion, offering for sale, sale, or distribution of any security or monitoring product or service, in or affecting commerce, by means of an endorsement, shall clearly and prominently disclose a material connection, if one exists, between such endorser and Respondent.

III.

IT IS FURTHER ORDERED that Respondent shall, within seven (7) days of the date of service of this order, take all reasonable steps to remove any demonstration, review, or endorsement, by an endorser with a material connection to Respondent, of any security or monitoring product or service currently viewable by the public that does not comply with Parts I and II of this order.

IV.

IT IS FURTHER ORDERED that Respondent, directly or through any corporation, partnership, subsidiary, division, trade name, or other device, in connection with the advertising,

labeling, promotion, offering for sale, sale, or distribution of any security or monitoring product or service, in or affecting commerce, by means of an endorsement by an endorser with a material connection to Respondent, shall take steps sufficient to ensure compliance with Parts I and II of this order. Such steps shall include, at a minimum:

A. Providing each such endorser with a clear statement of his or her responsibility to disclose, clearly and prominently, in any television appearance, blog posting, or other communication, the endorser's material connection to Respondent, and obtaining from each such endorser a signed and dated statement acknowledging receipt of that statement and expressly agreeing to comply with it;

B. Establishing, implementing, and thereafter maintaining a system to monitor and review the representations and disclosures of endorsers with material connections to Respondent to ensure compliance with Parts I and II of this order. The system shall include, at a minimum, monitoring and reviewing its endorsers' television and radio appearances, web sites, and blogs;

C. Immediately terminating and ceasing payment to any endorser with a material connection to Respondent who Respondent reasonably concludes:

1. Has misrepresented, in any manner, his or her independence and impartiality; or

2. Has failed to disclose, clearly and prominently, a material connection between such endorser and Respondent; and

D. Creating, and thereafter maintaining, reports sufficient to show the monitoring required by subpart B of this Part.

V.

IT IS FURTHER ORDERED that Respondent shall, for five (5) years after the last date of dissemination of any representation covered by this order, maintain and upon reasonable notice make available to the Federal Trade Commission for inspection and copying, 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 endorsement made or disseminated by Respondent, 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, 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; and

D. Are acknowledgments of receipt of this order obtained pursuant to Part VI.

VI.

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

VII.

IT IS FURTHER ORDERED that Respondent shall notify the Commission at least thirty (30) days prior to any change in the corporation that may affect compliance obligations arising under this order, including, but not limited to, dissolution, assignment, sale, merger, or other action that would result in the emergence of a successor corporation; the creation or dissolution of a subsidiary, parent, or affiliate that engages in any acts or practices subject to this order; the proposed filing of a bankruptcy petition; or a change in the corporate name or address. *Provided, however*, that, with respect to any proposed change in the corporation about which Respondent learns less than thirty (30) days prior to the date such action is to take place, Respondent shall notify the Commission as soon as is practicable after obtaining such knowledge. Unless otherwise directed by a representative of the Commission in writing, all notices required by this Part shall be emailed to Debrief@ftc.gov or sent by overnight courier to: Associate Director of Enforcement, Bureau of Consumer Protection, Federal Trade Commission, 600 Pennsylvania Avenue NW, Washington, DC 20580. The subject line must begin: In the Matter of ADT LLC, FTC File No. 122 3121.

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 in which it has complied 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 on June 18, 2034, 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; and

B. This order if such complaint is filed after the order has terminated pursuant to this Part.

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

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 ADT LLC, also doing business as ADT Security Services ("ADT").

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

This matter involves ADT's use of paid spokespersons to promote the ADT Pulse home security system in appearances on

national and local television and radio news programs and talk shows. The Commission's complaint alleges that the paid spokespersons were identified on air as experts in child safety, home security, or technology. The experts demonstrated and provided favorable reviews of the ADT Pulse as part of news segments on topics related to their expertise. In most of these appearances, there was no mention of any connection between the experts and ADT. The complaint also alleges that ADT used these paid spokespersons to promote the ADT Pulse in what appeared to be independent and objective reviews on the spokesperson's own website, in blog posts, and in other online materials. The complaint alleges that ADT violated Section 5 by misrepresenting that the demonstrations and discussions of the features and benefits of the ADT Pulse were independent reviews by impartial experts. The complaint further alleges that ADT violated Section 5 by failing to disclose that the experts were ADT's paid spokespersons.

The proposed order includes injunctive relief to address these alleged violations and requires ADT to follow certain monitoring and compliance procedures related to its use of paid spokespersons.

Part I of the proposed order prohibits ADT, in connection with the advertising of any security or monitoring product or service, from misrepresenting that a discussion or demonstration of such product or service is an independent review provided by an impartial expert.

Part II of the proposed order requires ADT, in connection with the advertising of any security or monitoring product by means of an endorsement, to disclose clearly and prominently a material connection, if one exists, between the endorser and ADT.

Part III of the proposed order requires ADT to take all reasonable steps to remove, within seven days of service of the order, any demonstration, review, or endorsement, by an endorser with a material connection to ADT, that does not comply with Parts I and II of the order.

Analysis to Aid Public Comment

Part IV of the proposed order sets out certain monitoring and compliance obligations that ADT must meet with respect to any endorser with a material connection to ADT, including: obtaining signed acknowledgements from such endorsers that they will disclose their connection to ADT; monitoring the endorsers' media appearances and online reviews; terminating endorsers who fail to disclose their connection to ADT; and maintaining records of its monitoring efforts.

Parts V through VIII of the proposed order require ADT to: keep copies of relevant consumer complaints and inquiries and documents demonstrating order compliance; provide copies of the order to officers, employees, and others with responsibilities with respect to the subject matter of the order; notify the Commission of changes in corporate structure that might affect compliance obligations under the order; and file compliance reports with the Commission.

Part IX provides that the order will terminate after twenty (20) years, with certain exceptions.

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

Complaint

IN THE MATTER OF

APPERIAN, INC.

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

Docket No. C-4461; File No. 142 3017
Complaint, June 19, 2014 – Decision, June 19, 2014

This consent order addresses Apperian, Inc.'s alleged false or misleading representations that Apperian made to consumers concerning its participation in the Safe Harbor privacy frameworks agreed upon by the U.S. and the European Union and the U.S. and Switzerland. The complaint alleges that Apperian, through its statements and use of the mark, falsely represented that it was a "current" participant in the Safe Harbor Frameworks when, in fact, from July 2012 until November 2013, Apperian was not a "current" participant in the Safe Harbor Frameworks. The consent order prohibits Apperian from making misrepresentations about its membership in any privacy or security program sponsored by the government or any other self-regulatory or standard-setting organization, including, but not limited to, the U.S.-EU Safe Harbor Framework and U.S.-Swiss Safe Harbor Framework.

Participants

For the *Commission*: *Jessica Lyon, Katie Race Brin*, and *Katherine White.*

For the *Respondent*: *Brenda R. Sharton, Goodwin Proctor LLP.*

COMPLAINT

The Federal Trade Commission, having reason to believe that Apperian, Inc., 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. Respondent Apperian, Inc. ("Apperian") is a Delaware corporation, with its principal office or place of business at 321 Summer Street, Boston, MA 02210.

2. Respondent develops mobile applications management platforms for enterprises and provides tools to help companies deploy apps to employees.

3. The acts and practices of respondent as alleged in this complaint have been in or affecting commerce, as "commerce" is defined in Section 4 of the FTC Act.

4. Respondent has set forth on its website, www.apperian.com, privacy policies and statements about its practices, including statements related to its participation in the Safe Harbor privacy frameworks agreed upon by the U.S. and the European Union ("U.S.-EU Safe Harbor Framework") and the U.S. and Switzerland ("U.S.-Swiss Safe Harbor Framework").

The Safe Harbor Frameworks

5. The U.S.-EU Safe Harbor Framework provides a method for U.S. companies to transfer personal data outside of Europe that is consistent with the requirements of the European Union Directive on Data Protection ("Directive"). Enacted in 1995, the Directive sets forth European Union ("EU") requirements for privacy and the protection of personal data. Among other things, it requires EU Member States to implement legislation that prohibits the transfer of personal data outside the EU, with exceptions, unless the European Commission ("EC") has made a determination that the recipient jurisdiction's laws ensure the protection of such personal data. This determination is referred to commonly as meeting the EU's "adequacy" standard.

6. To satisfy the EU adequacy standard for certain commercial transfers, the U.S. Department of Commerce ("Commerce") and the EC negotiated the U.S.-EU Safe Harbor Framework, which went into effect in 2000. The U.S.-EU Safe Harbor Framework allows U.S. companies to transfer personal data lawfully from the EU. To join the U.S.-EU Safe Harbor Framework, a company must self-certify to Commerce that it complies with seven principles and related requirements that have been deemed to meet the EU's adequacy standard.

7. Companies under the jurisdiction of the U.S. Federal Trade Commission ("FTC"), as well as the U.S. Department of Transportation, are eligible to join the U.S.-EU Safe Harbor Framework. A company under the FTC's jurisdiction that claims it has self-certified to the Safe Harbor principles, but failed to self-certify to Commerce, may be subject to an enforcement action based on the FTC's deception authority under Section 5 of the FTC Act.

8. The U.S.-Swiss Safe Harbor Framework is identical to the U.S.-EU Safe Harbor Framework and is consistent with the requirements of the Swiss Federal Act on Data Protection.

9. Commerce maintains a public website, www.export.gov/safeharbor, where it posts the names of companies that have self-certified to the U.S.-EU Safe Harbor Framework and the U.S.-Swiss Safe Harbor Framework ("Safe Harbor Frameworks"). The listing of companies indicates whether their self-certification is "current" or "not current" and a date when recertification is due. Companies are required to re-certify every year in order to retain their status as "current" members of the Safe Harbor Frameworks.

The U.S.-EU Safe Harbor Framework Certification Mark

10. In 2008, Commerce developed the U.S.-EU Safe Harbor Framework Certification Mark ("the mark"). Upon request, Commerce provides the mark to those organizations that maintain a "current" self-certification to the U.S.-EU Safe Harbor Framework. In addition, Commerce has established certain rules for using the mark, such as requirements relating to the mark's placement on a website and the inclusion of a link to www.export.gov/safeharbor. The mark appears as follows:

Violations of Section 5 of the FTC Act

11. In July 2010, respondent submitted to Commerce a self-certification of compliance with the Safe Harbor Frameworks.

12. In July 2012, respondent did not renew its self-certification to the Safe Harbor Frameworks, and Commerce subsequently updated respondent's status to "not current" on its public website. In November 2013, respondent renewed its self-certification to the Safe Harbor Frameworks, and respondent's status was changed to "current" on Commerce's website.

13. Since at least July 2010, respondent has disseminated or caused to be disseminated privacy policies and statements on the www.apperian.com website, including, but not limited to, the following statements:

> Apperian, Inc. complies with the U.S.-EU Safe Harbor Framework and the U.S.-Swiss Safe Harbor Framework as set forth by the U.S. Department of Commerce regarding the collection, use, and retention of personal information from European Union member countries and Switzerland. Apperian, Inc. has certified that it adheres to the Safe Harbor Privacy Principles of notice, choice, onward transfer, security, data integrity, access, and enforcement. To learn more about the Safe Harbor program, and to view Apperian's certification, please visit http://www.export.gov/safeharbor/.

14. From at least July 2010, respondent has displayed the mark on the www.apperian.com website.

15. Through the means described in Paragraphs 13 and 14, respondent represents, expressly or by implication, that it is a "current" participant in the U.S.-EU Safe Harbor and U.S.-Swiss Safe Harbor Frameworks.

16. In truth and in fact, from July 2012 until November 2013, respondent was not a "current" participant in the U.S.-EU Safe Harbor and U.S.-Swiss Safe Harbor Frameworks. Therefore, the representation set forth in Paragraph 15 was false and misleading.

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

THEREFORE, the Federal Trade Commission this nineteenth day of June, 2014, has issued this complaint against respondent.

By the Commission, Commissioner McSweeny not participating.

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 Apperian, Inc. is a Delaware corporation, with its principal office or place of business at 321 Summer Street, Boston, MA 02210.

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

ORDER

DEFINITIONS

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

A. Unless otherwise specified, "respondent" shall mean Apperian, Inc. and its successors and assigns.

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

I.

IT IS ORDERED that respondent and its officers, agents, representatives, and employees, whether acting directly or

indirectly, in connection with the advertising, marketing, promotion, offering for sale, or sale of any product or service, in or affecting commerce, shall not misrepresent in any manner, expressly or by implication, the extent to which respondent is a member of, adheres to, complies with, is certified by, is endorsed by, or otherwise participates in any privacy or security program sponsored by the government or any other self-regulatory or standard-setting organization, including, but not limited to, the U.S.-EU Safe Harbor Framework and the U.S.-Swiss Safe Harbor Framework.

II.

IT IS FURTHER ORDERED that respondent shall maintain and upon request make available to the Federal Trade Commission for inspection and copying, a print or electronic copy of, for a period of five (5) years from the date of preparation or dissemination, whichever is later, all documents relating to compliance with this order, including but not limited to:

A. all advertisements, promotional materials, and any other statements containing any representations covered by this order, with all materials relied upon in disseminating the representation; and

B. any documents, whether prepared by or on behalf of respondent, that call into question respondent's compliance with this order.

III.

IT IS FURTHER ORDERED that respondent shall deliver a copy of this order to all current and future principals, officers, directors, and managers, and to all current and future employees, agents, and representatives having responsibilities relating to the subject matter of this order. 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 IV, delivery shall be at least ten (10) days prior to the change

in structure. Respondent must secure a signed and dated statement acknowledging receipt of this order, within thirty (30) days of delivery, from all persons receiving a copy of the order pursuant to this section.

IV.

IT IS FURTHER ORDERED that respondent shall notify the Commission at least thirty (30) days prior to any change in the corporation(s) that may affect compliance obligations arising under this order, including, but not limited to: a dissolution, assignment, sale, merger, or other action that would result in the emergence of a successor corporation; the creation or dissolution of a subsidiary, parent, or affiliate that engages in any acts or practices subject to this order; the proposed filing of a bankruptcy petition; or a change in the corporate name or address. *Provided, however*, that, with respect to any proposed change in the corporation(s) about which respondent learns fewer than thirty (30) days prior to the date such action is to take place, respondent shall notify the Commission as soon as is practicable after obtaining such knowledge. 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 of Enforcement, Bureau of Consumer Protection, Federal Trade Commission, 600 Pennsylvania Avenue, N.W., Washington, D.C. 20580. The subject line must begin: *In re Apperian, Inc.*, FTC File No. 1423017.

V.

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

VI.

This order will terminate on June 19, 2034, 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 McSweeny not participating.

ANALYSIS OF CONSENT ORDER TO AID PUBLIC COMMENT

The Federal Trade Commission ("FTC" or "Commission") has accepted, subject to final approval, a consent agreement applicable to Apperian, Inc. ("Apperian").

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

This matter concerns alleged false or misleading representations that Apperian made to consumers concerning its participation in the Safe Harbor privacy frameworks agreed upon by the U.S. and the European Union ("EU") ("U.S.-EU Safe Harbor Framework") and the U.S. and Switzerland ("U.S.-Swiss Safe Harbor Framework"). It is among several actions the Commission is bringing to enforce the promises that companies make when they certify that they participate in the U.S.-EU Safe Harbor Framework and/or U.S.-Swiss Safe Harbor Framework ("Safe Harbor Frameworks"). The Safe Harbor Frameworks allow U.S. companies to transfer data outside the EU and Switzerland consistent with European law. To join the Safe Harbor Frameworks, a company must self-certify to the U.S. Department of Commerce ("Commerce") that it complies with a set of principles and related requirements that have been deemed by the European Commission and Switzerland as providing "adequate" privacy protection. Commerce maintains a public website, www.export.gov/safeharbor, where it posts the names of companies that have self-certified to the Safe Harbor Frameworks. The listing of companies indicates whether their self-certification is "current" or "not current." Companies are required to re-certify every year in order to retain their status as "current" members of the Safe Harbor Frameworks.

In 2008, Commerce developed the U.S.-EU Safe Harbor Framework Certification Mark ("the mark") to allow companies

to highlight for consumers their compliance with the Safe Harbor framework. Upon request, Commerce provides the mark to those organizations that maintain a "current" self-certification to the U.S.-EU Safe Harbor Framework. Commerce has established certain rules for using the mark, such as requirements related to the mark's placement on a website and the inclusion of a link to www.export.gov/safeharbor.

Apperian develops mobile applications management platforms for enterprises and provides tools to help companies deploy apps to employees. According to the Commission's complaint, since at least July 2010, Apperian has set forth on its website, www.apperian.com, privacy policies and statements about its practices, including statements related to its participation in the U.S.-EU Safe Harbor Framework and the U.S.-Swiss Safe Harbor Framework. In addition, since at least July 2010, Apperian has displayed the mark on its website.

The Commission's complaint alleges that Apperian, through its statements and use of the mark, falsely represented that it was a "current" participant in the Safe Harbor Frameworks when, in fact, from July 2012 until November 2013, Apperian was not a "current" participant in the Safe Harbor Frameworks. The Commission's complaint alleges that in July 2010, Apperian submitted a self-certification to the Safe Harbor Frameworks. Apperian did not renew its self-certification in July 2012, and Commerce subsequently updated Apperian's status to "not current" on its public website. In November 2013, Apperian renewed its self-certification to the Safe Harbor Frameworks, and its status was changed to "current" on Commerce's website.

Part I of the proposed order prohibits Apperian from making misrepresentations about its membership in any privacy or security program sponsored by the government or any other self-regulatory or standard-setting organization, including, but not limited to, the U.S.-EU Safe Harbor Framework and U.S.-Swiss Safe Harbor Framework.

Parts II through VI of the proposed order are reporting and compliance provisions. Part II requires Apperian to retain documents relating to its compliance with the order for a five-

year period. Part III requires dissemination of the order now and in the future to persons with responsibilities relating to the subject matter of the order. Part IV ensures notification to the FTC of changes in corporate status. Part V mandates that Apperian submit an initial compliance report to the FTC, and make available to the FTC subsequent reports. Part VI is a provision "sunsetting" the order after twenty (20) years, with certain exceptions.

The purpose of 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

ATLANTA FALCONS FOOTBALL CLUB, LLC

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

Docket No. C-4462; File No. 142 3018
Complaint, June 19, 2014 – Decision, June 19, 2014

This consent order addresses Atlanta Falcons Football Club, LLC's alleged false or misleading representations that the Atlanta Falcons made to consumers concerning their participation in the Safe Harbor privacy framework agreed upon by the U.S. and the European Union. The complaint alleges that the Atlanta Falcons falsely represented that they were a "current" participant in the Safe Harbor when, in fact, from September 2006 until November 2013, the Atlanta Falcons were not a "current" participant in the U.S.-EU Safe Harbor Framework. The consent order prohibits the Atlanta Falcons from making misrepresentations about their membership in any privacy or security program sponsored by the government or any other self-regulatory or standard-setting organization, including, but not limited to, the U.S.-EU Safe Harbor Framework.

Participants

For the *Commission*: *Jessica Lyon*, *Katie Race Brin*, and *Katherine White.*

For the *Respondent*: *John Graubert* and *Kurt Wimmer*, *Covington & Burling LLP.*

COMPLAINT

The Federal Trade Commission, having reason to believe that the Atlanta Falcons Football Club, LLC, a limited liability company, 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. Respondent the Atlanta Falcons Football Club, LLC ("Atlanta Falcons") is a Georgia limited liability company with its principal office or place of business at 440 Falcon Parkway, Flowery Branch, GA 30542.

2. Respondent is a professional football team and member of the National Football League.

3. The acts and practices of respondent as alleged in this complaint have been in or affecting commerce, as "commerce" is defined in Section 4 of the FTC Act.

4. Respondent has set forth on its website, www.atlantafalcons.com, privacy policies and statements about its practices, including statements related to its participation in the Safe Harbor privacy framework agreed upon by the U.S. and the European Union ("U.S.-EU Safe Harbor Framework").

The Framework

5. The U.S.-EU Safe Harbor Framework provides a method for U.S. companies to transfer personal data outside of Europe that is consistent with the requirements of the European Union Directive on Data Protection ("Directive"). Enacted in 1995, the Directive sets forth European Union ("EU") requirements for privacy and the protection of personal data. Among other things, it requires EU Member States to implement legislation that prohibits the transfer of personal data outside the EU, with exceptions, unless the European Commission ("EC") has made a determination that the recipient jurisdiction's laws ensure the protection of such personal data. This determination is referred to commonly as meeting the EU's "adequacy" standard.

6. To satisfy the EU adequacy standard for certain commercial transfers, the U.S. Department of Commerce ("Commerce") and the EC negotiated the U.S.-EU Safe Harbor Framework, which went into effect in 2000. The U.S.-EU Safe Harbor Framework allows U.S. companies to transfer personal data lawfully from the EU. To join the U.S.-EU Safe Harbor Framework, a company must self-certify to Commerce that it complies with seven principles and related requirements that have been deemed to meet the EU's adequacy standard.

7. Companies under the jurisdiction of the U.S. Federal Trade Commission ("FTC"), as well as the U.S. Department of Transportation, are eligible to join the U.S.-EU Safe Harbor

Framework. A company under the FTC's jurisdiction that claims it has self-certified to the Safe Harbor principles, but failed to self-certify to Commerce, may be subject to an enforcement action based on the FTC's deception authority under Section 5 of the FTC Act.

8. Commerce maintains a public website, www.export.gov/safeharbor, where it posts the names of companies that have self-certified to the U.S.-EU Safe Harbor Framework. The listing of companies indicates whether their self-certification is "current" or "not current" and a date when recertification is due. Companies are required to re-certify every year in order to retain their status as "current" members of the U.S.-EU Safe Harbor Framework.

Violations of Section 5 of the FTC Act

9. In September 2005, respondent submitted to Commerce a self-certification of compliance to the U.S.-EU Safe Harbor Framework.

10. In September 2006, respondent did not renew its self-certification to the U.S.-EU Safe Harbor Framework, and Commerce subsequently updated respondent's status to "not current" on its public website.

11. From least September 2005 until November 2013, respondent disseminated or caused to be disseminated privacy policies and statements on the www.atlantafalcons.com website, including, but not limited to, the following statements:

> The Atlanta Falcons Football Club, LLC complies with the U.S.-EU Safe Harbor Framework as set forth by the U.S. Department of Commerce regarding the collection, use, and retention of personal data from European Union member countries. The Atlanta Falcons Football Club, LLC has certified that it adheres to the Safe Harbor Privacy Principles of notice, choice, onward transfer, security, data integrity, access, and enforcement. To

> learn more about the Safe Harbor program, and to view The Atlanta Falcons Football Club, LLC's certification, please visit http://www.export.gov/safeharbor.

12. Through the means described in Paragraph 11, respondent represented, expressly or by implication, that it was a "current" participant in the U.S.-EU Safe Harbor Framework.

13. In truth and in fact, from September 2006 until November 2013, respondent was not a "current" participant in the U.S.-EU Safe Harbor Framework. Therefore, the representation set forth in Paragraph 12 is false and misleading.

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

THEREFORE, the Federal Trade Commission this nineteenth day of June, 2014, has issued this complaint against respondent.

By the Commission, Commissioner McSweeny not participating.

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 the Atlanta Falcons Football Club, LLC is a Georgia limited liability company with its principal office or place of business at 440 Falcon Parkway, Flowery Branch, GA 30542.

2. Respondent neither admits nor denies any of the allegations in the draft complaint, except as specifically stated in this order. Only for purposes of this action, respondent admits the facts necessary to establish jurisdiction.

ORDER

DEFINITIONS

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

A. Unless otherwise specified, "respondent" shall mean Atlanta Falcons Football Club, LLC and its successors and assigns.

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

I.

IT IS ORDERED that respondent and its officers, agents, representatives, and employees, whether acting directly or indirectly, in connection with the advertising, marketing, promotion, offering for sale, or sale of any product or service, in or affecting commerce, shall not misrepresent in any manner, expressly or by implication, the extent to which respondent is a member of, adheres to, complies with, is certified by, is endorsed by, or otherwise participates in any privacy or security program sponsored by the government or any other self-regulatory or standard-setting organization, including, but not limited to, the U.S.-EU Safe Harbor Framework and the U.S.-Swiss Safe Harbor Framework.

II.

IT IS FURTHER ORDERED that respondent shall maintain and upon request make available to the Federal Trade Commission for inspection and copying, a print or electronic copy of, for a period of five (5) years from the date of preparation or dissemination, whichever is later, all documents relating to compliance with this order, including but not limited to:

A. all advertisements, promotional materials, and any other statements containing any representations

covered by this order, with all materials relied upon in disseminating the representation; and

B. any documents, whether prepared by or on behalf of respondent, that call into question respondent's compliance with this order.

III.

IT IS FURTHER ORDERED that respondent shall deliver a copy of this order to all current and future principals, officers, directors, and managers, and to all current and future employees, agents, and representatives having responsibilities relating to the subject matter of this order. 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. Respondent must secure a signed and dated statement acknowledging receipt of this order, within thirty (30) days of delivery, from all persons receiving a copy of the order pursuant to this section.

IV.

IT IS FURTHER ORDERED that respondent shall notify the Commission within fourteen (14) days of 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. 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 of Enforcement, Bureau of Consumer Protection, Federal Trade Commission, 600 Pennsylvania Avenue, N.W., Washington, D.C. 20580. The subject line must begin: *In re Atlanta Falcons Football Club, LLC*, FTC File No. 1423018.

V.

IT IS FURTHER ORDERED that respondent, 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 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.

VI.

This order will terminate on June 19, 2034, 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 McSweeny not participating.

ANALYSIS OF CONSENT ORDER TO AID PUBLIC COMMENT

The Federal Trade Commission ("FTC" or "Commission") has accepted, subject to final approval, a consent agreement applicable to the Atlanta Falcons Football Club, LLC ("the Atlanta Falcons").

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

This matter concerns alleged false or misleading representations that the Atlanta Falcons made to consumers concerning their participation in the Safe Harbor privacy framework ("Safe Harbor") agreed upon by the U.S. and the European Union ("EU") ("U.S.-EU Safe Harbor Framework"). It is among several actions the Commission is bringing to enforce the promises that companies make when they certify that they participate in the Safe Harbor Framework. The Safe Harbor framework allows U.S. companies to transfer data outside the EU consistent with European law. To join the Safe Harbor framework, a company must self-certify to the U.S. Department of Commerce ("Commerce") that it complies with a set of principles and related requirements that have been deemed by the European Commission as providing "adequate" privacy protection. Commerce maintains a public website, www.export.gov/safeharbor, where it posts the names of companies that have self-certified to the Safe Harbor framework. The listing of companies indicates whether their self-certification is "current" or "not current." Companies are required to re-certify every year in order to retain their status as "current" members of the Safe Harbor framework.

The Atlanta Falcons are a professional football team and a member of the National Football League. According to the Commission's complaint, from September 2005 until November

2013, the Atlanta Falcons set forth on their website, www.atlantafalcons.com, privacy policies and statements about their practices, including statements related to their participation in the U.S-EU Safe Harbor Framework.

The Commission's complaint alleges that the Atlanta Falcons falsely represented that they were a "current" participant in the Safe Harbor when, in fact, from September 2006 until November 2013, the Atlanta Falcons were not a "current" participant in the U.S.-EU Safe Harbor Framework. The Commission's complaint alleges that in September 2005, the Atlanta Falcons submitted a Safe Harbor self-certification. The Atlanta Falcons did not renew the self-certification in September 2006, and Commerce subsequently updated the Atlanta Falcons' status to "not current" on its public website.

Part I of the proposed order prohibits the Atlanta Falcons from making misrepresentations about their membership in any privacy or security program sponsored by the government or any other self-regulatory or standard-setting organization, including, but not limited to, the U.S.-EU Safe Harbor Framework.

Parts II through VI of the proposed order are reporting and compliance provisions. Part II requires the Atlanta Falcons to retain documents relating to 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 the Atlanta Falcons submit an initial compliance report to the FTC, and make available to the FTC subsequent reports. Part VI is a provision "sunsetting" the order after twenty (20) years, with certain exceptions.

The purpose of 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

BAKER TILLY VIRCHOW KRAUSE, LLP

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

Docket No. C-4463; File No. 142 3019
Complaint, June 19, 2014 – Decision, June 19, 2014

This consent order addresses Baker Tilly Virchow Krause, LLP's alleged false or misleading representations that Baker Tilly made to consumers concerning its participation in the Safe Harbor privacy framework agreed upon by the U.S. and the European Union. The complaint alleges that Baker Tilly, through its statements and use of the mark, falsely represented that it was a "current" participant in the Safe Harbor when, in fact, from June 2011 until December 2013, Baker Tilly was not a "current" participant in the Safe Harbor. The consent order prohibits Baker Tilly from making misrepresentations about its membership in any privacy or security program sponsored by the government or any other self-regulatory or standard-setting organization, including, but not limited to, the U.S.-EU Safe Harbor Framework.

Participants

For the *Commission*: *Jessica Lyon, Katie Race Brin*, and *Katherine White.*

For the *Respondents*: *Catherine Casey, General Counsel, Baker Tilly Virchow Krause, LLP.*

COMPLAINT

The Federal Trade Commission, having reason to believe that Baker Tilly Virchow Krause, LLP, a limited liability partnership, 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. Respondent Baker Tilly Virchow Krause, LLP, ("Baker Tilly") is an Illinois limited liability partnership with its principal office or place of business at 205 North Michigan Avenue, Chicago, IL 60601.

2. Respondent is an accounting and advisory services firm.

3. The acts and practices of respondent as alleged in this complaint have been in or affecting commerce, as "commerce" is defined in Section 4 of the FTC Act.

4. Respondent has set forth on its website, www.bakertilly.com, privacy policies and statements about its practices, including statements related to its participation in the Safe Harbor privacy framework agreed upon by the U.S. and the European Union ("U.S.-EU Safe Harbor Framework").

The Framework

5. The U.S.-EU Safe Harbor Framework provides a method for U.S. companies to transfer personal data outside of Europe that is consistent with the requirements of the European Union Directive on Data Protection ("Directive"). Enacted in 1995, the Directive sets forth European Union ("EU") requirements for privacy and the protection of personal data. Among other things, it requires EU Member States to implement legislation that prohibits the transfer of personal data outside the EU, with exceptions, unless the European Commission ("EC") has made a determination that the recipient jurisdiction's laws ensure the protection of such personal data. This determination is referred to commonly as meeting the EU's "adequacy" standard.

6. To satisfy the EU adequacy standard for certain commercial transfers, the U.S. Department of Commerce ("Commerce") and the EC negotiated the U.S.-EU Safe Harbor Framework, which went into effect in 2000. The U.S.-EU Safe Harbor Framework allows U.S. companies to transfer personal data lawfully from the EU. To join the U.S.-EU Safe Harbor Framework, a company must self-certify to Commerce that it complies with seven principles and related requirements that have been deemed to meet the EU's adequacy standard.

7. Companies under the jurisdiction of the U.S. Federal Trade Commission ("FTC"), as well as the U.S. Department of Transportation, are eligible to join the U.S.-EU Safe Harbor Framework. A company under the FTC's jurisdiction that claims it has self-certified to the Safe Harbor principles, but failed to self-certify to Commerce, or subsequently renew its Safe Harbor

certification, may be subject to an enforcement action based on the FTC's deception authority under Section 5 of the FTC Act.

8. Commerce maintains a public website, www.export.gov/safeharbor, where it posts the names of companies that have self-certified to the U.S.-EU Safe Harbor Framework. The listing of companies indicates whether their self-certification is "current" or "not current" and a date when recertification is due. Companies are required to re-certify every year in order to retain their status as "current" members of the Safe Harbor Framework.

The U.S.-EU Safe Harbor Framework Certification Mark

9. In 2008, Commerce developed the U.S.-EU Safe Harbor Framework Certification Mark ("the mark"). Upon request, Commerce provides the mark to those organizations that maintain a "current" self-certification to the U.S.-EU Safe Harbor Framework. In addition, Commerce has established certain rules for using the mark, such as requirements relating to the mark's placement on a website and the inclusion of a link to www.export.gov/safeharbor. The mark appears as follows:

Violations of Section 5 of the FTC Act

10. In June 2010, respondent submitted to Commerce a self-certification of compliance with the Safe Harbor.

11. In June 2011, respondent did not renew its self-certification to the Safe Harbor, and Commerce subsequently updated respondent's status to "not current" on its public website. In December 2013, respondent renewed its self-certification to the Safe Harbor Framework, and respondent's status was changed to "current" on Commerce's website.

12. Since at least June 2010, respondent has disseminated or caused to be disseminated privacy policies and statements on the www.bakertilly.com website, including, but not limited to, the following statements:

> Baker Tilly Virchow Krause, LLP, whose principal office is located in the State of Illinois, United States of America (the "United States") controls and operates the following data processing systems (referred to herein as the "Systems") that are certified under the voluntary U.S.-EU Safe Harbor program…

13. From at least June 2010, respondent has displayed the mark on the www.bakertilly.com website.

14. Through the means described in Paragraphs 12 and 13, respondent represents, expressly or by implication, that it is a "current" participant in the U.S.-EU Safe Harbor Framework.

15. In truth and in fact, from June 2011 until December 2013, respondent was not a "current" participant in the U.S.-EU Safe Harbor Framework. Therefore, the representation set forth in Paragraph 14 was false and misleading.

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

THEREFORE, the Federal Trade Commission this nineteenth day of June, 2014, has issued this complaint against respondent.

By the Commission, Commissioner McSweeny not participating.

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 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 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 Baker Tilly Virchow Krause, LLP, is an Illinois limited liability partnership with its principal office or place of business at 205 North Michigan Avenue, Chicago, IL 60601.

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

ORDER

DEFINITIONS

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

A. Unless otherwise specified, "respondent" shall mean Baker Tilly Virchow Krause, LLP, and its successors and assigns.

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

I.

IT IS ORDERED that respondent and its officers, agents, representatives, and employees, whether acting directly or indirectly, in connection with the advertising, marketing, promotion, offering for sale, or sale of any product or service, in or affecting commerce, shall not misrepresent in any manner, expressly or by implication, the extent to which respondent is a member of, adheres to, complies with, is certified by, is endorsed by, or otherwise participates in any privacy or security program sponsored by the government or any other self-regulatory or standard-setting organization, including, but not limited to, the U.S.-EU Safe Harbor Framework and the U.S.-Swiss Safe Harbor Framework.

II.

IT IS FURTHER ORDERED that respondent shall maintain and upon request make available to the Federal Trade Commission for inspection and copying, a print or electronic copy of, for a period of five (5) years from the date of preparation or dissemination, whichever is later, all documents relating to compliance with this order, including but not limited to:

A. all advertisements, promotional materials, and any other statements containing any representations covered by this order, with all materials relied upon in disseminating the representation; and

B. any documents, whether prepared by or on behalf of respondent, that call into question respondent's compliance with this order.

III.

IT IS FURTHER ORDERED that respondent shall deliver a copy of this order to all current and future principals, officers, directors, and managers, and to all current and future employees, agents, and representatives having responsibilities relating to the subject matter of this order. 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 IV, delivery shall be at least ten (10) days prior to the change in structure. Respondent must secure a signed and dated statement acknowledging receipt of this order, within thirty (30) days of delivery, from all persons receiving a copy of the order pursuant to this section.

IV.

IT IS FURTHER ORDERED that respondent shall notify the Commission at least thirty (30) days prior to any change in the corporation(s) that may affect compliance obligations arising under this order, including, but not limited to: a dissolution, assignment, sale, merger, or other action that would result in the emergence of a successor corporation; the creation or dissolution of a subsidiary, parent, or affiliate that engages in any acts or practices subject to this order; the proposed filing of a bankruptcy petition; or a change in the corporate name or address. *Provided, however*, that, with respect to any proposed change in the corporation(s) about which respondent learns fewer than thirty (30) days prior to the date such action is to take place, respondent shall notify the Commission as soon as is practicable after

obtaining such knowledge. 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 of Enforcement, Bureau of Consumer Protection, Federal Trade Commission, 600 Pennsylvania Avenue, N.W., Washington, D.C. 20580. The subject line must begin: *In re Baker Tilly Virchow Krause, LLP*, FTC File No. 1423019.

V.

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

VI.

This order will terminate on June 19, 2034, 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 McSweeny not participating.

ANALYSIS OF CONSENT ORDER TO AID PUBLIC COMMENT

The Federal Trade Commission ("FTC" or "Commission") has accepted, subject to final approval, a consent agreement applicable to Baker Tilly Virchow Krause, LLP ("Baker Tilly").

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

This matter concerns alleged false or misleading representations that Baker Tilly made to consumers concerning its participation in the Safe Harbor privacy framework ("Safe Harbor") agreed upon by the U.S. and the European Union ("EU") ("U.S.-EU Safe Harbor Framework"). It is among several actions the Commission is bringing to enforce the promises that companies make when they certify that they participate in the Safe Harbor Framework. The Safe Harbor framework allows U.S. companies to transfer data outside the EU consistent with European law. To join the Safe Harbor framework, a company must self-certify to the U.S. Department of Commerce ("Commerce") that it complies with a set of principles and

related requirements that have been deemed by the European Commission as providing "adequate" privacy protection. These principles include notice, choice, onward transfer, security, data integrity, access, and enforcement. Commerce maintains a public website, www.export.gov/safeharbor, where it posts the names of companies that have self-certified to the Safe Harbor framework. The listing of companies indicates whether their self-certification is "current" or "not current." Companies are required to re-certify every year in order to retain their status as "current" members of the Safe Harbor framework.

In 2008, Commerce developed the U.S.-EU Safe Harbor Framework Certification Mark ("the mark") to allow companies to highlight for consumers their compliance with the Safe Harbor Framework. Upon request, Commerce provides the mark to those organizations that maintain a "current" self-certification to the U.S.-EU Safe Harbor Framework. Commerce has established certain rules for using the mark, such as requirements related to the mark's placement on a website and the inclusion of a link to www.export.gov/safeharbor.

Baker Tilly is an accounting and advisory services firm. According to the Commission's complaint, since at least June 2010, Baker Tilly has set forth on its website, www.bakertilly.com, privacy policies and statements about its practices, including statements related to its participation in the U.S-EU Safe Harbor Framework. In addition, from at least June 2010, Baker Tilly displayed the mark on its website.

The Commission's complaint alleges that Baker Tilly, through its statements and use of the mark, falsely represented that it was a "current" participant in the Safe Harbor when, in fact, from June 2011 until December 2013, Baker Tilly was not a "current" participant in the Safe Harbor. The Commission's complaint alleges that in June 2010, Baker Tilly submitted a Safe Harbor self-certification. Baker Tilly did not renew its self-certification in June 2011 and Commerce subsequently updated Baker Tilly's status to "not current" on its public website. In December 2013, Baker Tilly renewed its self-certification to the Safe Harbor and its status was changed to "current" on Commerce's website.

Part I of the proposed order prohibits Baker Tilly from making misrepresentations about its membership in any privacy or security program sponsored by the government or any other self-regulatory or standard-setting organization, including, but not limited to, the U.S.-EU Safe Harbor Framework.

Parts II through VI of the proposed order are reporting and compliance provisions. Part II requires Baker Tilly to retain documents relating to its compliance with the order for a five-year period. Part III requires dissemination of the order now and in the future to persons with responsibilities relating to the subject matter of the order. Part IV ensures notification to the FTC of changes in corporate status. Part V mandates that Baker Tilly submit an initial compliance report to the FTC, and make available to the FTC subsequent reports. Part VI is a provision "sunsetting" the order after twenty (20) years, with certain exceptions.

The purpose of 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

BITTORRENT, INC.

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

Docket No. C-4464; File No. 142 3020
Complaint, June 19, 2014 – Decision, June 19, 2014

This consent order addresses BitTorrent, Inc.'s alleged false or misleading representations that BitTorrent made to consumers concerning its participation in the Safe Harbor privacy framework agreed upon by the U.S. and the European Union. The complaint alleges that BitTorrent falsely represented that it was a "current" participant in the Safe Harbor when, in fact, from January 2008 until November 2013, BitTorrent was not a "current" participant in the U.S.-EU Safe Harbor Framework. The consent order prohibits BitTorrent from making misrepresentations about its membership in any privacy or security program sponsored by the government or any other self-regulatory or standard-setting organization, including, but not limited to, the U.S.-EU Safe Harbor Framework.

Participants

For the *Commission*: *Jessica Lyon*, *Katie Race Brin*, and *Katherine White.*

For the *Respondent*: *Stacey Brandenburg* and *Ken Driefach, ZwiliGen PLLC.*

COMPLAINT

The Federal Trade Commission, having reason to believe that the BitTorrent, Inc., 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. Respondent BitTorrent, Inc. ("BitTorrent") is a California corporation, with its principal office or place of business at 303 2nd Street, Suite S600, San Francisco, CA 94107.

2. Respondent is the developer of a popular peer-to-peer file-sharing system used to exchange software, music, movies, digital books, and other large files online.

3. The acts and practices of respondent as alleged in this complaint have been in or affecting commerce, as "commerce" is defined in Section 4 of the FTC Act.

4. Respondent has set forth on its website, www.bittorrent.com, privacy policies and statements about its practices, including statements related to its participation in the Safe Harbor privacy framework agreed upon by the U.S. and the European Union ("U.S.-EU Safe Harbor Framework").

The Framework

5. The U.S.-EU Safe Harbor Framework provides a method for U.S. companies to transfer personal data outside of Europe that is consistent with the requirements of the European Union Directive on Data Protection ("Directive"). Enacted in 1995, the Directive sets forth European Union ("EU") requirements for privacy and the protection of personal data. Among other things, it requires EU Member States to implement legislation that prohibits the transfer of personal data outside the EU, with exceptions, unless the European Commission ("EC") has made a determination that the recipient jurisdiction's laws ensure the protection of such personal data. This determination is referred to commonly as meeting the EU's "adequacy" standard.

6. To satisfy the EU adequacy standard for certain commercial transfers, the U.S. Department of Commerce ("Commerce") and the EC negotiated the U.S.-EU Safe Harbor Framework, which went into effect in 2000. The U.S.-EU Safe Harbor Framework allows U.S. companies to transfer personal data lawfully from the EU. To join the U.S.-EU Safe Harbor Framework, a company must self-certify to Commerce that it complies with seven principles and related requirements that have been deemed to meet the EU's adequacy standard.

7. Companies under the jurisdiction of the U.S. Federal Trade Commission ("FTC"), as well as the U.S. Department of

Transportation, are eligible to join the U.S.-EU Safe Harbor Framework. A company under the FTC's jurisdiction that claims it has self-certified to the Safe Harbor principles, but failed to self-certify to Commerce, may be subject to an enforcement action based on the FTC's deception authority under Section 5 of the FTC Act.

8. Commerce maintains a public website, www.export.gov/safeharbor, where it posts the names of companies that have self-certified to the U.S.-EU Safe Harbor Framework. The listing of companies indicates whether their self-certification is "current" or "not current" and a date when recertification is due. Companies are required to re-certify every year in order to retain their status as "current" members of the U.S.-EU Safe Harbor Framework.

Violations of Section 5 of the FTC Act

9. In January 2007, respondent submitted to Commerce a self-certification of compliance to the U.S.-EU Safe Harbor Framework.

10. In January 2008, respondent did not renew its self-certification to the U.S.-EU Safe Harbor Framework, and Commerce subsequently updated respondent's status to "not current" on its public website.

11. From at least January 2007 until November 2013, respondent disseminated or caused to be disseminated privacy policies and statements on the www.bittorrent.com website, including, but not limited to, the following statements:

> BitTorrent adheres to the European Union Safe Harbor principles as set forth by the United States Department of Commerce regarding the collection, use, and retention of personal information covered by the Privacy Policy from the European Union.

12. Through the means described in Paragraph 11, respondent represented, expressly or by implication, that it was a "current" participant in the U.S.-EU Safe Harbor Framework.

13. In truth and in fact, from January 2008 until November 2013, respondent was not a "current" participant in the U.S.-EU Safe Harbor Framework. Therefore, the representation set forth in Paragraph 12 is false and misleading.

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

THEREFORE, the Federal Trade Commission this nineteenth day of June, 2014, has issued this complaint against respondent.

By the Commission, Commissioner McSweeny not participating.

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 BitTorrent, Inc. is a California corporation, with its principal office or place of business at 303 2nd Street, Suite S600, San Francisco, CA 94107.

2. Respondent neither admits nor denies any of the allegations in the draft complaint, except as specifically stated in this order. Only for purposes of this action, respondent admits the facts necessary to establish jurisdiction.

ORDER

DEFINITIONS

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

A. Unless otherwise specified, "respondent" shall mean BitTorrent, Inc. and its successors and assigns.

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

I.

IT IS ORDERED that respondent and its officers, agents, representatives, and employees, whether acting directly or indirectly, in connection with the advertising, marketing, promotion, offering for sale, or sale of any product or service, in or affecting commerce, shall not misrepresent in any manner, expressly or by implication, the extent to which respondent is a member of, adheres to, complies with, is certified by, is endorsed by, or otherwise participates in any privacy or security program sponsored by the government or any other self-regulatory or standard-setting organization, including, but not limited to, the U.S.-EU Safe Harbor Framework and the U.S.-Swiss Safe Harbor Framework.

II.

IT IS FURTHER ORDERED that respondent shall maintain and upon request make available to the Federal Trade Commission for inspection and copying, a print or electronic copy of, for a period of five (5) years from the date of preparation or dissemination, whichever is later, all documents relating to compliance with this order, including but not limited to:

A. all advertisements, promotional materials, and any other statements containing any representations covered by this order, with all materials relied upon in disseminating the representation; and

B. any documents, whether prepared by or on behalf of respondent, that call into question respondent's compliance with this order.

III.

IT IS FURTHER ORDERED that respondent shall deliver a copy of this order to all current and future principals, officers, directors, and managers, and to all current and future employees, agents, and representatives having responsibilities relating to the subject matter of this order. 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 IV, delivery shall be at least ten (10) days prior to the change in structure. Respondent must secure a signed and dated statement acknowledging receipt of this order, within thirty (30) days of delivery, from all persons receiving a copy of the order pursuant to this section.

IV.

IT IS FURTHER ORDERED that respondent shall notify the Commission at least thirty (30) days prior to any change in the corporation(s) that may affect compliance obligations arising under this order, including, but not limited to: a dissolution, assignment, sale, merger, or other action that would result in the emergence of a successor corporation; the creation or dissolution of a subsidiary, parent, or affiliate that engages in any acts or practices subject to this order; the proposed filing of a bankruptcy petition; or a change in the corporate name or address. *Provided, however*, that, with respect to any proposed change in the corporation(s) about which respondent learns fewer than thirty (30) days prior to the date such action is to take place, respondent shall notify the Commission as soon as is practicable after obtaining such knowledge. 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 of Enforcement, Bureau of Consumer Protection, Federal Trade Commission, 600 Pennsylvania Avenue, N.W., Washington, D.C. 20580. The subject line must begin: *In re BitTorrent, Inc.*, FTC File No. 1423020.

V.

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

VI.

This order will terminate on June 19, 2034, 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 McSweeny not participating.

ANALYSIS OF CONSENT ORDER TO AID PUBLIC COMMENT

The Federal Trade Commission ("FTC" or "Commission") has accepted, subject to final approval, a consent agreement applicable to BitTorrent, Inc. ("BitTorrent").

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

This matter concerns alleged false or misleading representations that BitTorrent made to consumers concerning its participation in the Safe Harbor privacy framework ("Safe Harbor") agreed upon by the U.S. and the European Union ("EU") ("U.S.-EU Safe Harbor Framework"). It is among several actions the Commission is bringing to enforce the promises that companies make when they certify that they participate in the Safe Harbor Framework. The Safe Harbor framework allows U.S. companies to transfer data outside the EU consistent with European law. To join the Safe Harbor framework, a company must self-certify to the U.S. Department of Commerce ("Commerce") that it complies with a set of principles and related requirements that have been deemed by the European Commission as providing "adequate" privacy protection. Commerce maintains a public website, www.export.gov/safeharbor, where it posts the names of companies that have self-certified to the Safe Harbor framework. The listing of companies indicates whether their self-certification is "current" or "not current." Companies are required to re-certify every year in order to retain their status as "current" members of the Safe Harbor framework.

BitTorrent is the developer of a peer-to-peer file-sharing system. According to the Commission's complaint, from January 2007 until November 2013, BitTorrent set forth on its website, www.bittorrent.com, privacy policies and statements about its

practices, including statements related to its participation in the U.S-EU Safe Harbor Framework.

The Commission's complaint alleges that BitTorrent falsely represented that it was a "current" participant in the Safe Harbor when, in fact, from January 2008 until November 2013, BitTorrent was not a "current" participant in the U.S.-EU Safe Harbor Framework. The Commission's complaint alleges that in January 2007, BitTorrent submitted a Safe Harbor self-certification. BitTorrent did not renew its self-certification in January 2008, and Commerce subsequently updated BitTorrent's status to "not current" on its public website.

Part I of the proposed order prohibits BitTorrent from making misrepresentations about its membership in any privacy or security program sponsored by the government or any other self-regulatory or standard-setting organization, including, but not limited to, the U.S.-EU Safe Harbor Framework.

Parts II through VI of the proposed order are reporting and compliance provisions. Part II requires BitTorrent to retain documents relating to its compliance with the order for a five-year period. Part III requires dissemination of the order now and in the future to persons with responsibilities relating to the subject matter of the order. Part IV ensures notification to the FTC of changes in corporate status. Part V mandates that BitTorrent submit an initial compliance report to the FTC, and make available to the FTC subsequent reports. Part VI is a provision "sunsetting" the order after twenty (20) years, with certain exceptions.

The purpose of 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

CHARLES RIVER LABORATORIES INTERNATIONAL, INC.

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

Docket No. C-4465; File No. 142 3022
Complaint, June 19, 2014 – Decision, June 19, 2014

This consent order addresses Charles River Laboratories International, Inc.'s alleged false or misleading representations that Charles River Labs made to consumers concerning its participation in the Safe Harbor privacy framework agreed upon by the U.S. and the European Union. The complaint alleges that that Charles River Labs falsely represented that it was a "current" participant in the Safe Harbor when, in fact, from May 2011 until December 2013, Charles River Labs was not a "current" participant in the U.S.-EU Safe Harbor Framework. The consent order prohibits Charles River Labs from making misrepresentations about its membership in any privacy or security program sponsored by the government or any other self-regulatory or standard-setting organization, including, but not limited to, the U.S.-EU Safe Harbor Framework.

Participants

For the *Commission*: *Jessica Lyon, Katie Race Brin*, and *Katherine White.*

For the *Respondent*: *Robert Kidwell, Mintz, Levin, Cohen, Ferris, Glovsky and Popeo, P.C.*

COMPLAINT

The Federal Trade Commission, having reason to believe that Charles River Laboratories International, Inc., 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. Respondent Charles River Laboratories International, Inc. ("Charles River Labs") is a Delaware corporation, with its principal office or place of business at 251 Ballardvale Street, Wilmington, Massachusetts 01887.

2. Respondent provides solutions that accelerate the early-stage drug discovery and development process and models required in research and development of new drugs, devices and therapies.

3. The acts and practices of respondent as alleged in this complaint have been in or affecting commerce, as "commerce" is defined in Section 4 of the FTC Act.

4. Respondent has set forth on its website, www.criver.com, privacy policies and statements about its practices, including statements related to its participation in the Safe Harbor privacy framework agreed upon by the U.S. and the European Union ("U.S.-EU Safe Harbor Framework").

The Framework

5. The U.S.-EU Safe Harbor Framework provides a method for U.S. companies to transfer personal data outside of Europe that is consistent with the requirements of the European Union Directive on Data Protection ("Directive"). Enacted in 1995, the Directive sets forth European Union ("EU") requirements for privacy and the protection of personal data. Among other things, it requires EU Member States to implement legislation that prohibits the transfer of personal data outside the EU, with exceptions, unless the European Commission ("EC") has made a determination that the recipient jurisdiction's laws ensure the protection of such personal data. This determination is referred to commonly as meeting the EU's "adequacy" standard.

6. To satisfy the EU adequacy standard for certain commercial transfers, the U.S. Department of Commerce ("Commerce") and the EC negotiated the U.S.-EU Safe Harbor Framework, which went into effect in 2000. The U.S.-EU Safe Harbor Framework allows U.S. companies to transfer personal data lawfully from the EU. To join the U.S.-EU Safe Harbor Framework, a company must self-certify to Commerce that it complies with seven principles and related requirements that have been deemed to meet the EU's adequacy standard.

7. Companies under the jurisdiction of the U.S. Federal Trade Commission ("FTC"), as well as the U.S. Department of Transportation, are eligible to join the U.S.-EU Safe Harbor Framework. A company under the FTC's jurisdiction that claims it has self-certified to the Safe Harbor principles, but failed to self-certify to Commerce, may be subject to an enforcement action based on the FTC's deception authority under Section 5 of the FTC Act.

8. Commerce maintains a public website, www.export.gov/safeharbor, where it posts the names of companies that have self-certified to the U.S.-EU Safe Harbor Framework. The listing of companies indicates whether their self-certification is "current" or "not current" and a date when recertification is due. Companies are required to re-certify every year in order to retain their status as "current" members of the U.S.-EU Safe Harbor Framework.

Violations of Section 5 of the FTC Act

9. In May 2006, respondent submitted to Commerce a self-certification of compliance to the U.S.-EU Safe Harbor Framework.

10. In May 2011, respondent did not renew its self-certification to the U.S.-EU Safe Harbor Framework, and Commerce subsequently updated respondent's status to "not current" on its public website. In December 2013, respondent renewed its self-certification to the U.S.-EU Safe Harbor Framework, and respondent's status was changed to "current" on Commerce's website.

11. Since at least May 2006, respondent has disseminated or caused to be disseminated privacy policies and statements on the www.criver.com website, including, but not limited to, the following statements:

> It is our policy to respect the privacy of our employees, customers, business partners, and others. Personal Data is used, collected, and retained in a manner consistent with the laws of the countries in which we do

> business. In furtherance of this commitment, we comply with the U.S.-EU Safe Harbor Framework as set forth by the U.S. Department of Commerce regarding the collection, use, and retention of personal data from European Union countries ("EU"). We self-certify our adherence to the Safe Harbor Privacy Principles ("Safe Harbor Principles") of notice, choice, onward transfer, security, data integrity, access and enforcement. To learn more about the Safe Harbor Principles, and to view our certification, please visit http://www.export.gov/safeharbor/.

12. Through the means described in Paragraph 11, respondent represents, expressly or by implication, that it is a "current" participant in the U.S.-EU Safe Harbor Framework.

13. In truth and in fact, from May 2011 until December 2013, respondent was not a "current" participant in the U.S.-EU Safe Harbor Framework. Therefore, the representation set forth in Paragraph 12 was false and misleading.

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

THEREFORE, the Federal Trade Commission this nineteenth day of June, 2014, has issued this complaint against respondent.

By the Commission, Commissioner McSweeny not participating.

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 Charles River Laboratories International, Inc. is a Delaware corporation, with its principal office or place of business at 251 Ballardvale Street, Wilmington, Massachusetts 01887.

2. Respondent neither admits nor denies any of the allegations in the draft complaint, except as

specifically stated in this order. Only for purposes of this action, respondent admits the facts necessary to establish jurisdiction.

ORDER

DEFINITIONS

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

A. Unless otherwise specified, "respondent" shall mean Charles River Laboratories International, Inc. and its successors and assigns.

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

I.

IT IS ORDERED that respondent and its officers, agents, representatives, and employees, whether acting directly or indirectly, in connection with the advertising, marketing, promotion, offering for sale, or sale of any product or service, in or affecting commerce, shall not misrepresent in any manner, expressly or by implication, the extent to which respondent is a member of, adheres to, complies with, is certified by, is endorsed by, or otherwise participates in any privacy or security program sponsored by the government or any other self-regulatory or standard-setting organization, including, but not limited to, the U.S.-EU Safe Harbor Framework and the U.S.-Swiss Safe Harbor Framework.

II.

IT IS FURTHER ORDERED that respondent shall maintain and upon request make available to the Federal Trade Commission for inspection and copying, a print or electronic copy of, for a period of five (5) years from the date of preparation or dissemination, whichever is later, all documents relating to compliance with this order, including but not limited to:

A. all advertisements, promotional materials, and any other statements containing any representations covered by this order, with all materials relied upon in disseminating the representation; and

B. any documents, whether prepared by or on behalf of respondent, that call into question respondent's compliance with this order.

III.

IT IS FURTHER ORDERED that respondent shall deliver a copy of this order to all current and future principals, officers, directors, and managers, and to all current and future employees, agents, and representatives having responsibilities relating to the subject matter of this order. 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 IV, delivery shall be at least ten (10) days prior to the change in structure. Respondent must secure a signed and dated statement acknowledging receipt of this order, within thirty (30) days of delivery, from all persons receiving a copy of the order pursuant to this section.

IV.

IT IS FURTHER ORDERED that respondent shall notify the Commission at least thirty (30) days prior to any change in the corporation(s) that may affect compliance obligations arising under this order, including, but not limited to: a dissolution, assignment, sale, merger, or other action that would result in the emergence of a successor corporation; the creation or dissolution of a subsidiary, parent, or affiliate that engages in any acts or practices subject to this order; the proposed filing of a bankruptcy petition; or a change in the corporate name or address. *Provided, however*, that, with respect to any proposed change in the corporation(s) about which respondent learns fewer than thirty (30) days prior to the date such action is to take place, respondent shall notify the Commission as soon as is practicable after

obtaining such knowledge. 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 of Enforcement, Bureau of Consumer Protection, Federal Trade Commission, 600 Pennsylvania Avenue, N.W., Washington, D.C. 20580. The subject line must begin: *In re Charles River Laboratories International, Inc.*, FTC File No. 1423022.

V.

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

VI.

This order will terminate on June 19, 2034, 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 McSweeny not participating.

ANALYSIS OF CONSENT ORDER TO AID PUBLIC COMMENT

The Federal Trade Commission ("FTC" or "Commission") has accepted, subject to final approval, a consent agreement applicable to Charles River Laboratories International, Inc. ("Charles River Labs").

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

This matter concerns alleged false or misleading representations that Charles River Labs made to consumers concerning its participation in the Safe Harbor privacy framework ("Safe Harbor") agreed upon by the U.S. and the European Union ("EU") ("U.S.-EU Safe Harbor Framework"). It is among several actions the Commission is bringing to enforce the promises that companies make when they certify that they participate in the Safe Harbor Framework. The Safe Harbor framework allows U.S. companies to transfer data outside the EU consistent with European law. To join the Safe Harbor

framework, a company must self-certify to the U.S. Department of Commerce ("Commerce") that it complies with a set of principles and related requirements that have been deemed by the European Commission as providing "adequate" privacy protection. Commerce maintains a public website, www.export.gov/safeharbor, where it posts the names of companies that have self-certified to the Safe Harbor framework. The listing of companies indicates whether their self-certification is "current" or "not current." Companies are required to re-certify every year in order to retain their status as "current" members of the Safe Harbor framework.

Charles River Labs provides support for research and development of new drugs, devices and therapies. According to the Commission's complaint, since at least May 2006, Charles River Labs set forth on its website, www.criver.com, privacy policies and statements about its practices, including statements related to its participation in the U.S-EU Safe Harbor Framework.

The Commission's complaint alleges that Charles River Labs falsely represented that it was a "current" participant in the Safe Harbor when, in fact, from May 2011 until December 2013, Charles River Labs was not a "current" participant in the U.S.-EU Safe Harbor Framework. The Commission's complaint alleges that in May 2006, Charles River Labs submitted a Safe Harbor self-certification. Charles River Labs did not renew its self-certification in May 2011 and Commerce subsequently updated Charles River Labs status to "not current" on its public website. In December 2013, Charles River Labs renewed its self-certification to the Safe Harbor framework, and its status was changed to "current" on Commerce's website.

Part I of the proposed order prohibits Charles River Labs from making misrepresentations about its membership in any privacy or security program sponsored by the government or any other self-regulatory or standard-setting organization, including, but not limited to, the U.S.-EU Safe Harbor Framework.

Parts II through VI of the proposed order are reporting and compliance provisions. Part II requires Charles River Labs to

retain documents relating to its compliance with the order for a five-year period. Part III requires dissemination of the order now and in the future to persons with responsibilities relating to the subject matter of the order. Part IV ensures notification to the FTC of changes in corporate status. Part V mandates that Charles River Labs submit an initial compliance report to the FTC, and make available to the FTC subsequent reports. Part VI is a provision "sunsetting" the order after twenty (20) years, with certain exceptions.

The purpose of 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

DATAMOTION, INC.

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

Docket No. C-4466; File No. 142 3023
Complaint, June 19, 2014 – Decision, June 19, 2014

This consent order addresses DataMotion, Inc.'s alleged false or misleading representations that DataMotion made to consumers concerning its participation in the Safe Harbor privacy frameworks agreed upon by the U.S. and the European Union and the U.S. and Switzerland. The complaint alleges that DataMotion, through its statements and use of the mark, falsely represented that it was a "current" participant in the Safe Harbor Frameworks when, in fact, from April 2013 until November 2013, DataMotion was not a "current" participant in the Safe Harbor Frameworks. The consent order prohibits DataMotion from making misrepresentations about its membership in any privacy or security program sponsored by the government or any other self-regulatory or standard-setting organization, including, but not limited to, the U.S.-EU Safe Harbor Framework and the U.S.-Swiss Safe Harbor Framework.

Participants

For the *Commission*: *Jessica Lyon, Katie Race Brin,* and *Katherine White.*

For the *Respondent*: *Bob Bales, CEO, pro se.*

COMPLAINT

The Federal Trade Commission, having reason to believe that DataMotion, Inc., 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. Respondent DataMotion, Inc., ("DataMotion") is a Delaware corporation with its principal office or place of business at 35 Airport Road, Suite 120, Morristown, New Jersey 07960.

2. Respondent provides businesses with systems for sending encrypted email and other secure file transport.

3. The acts and practices of respondent as alleged in this complaint have been in or affecting commerce, as "commerce" is defined in Section 4 of the FTC Act.

4. Respondent has set forth on its website, www.datamotion.com, privacy policies and statements about its practices, including statements related to its participation in the Safe Harbor privacy frameworks agreed upon by the U.S. and the European Union ("U.S.-EU Safe Harbor Framework") and the U.S. and Switzerland ("U.S.-Swiss Safe Harbor Framework").

The Frameworks

5. The U.S.-EU Safe Harbor Framework provides a method for U.S. companies to transfer personal data outside of Europe that is consistent with the requirements of the European Union Directive on Data Protection ("Directive"). Enacted in 1995, the Directive sets forth European Union ("EU") requirements for privacy and the protection of personal data. Among other things, it requires EU Member States to implement legislation that prohibits the transfer of personal data outside the EU, with exceptions, unless the European Commission ("EC") has made a determination that the recipient jurisdiction's laws ensure the protection of such personal data. This determination is referred to commonly as meeting the EU's "adequacy" standard.

6. To satisfy the EU adequacy standard for certain commercial transfers, the U.S. Department of Commerce ("Commerce") and the EC negotiated the U.S.-EU Safe Harbor Framework, which went into effect in 2000. The U.S.-EU Safe Harbor Framework allows U.S. companies to transfer personal data lawfully from the EU. To join the U.S.-EU Safe Harbor Framework, a company must self-certify to Commerce that it complies with seven principles and related requirements that have been deemed to meet the EU's adequacy standard.

7. Companies under the jurisdiction of the U.S. Federal Trade Commission ("FTC"), as well as the U.S. Department of Transportation, are eligible to join the U.S.-EU Safe Harbor Framework. A company under the FTC's jurisdiction that claims it has self-certified to the Safe Harbor principles, but failed to

self-certify to Commerce, may be subject to an enforcement action based on the FTC's deception authority under Section 5 of the FTC Act.

8. The U.S.-Swiss Safe Harbor Framework is identical to the U.S.-EU Safe Harbor Framework and is consistent with the requirements of the Swiss Federal Act on Data Protection.

9. Commerce maintains a public website, www.export.gov/safeharbor, where it posts the names of companies that have self-certified to the U.S.-EU Safe Harbor Framework and the U.S.-Swiss Safe Harbor Framework. The listing of companies indicates whether their self-certification is "current" or "not current" and a date when recertification is due. Companies are required to re-certify every year in order to retain their status as "current" members of the Safe Harbor Frameworks.

The U.S.-EU Safe Harbor Framework Certification Mark

10. In 2008, Commerce developed the U.S.-EU Safe Harbor Framework Certification Mark ("the mark"). Upon request, Commerce provides the mark to those organizations that maintain a "current" self-certification to the U.S.-EU Safe Harbor Framework. In addition, Commerce has established certain rules for using the mark, such as requirements relating to the mark's placement on a website and the inclusion of a link to www.export.gov/safeharbor. The mark appears as follows:

Violations of Section 5 of the FTC Act

11. In April 2012, respondent submitted to Commerce a self-certification of compliance with the Safe Harbor Frameworks.

12. In April 2013, respondent did not renew its self-certification to the Safe Harbor Frameworks, and Commerce subsequently updated respondent's status to "not current" on its public website. In November 2013, respondent renewed its self-certification to the Safe Harbor Frameworks and respondent's status was changed to "current" on Commerce's website.

13. From at least April 2012, respondent has disseminated or caused to be disseminated privacy policies and statements on the www.datamotion.com website, including, but not limited to, the following statements:

> DataMotion complies with the U.S.-EU Safe Harbor Framework and the U.S.-Swiss Safe Harbor Framework as set forth by the U.S. Department of Commerce regarding the collection, use, and retention of personal information from European Union member countries and Switzerland. DataMotion has certified that it adheres to the Safe Harbor Privacy Principles of notice, choice, onward transfer, security, data integrity, access, and enforcement. To learn more about the Safe Harbor program, and to view DataMotion's certification, please visit www.export.gov/safeharbor (http://www.export.gov/safeharbor)

14. From at least April 2012, respondent has displayed the mark on the www.datamotion.com website.

15. Through the means described in Paragraph 13 and 14, respondent represented, expressly or by implication, that it was a "current" participant in the U.S.-EU Safe Harbor and U.S.-Swiss Safe Harbor Frameworks.

16. In truth and in fact, from April 2013 until November 2013, respondent was not a "current" participant in the U.S.-EU Safe Harbor Framework or the U.S.-Swiss Safe Harbor Framework. Therefore, the representation set forth in Paragraph 15 is false and misleading.

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

THEREFORE, the Federal Trade Commission this nineteenth day of June, 2014, has issued this complaint against respondent.

By the Commission, Commissioner McSweeny not participating.

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, 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 Decision and Order ("Order"):

1. Respondent DataMotion, Inc. ("DataMotion") is a Delaware corporation with its principal office or place of business at 35 Airport Road, Suite 120, Morristown, NJ 07960.

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

ORDER

DEFINITIONS

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

A. Unless otherwise specified, "respondent" shall mean DataMotion, Inc. and its successors and assigns.

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

I.

IT IS ORDERED that respondent and its officers, agents, representatives, and employees, whether acting directly or indirectly, in connection with the advertising, marketing, promotion, offering for sale, or sale of any product or service, in or affecting commerce, shall not misrepresent in any manner, expressly or by implication, the extent to which respondent is a

member of, adheres to, complies with, is certified by, is endorsed by, or otherwise participates in any privacy or security program sponsored by the government or any other self-regulatory or standard-setting organization, including, but not limited to, the U.S.-EU Safe Harbor Framework and the U.S.-Swiss Safe Harbor Framework.

II.

IT IS FURTHER ORDERED that respondent shall maintain and upon request make available to the Federal Trade Commission for inspection and copying, a print or electronic copy of, for a period of five (5) years from the date of preparation or dissemination, whichever is later, all documents relating to compliance with this order, including but not limited to:

A. all advertisements, promotional materials, and any other statements containing any representations covered by this order, with all materials relied upon in disseminating the representation; and

B. any documents, whether prepared by or on behalf of respondent, that call into question respondent's compliance with this order.

III.

IT IS FURTHER ORDERED that respondent shall deliver a copy of this order to all current and future principals, officers, directors, and managers, and to all current and future employees, agents, and representatives having responsibilities relating to the subject matter of this order. 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 IV, delivery shall be at least ten (10) days prior to the change in structure. Respondent must secure a signed and dated statement acknowledging receipt of this order, within thirty (30) days of delivery, from all persons receiving a copy of the order pursuant to this section.

IV.

IT IS FURTHER ORDERED that respondent shall notify the Commission at least thirty (30) days prior to any change in the corporation(s) that may affect compliance obligations arising under this order, including, but not limited to: a dissolution, assignment, sale, merger, or other action that would result in the emergence of a successor corporation; the creation or dissolution of a subsidiary, parent, or affiliate that engages in any acts or practices subject to this order; the proposed filing of a bankruptcy petition; or a change in the corporate name or address. *Provided, however*, that, with respect to any proposed change in the corporation(s) about which respondent learns fewer than thirty (30) days prior to the date such action is to take place, respondent shall notify the Commission as soon as is practicable after obtaining such knowledge. 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 of Enforcement, Bureau of Consumer Protection, Federal Trade Commission, 600 Pennsylvania Avenue, N.W., Washington, D.C. 20580. The subject line must begin: *In re DataMotion, Inc.*, FTC File No. 1423023.

V.

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

VI.

This order will terminate on June 19, 2034, 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 McSweeny not participating.

ANALYSIS OF CONSENT ORDER TO AID PUBLIC COMMENT

The Federal Trade Commission ("FTC" or "Commission") has accepted, subject to final approval, a consent agreement applicable to DataMotion, Inc. ("DataMotion").

The proposed consent order has been placed on the public record for thirty (30) days for receipt of comments by interested persons. Comments received during this period will become part of the public record. After thirty (30) days, the Commission will

again review the agreement and the comments received, and will decide whether it should withdraw from the agreement and take appropriate action or make final the agreement's proposed order.

This matter concerns alleged false or misleading representations that DataMotion made to consumers concerning its participation in the Safe Harbor privacy frameworks agreed upon by the U.S. and the European Union ("U.S.-EU Safe Harbor Framework") and the U.S. and Switzerland ("U.S.-Swiss Safe Harbor Framework"). It is among several actions the Commission is bringing to enforce the promises that companies make when they certify that they participate in the U.S.-EU Safe Harbor Framework and/or U.S.-Swiss Safe Harbor Framework ("Safe Harbor Frameworks"). The Safe Harbor Frameworks allow U.S. companies to transfer data outside the EU and Switzerland consistent with European law. To join the Safe Harbor Frameworks, a company must self-certify to the U.S. Department of Commerce ("Commerce") that it complies with a set of principles and related requirements that have been deemed by the European Commission and Switzerland as providing "adequate" privacy protection. These principles include notice, choice, onward transfer, security, data integrity, access, and enforcement. Commerce maintains a public website, www.export.gov/safeharbor, where it posts the names of companies that have self-certified to the Safe Harbor Frameworks. The listing of companies indicates whether their self-certification is "current" or "not current." Companies are required to re-certify every year in order to retain their status as "current" members of the Safe Harbor Frameworks.

In 2008, Commerce developed the U.S.-EU Safe Harbor Framework Certification Mark ("the mark") to allow companies to highlight for consumers their compliance with the Safe Harbor framework. Upon request, Commerce provides the mark to those organizations that maintain a "current" self-certification to the U.S.-EU Safe Harbor Framework. Commerce has established certain rules for using the mark, such as requirements related to the mark's placement on a website and the inclusion of a link to www.export.gov/safeharbor.

DataMotion provides businesses with systems for sending encrypted email and other secure file transport. According to the Commission's complaint, since at least April 2012, DataMotion has set forth on its website, www.datamotion.com, privacy policies and statements about its practices, including statements related to its participation in the U.S-EU Safe Harbor Framework and U.S.-Swiss Safe Harbor Framework. In addition, from at least April 2012 until November 2013, DataMotion displayed the mark on its website.

The Commission's complaint alleges that DataMotion, through its statements and use of the mark, falsely represented that it was a "current" participant in the Safe Harbor Frameworks when, in fact, from April 2013 until November 2013, DataMotion was not a "current" participant in the Safe Harbor Frameworks. The Commission's complaint alleges that in April 2012, DataMotion submitted a self-certification to the Safe Harbor Frameworks. DataMotion did not renew its self-certification in April 2013 and Commerce subsequently updated DataMotion's status to "not current" on its public website. In November 2013, DataMotion renewed its self-certification to the Safe Harbor Frameworks and its status was changed to "current" on Commerce's website.

Part I of the proposed order prohibits DataMotion from making misrepresentations about its membership in any privacy or security program sponsored by the government or any other self-regulatory or standard-setting organization, including, but not limited to, the U.S.-EU Safe Harbor Framework and the U.S.-Swiss Safe Harbor Framework.

Parts II through VI of the proposed order are reporting and compliance provisions. Part II requires DataMotion to retain documents relating to its compliance with the order for a five-year period. Part III requires dissemination of the order now and in the future to persons with responsibilities relating to the subject matter of the order. Part IV ensures notification to the FTC of changes in corporate status. Part V mandates that DataMotion submit an initial compliance report to the FTC, and make available to the FTC subsequent reports. Part VI is a

provision "sunsetting" the order after twenty (20) years, with certain exceptions.

The purpose of 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

DDC LABORATORIES, INC.
D/B/A
DNA DIAGNOSTICS CENTER

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

Docket No. C-4467; File No. 142 3024
Complaint, June 19, 2014 – Decision, June 19, 2014

This consent order addresses DDC Laboratories, Inc.'s alleged false or misleading representations that DDC made to consumers concerning its participation in the Safe Harbor privacy framework agreed upon by the U.S. and the European Union. The complaint alleges that DDC, through its statement, falsely represented that it was a "current" participant in the Safe Harbor when, in fact, from November 2011 until November 2013, DDC was not a "current" participant in the Safe Harbor. The consent order prohibits DDC from making misrepresentations about its membership in any privacy or security program sponsored by the government or any other self-regulatory or standard-setting organization, including, but not limited to, the U.S.-EU Safe Harbor Framework.

Participants

For the *Commission*: *Jessica Lyon, Katie Race Brin*, and *Katherine White.*

For the *Respondent*: *Jim Fishkin, Dechert LLP*.

COMPLAINT

The Federal Trade Commission, having reason to believe that DDC Laboratories, Inc. ("Respondent" or "DDC"), 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. Respondent DDC Laboratories, Inc., also doing business as DNA Diagnostics Center, is an Ohio corporation with its principal office or place of business at One DDC Way, Fairfield, OH 45014.

2. Respondent is a leading provider of private DNA testing and focuses primarily on testing to establish paternity and other familial relationships.

3. The acts and practices of Respondent as alleged in this Complaint have been in or affecting commerce, as "commerce" is defined in Section 4 of the FTC Act.

4. Respondent has set forth on its website, www.dnacenter.com, privacy policies and statements about its practices, including a statement related to its adherence to the Safe Harbor privacy framework agreed upon by the U.S. and the European Union ("U.S.-EU Safe Harbor Framework").

The Safe Harbor Framework

5. The U.S.-EU Safe Harbor Framework provides a method for U.S. companies to transfer personal data outside of Europe that is consistent with the requirements of the European Union Directive on Data Protection ("Directive"). Enacted in 1995, the Directive sets forth European Union ("EU") requirements for privacy and the protection of personal data. Among other things, it requires EU Member States to implement legislation that prohibits the transfer of personal data outside the EU, with exceptions, unless the European Commission ("EC") has made a determination that the recipient jurisdiction's laws ensure the protection of such personal data. This determination is referred to commonly as meeting the EU's "adequacy" standard.

6. To satisfy the EU adequacy standard for certain commercial transfers, the U.S. Department of Commerce ("Commerce") and the EC negotiated the U.S.-EU Safe Harbor Framework, which went into effect in 2000. The U.S.-EU Safe Harbor Framework allows U.S. companies to transfer personal data lawfully from the EU. To join the U.S.-EU Safe Harbor Framework, a company must self-certify to Commerce that it complies with seven principles and related requirements that have been deemed to meet the EU's adequacy standard.

7. Companies under the jurisdiction of the U.S. Federal Trade Commission ("FTC"), as well as the U.S. Department of

Transportation, are eligible to join the U.S.-EU Safe Harbor Framework. A company under the FTC's jurisdiction that claims it has self-certified to the Safe Harbor principles, but failed to self-certify to Commerce, or subsequently renew its Safe Harbor certification, may be subject to an enforcement action based on the FTC's deception authority under Section 5 of the FTC Act.

8. Commerce maintains a public website, www.export.gov/safeharbor, where it posts the names of companies that have self-certified to the U.S.-EU Safe Harbor Framework. The listing of companies indicates whether their self-certification is "current" or "not current" and a date when recertification is due. Companies are required to re-certify every year in order to retain their status as "current" members of the Safe Harbor Framework.

Violations of Section 5 of the FTC Act

9. In November 2007, Respondent submitted to Commerce a self-certification of compliance to the Safe Harbor Framework. Respondent subsequently renewed its self-certification in November 2008, November 2009, and November 2010.

10. In November 2011, Respondent did not renew its self-certification to the Safe Harbor, and Commerce subsequently updated Respondent's status to "not current" on its public website. In November 2013, Respondent renewed its self-certification to the Safe Harbor Framework and Respondent's status was changed to "current" on Commerce's website.

11. Since at least November 2007, Respondent has disseminated or caused to be disseminated a privacy policy and statement on the www.dnacenter.com website, including the following statement:

> DDC and its subsidiaries, branches, divisions, and business units in the United States adhere to the Safe Harbor Principles published by the U.S. Department of Commerce with respect to all such data.

12. Through the means described in Paragraph 11, Respondent represents, expressly or by implication, that it is a "current" participant in the U.S.-EU Safe Harbor Framework.

13. In truth and in fact, from November 2011 until November 2013, Respondent was not a "current" participant in the U.S.-EU Safe Harbor Framework. Therefore, the representation set forth in Paragraph 12 was, false and misleading.

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

THEREFORE, the Federal Trade Commission this nineteenth day of June, 2014, has issued this Complaint against Respondent.

By the Commission, Commissioner McSweeny not participating.

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 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 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 DDC Laboratories, Inc., also doing business as DNA Diagnostics Center, is an Ohio corporation with its principal office or place of business at One DDC Way, Fairfield, OH 45014.

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

ORDER

DEFINITIONS

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

A. Unless otherwise specified, "respondent" shall mean DDC Laboratories, Inc., and its successors and assigns.

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

I.

IT IS ORDERED that respondent and its officers, agents, representatives, and employees, whether acting directly or indirectly, in connection with the advertising, marketing, promotion, offering for sale, or sale of any product or service, in or affecting commerce, shall not misrepresent in any manner, expressly or by implication, the extent to which respondent is a member of, adheres to, complies with, is certified by, is endorsed by, or otherwise participates in any privacy or security program sponsored by the government or any other self-regulatory or standard-setting organization, including, but not limited to, the U.S.-EU Safe Harbor Framework and the U.S.-Swiss Safe Harbor Framework.

II.

IT IS FURTHER ORDERED that respondent shall maintain and upon request make available to the Federal Trade Commission for inspection and copying, a print or electronic copy of, for a period of five (5) years from the date of preparation or dissemination, whichever is later, all documents relating to compliance with this order, including but not limited to:

A. all advertisements, promotional materials, and any other statements containing any representations covered by this order, with all materials relied upon in disseminating the representation; and

B. any documents, whether prepared by or on behalf of respondent, that call into question respondent's compliance with this order.

III.

IT IS FURTHER ORDERED that respondent shall deliver a copy of this order to all current and future principals, officers, directors, and managers, and to all current and future employees, agents, and representatives having responsibilities relating to the subject matter of this order. 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 IV, delivery shall be at least ten (10) days prior to the change in structure. Respondent must secure a signed and dated statement acknowledging receipt of this order, within thirty (30) days of delivery, from all persons receiving a copy of the order pursuant to this section.

IV.

IT IS FURTHER ORDERED that respondent shall notify the Commission at least thirty (30) days prior to any change in the corporation(s) that may affect compliance obligations arising under this order, including, but not limited to: a dissolution, assignment, sale, merger, or other action that would result in the emergence of a successor corporation; the creation or dissolution of a subsidiary, parent, or affiliate that engages in any acts or practices subject to this order; the proposed filing of a bankruptcy petition; or a change in the corporate name or address. *Provided, however*, that, with respect to any proposed change in the corporation(s) about which respondent learns fewer than thirty (30) days prior to the date such action is to take place, respondent shall notify the Commission as soon as is practicable after obtaining such knowledge. 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 of Enforcement, Bureau of Consumer Protection, Federal Trade Commission, 600 Pennsylvania Avenue, N.W., Washington, D.C. 20580. The subject line must begin: *In re DDC Laboratories, Inc.*, FTC File No. 1423024.

V.

IT IS FURTHER ORDERED that respondent, and its successors and assigns, within sixty (60) days after the date of service of this order, shall file with the Commission a true and accurate report, in writing, setting forth in detail the manner and form of its compliance with this order. Within ten (10) days of

receipt of written notice from a representative of the Commission, it shall submit an additional true and accurate written report.

VI.

This order will terminate on June 19, 2034, 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 McSweeny not participating.

ANALYSIS OF CONSENT ORDER TO AID PUBLIC COMMENT

The Federal Trade Commission ("FTC" or "Commission") has accepted, subject to final approval, a consent agreement applicable to DDC Laboratories, Inc. ("DDC").

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

This matter concerns alleged false or misleading representations that DDC made to consumers concerning its participation in the Safe Harbor privacy framework ("Safe Harbor") agreed upon by the U.S. and the European Union ("EU") ("U.S.-EU Safe Harbor Framework"). It is among several actions the Commission is bringing to enforce the promises that companies make when they certify that they participate in the Safe Harbor Framework. The Safe Harbor framework allows U.S. companies to transfer data outside the EU consistent with European law. To join the Safe Harbor framework, a company must self-certify to the U.S. Department of Commerce ("Commerce") that it complies with a set of principles and related requirements that have been deemed by the European Commission as providing "adequate" privacy protection. These principles include notice, choice, onward transfer, security, data integrity, access, and enforcement. Commerce maintains a public website, www.export.gov/safeharbor, where it posts the names of companies that have self-certified to the Safe Harbor framework. The listing of companies indicates whether their self-certification is "current" or "not current." Companies are required to re-certify every year in order to retain their status as "current" members of the Safe Harbor framework.

DDC is a leading provider of private DNA testing and focuses primarily on testing to establish paternity and other familial relationships. According to the Commission's complaint, since at

least November 2007, DDC has set forth on its website, www.dnacenter.com, a privacy policy and statement about its practices, including a statement related to its participation in the U.S-EU Safe Harbor Framework.

The Commission's complaint alleges that DDC, through its statement, falsely represented that it was a "current" participant in the Safe Harbor when, in fact, from November 2011 until November 2013, DDC was not a "current" participant in the Safe Harbor. The Commission's complaint alleges that in November 2007, DDC submitted a Safe Harbor self-certification. DDC subsequently renewed its self-certification in November 2008, November 2009, and November 2010. DDC did not renew its self-certification in November 2011 and Commerce subsequently updated DDC's status to "not current" on its public website. In November 2013, DDC renewed its self-certification to the Safe Harbor and its status was changed to "current" on Commerce's website.

Part I of the proposed order prohibits DDC from making misrepresentations about its membership in any privacy or security program sponsored by the government or any other self-regulatory or standard-setting organization, including, but not limited to, the U.S.-EU Safe Harbor Framework.

Parts II through VI of the proposed order are reporting and compliance provisions. Part II requires DDC to retain documents relating to its compliance with the order for a five-year period. Part III requires dissemination of the order now and in the future to persons with responsibilities relating to the subject matter of the order. Part IV ensures notification to the FTC of changes in corporate status. Part V mandates that DDC submit an initial compliance report to the FTC, and make available to the FTC subsequent reports. Part VI is a provision "sunsetting" the order after twenty (20) years, with certain exceptions.

The purpose of 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

PDB SPORTS, LTD.
D/B/A
DENVER BRONCOS FOOTBALL CLUB

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

Docket No. C-4468; File No. 142 3025
Complaint, June 19, 2014 – Decision, June 19, 2014

This consent order addresses PDB Sports, Ltd. d/b/a the Denver Broncos Football Club's alleged false or misleading representations that the Denver Broncos made to consumers concerning their participation in the Safe Harbor privacy framework agreed upon by the U.S. and the European Union. The complaint alleges that the Denver Broncos falsely represented that they were a "current" participant in the Safe Harbor when, in fact, from November 2011 until November 2013, the Denver Broncos were not a "current" participant in the U.S.-EU Safe Harbor Framework. The consent order prohibits the Denver Broncos from making misrepresentations about their membership in any privacy or security program sponsored by the government or any other self-regulatory or standard-setting organization, including, but not limited to, the U.S.-EU Safe Harbor Framework.

Participants

For the *Commission*: *Jessica Lyon*, *Katie Race Brin*, and *Katherine White.*

For the *Respondents*: *John Graubert* and *Kurt Wimmer, Covington & Burling LLP.*

COMPLAINT

The Federal Trade Commission, having reason to believe that PDB Sports, Ltd., doing business as the Denver Broncos Football Club, a limited partnership, 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. Respondent PDB Sports, Ltd., doing business as the Denver Broncos Football Club, ("Denver Broncos") is a Colorado

limited partnership with its principal office or place of business at 13655 Broncos Parkway, Englewood, CO 80112.

2. Respondent is a professional football team and a member of the National Football League.

3. The acts and practices of respondent as alleged in this complaint have been in or affecting commerce, as "commerce" is defined in Section 4 of the FTC Act.

4. Respondent has set forth on its website, www.denverbroncos.com, privacy policies and statements about its practices, including statements related to its participation in the Safe Harbor privacy framework agreed upon by the U.S. and the European Union ("U.S.-EU Safe Harbor Framework").

The Framework

5. The U.S.-EU Safe Harbor Framework provides a method for U.S. companies to transfer personal data outside of Europe that is consistent with the requirements of the European Union Directive on Data Protection ("Directive"). Enacted in 1995, the Directive sets forth European Union ("EU") requirements for privacy and the protection of personal data. Among other things, it requires EU Member States to implement legislation that prohibits the transfer of personal data outside the EU, with exceptions, unless the European Commission ("EC") has made a determination that the recipient jurisdiction's laws ensure the protection of such personal data. This determination is referred to commonly as meeting the EU's "adequacy" standard.

6. To satisfy the EU adequacy standard for certain commercial transfers, the U.S. Department of Commerce ("Commerce") and the EC negotiated the U.S.-EU Safe Harbor Framework, which went into effect in 2000. The U.S.-EU Safe Harbor Framework allows U.S. companies to transfer personal data lawfully from the EU. To join the U.S.-EU Safe Harbor Framework, a company must self-certify to Commerce that it complies with seven principles and related requirements that have been deemed to meet the EU's adequacy standard.

7. Companies under the jurisdiction of the U.S. Federal Trade Commission ("FTC"), as well as the U.S. Department of Transportation, are eligible to join the U.S.-EU Safe Harbor Framework. A company under the FTC's jurisdiction that claims it has self-certified to the Safe Harbor principles, but failed to self-certify to Commerce, may be subject to an enforcement action based on the FTC's deception authority under Section 5 of the FTC Act.

8. Commerce maintains a public website, www.export.gov/safeharbor, where it posts the names of companies that have self-certified to the U.S.-EU Safe Harbor Framework. The listing of companies indicates whether their self-certification is "current" or "not current" and a date when recertification is due. Companies are required to re-certify every year in order to retain their status as "current" members of the U.S.-EU Safe Harbor Framework.

Violations of Section 5 of the FTC Act

9. In November 2008, respondent submitted to Commerce a self-certification of compliance to the U.S.-EU Safe Harbor Framework.

10. In November 2011, respondent did not renew its self-certification to the U.S.-EU Safe Harbor Framework, and Commerce subsequently updated respondent's status to "not current" on its public website.

11. From at least November 2008 until November 2013, respondent disseminated or caused to be disseminated privacy policies and statements on the www.denverbroncos.com website, including, but not limited to, the following statements:

> Denver Broncos Football Club complies with the EU Safe Harbor framework as set forth by the Department of Commerce regarding the collection, use, and retention of data from the European Union.

12. Through the means described in Paragraph 11, respondent represented, expressly or by implication, that it was a "current" participant in the U.S.-EU Safe Harbor Framework.

13. In truth and in fact, from November 2011 until November 2013, respondent was not a "current" participant in the U.S.-EU Safe Harbor Framework. Therefore, the representation set forth in Paragraph 12 is false and misleading.

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

THEREFORE, the Federal Trade Commission this nineteenth day of June, 2014, has issued this complaint against respondent.

By the Commission, Commissioner McSweeny not participating.

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 PDB Sports, Ltd., doing business as the Denver Broncos Football Club, is a Colorado limited partnership with its principal office or place of business at 13655 Broncos Parkway, Englewood, CO 80112.

2. Respondent neither admits nor denies any of the allegations in the draft complaint, except as specifically stated in this order. Only for purposes of this action, respondent admits the facts necessary to establish jurisdiction.

ORDER

DEFINITIONS

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

A. Unless otherwise specified, "respondent" shall mean PDB Sports, Ltd., doing business as the Denver Broncos Football Club, and its successors and assigns.

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

I.

IT IS ORDERED that respondent and its officers, agents, representatives, and employees, whether acting directly or indirectly, in connection with the advertising, marketing, promotion, offering for sale, or sale of any product or service, in or affecting commerce, shall not misrepresent in any manner, expressly or by implication, the extent to which respondent is a member of, adheres to, complies with, is certified by, is endorsed by, or otherwise participates in any privacy or security program sponsored by the government or any other self-regulatory or standard-setting organization, including, but not limited to, the U.S.-EU Safe Harbor Framework and the U.S.-Swiss Safe Harbor Framework.

II.

IT IS FURTHER ORDERED that respondent shall maintain and upon request make available to the Federal Trade Commission for inspection and copying, a print or electronic copy of, for a period of five (5) years from the date of preparation or dissemination, whichever is later, all documents relating to compliance with this order, including but not limited to:

A. all advertisements, promotional materials, and any other statements containing any representations covered by this order, with all materials relied upon in disseminating the representation; and

B. any documents, whether prepared by or on behalf of respondent, that call into question respondent's compliance with this order.

III.

IT IS FURTHER ORDERED that respondent shall deliver a copy of this order to all current and future principals, officers, directors, and managers, and to all current and future employees,

agents, and representatives having responsibilities relating to the subject matter of this order. 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. Respondent must secure a signed and dated statement acknowledging receipt of this order, within thirty (30) days of delivery, from all persons receiving a copy of the order pursuant to this section.

IV.

IT IS FURTHER ORDERED that respondent shall notify the Commission within fourteen (14) days of any change in the partnership(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 company; the creation or dissolution of a subsidiary, parent, or affiliate that engages in any acts or practices subject to this order; the proposed filing of a bankruptcy petition; or a change in the partnership name or address. 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 of Enforcement, Bureau of Consumer Protection, Federal Trade Commission, 600 Pennsylvania Avenue, N.W., Washington, D.C. 20580. The subject line must begin: *In re PDB Sports, Ltd., d/b/a the Denver Broncos Football Club*, FTC File No. 1423025.

V.

IT IS FURTHER ORDERED that respondent, 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 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.

VI.

This order will terminate on June 19, 2034, 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 McSweeny not participating.

ANALYSIS OF CONSENT ORDER TO AID PUBLIC COMMENT

The Federal Trade Commission ("FTC" or "Commission") has accepted, subject to final approval, a consent agreement

applicable to PDB Sports, Ltd., doing business as the Denver Broncos Football Club ("the Denver Broncos").

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

This matter concerns alleged false or misleading representations that the Denver Broncos made to consumers concerning their participation in the Safe Harbor privacy framework ("Safe Harbor") agreed upon by the U.S. and the European Union ("EU") ("U.S.-EU Safe Harbor Framework"). It is among several actions the Commission is bringing to enforce the promises that companies make when they certify that they participate in the Safe Harbor Framework. The Safe Harbor framework allows U.S. companies to transfer data outside the EU consistent with European law. To join the Safe Harbor framework, a company must self-certify to the U.S. Department of Commerce ("Commerce") that it complies with a set of principles and related requirements that have been deemed by the European Commission as providing "adequate" privacy protection. Commerce maintains a public website, www.export.gov/safeharbor, where it posts the names of companies that have self-certified to the Safe Harbor framework. The listing of companies indicates whether their self-certification is "current" or "not current." Companies are required to re-certify every year in order to retain their status as "current" members of the Safe Harbor framework.

The Denver Broncos are a professional football team and a member of the National Football League. According to the Commission's complaint, from November 2008 until November 2013, the Denver Broncos set forth on their website, www.denverbroncos.com, privacy policies and statements about their practices, including statements related to their participation in the U.S-EU Safe Harbor Framework.

Analysis to Aid Public Comment

The Commission's complaint alleges that the Denver Broncos falsely represented that they were a "current" participant in the Safe Harbor when, in fact, from November 2011 until November 2013, the Denver Broncos were not a "current" participant in the U.S.-EU Safe Harbor Framework. The Commission's complaint alleges that in November 2008, the Denver Broncos submitted a Safe Harbor self-certification. The Denver Broncos did not renew the self-certification in November 2011, and Commerce subsequently updated the Denver Broncos' status to "not current" on its public website.

Part I of the proposed order prohibits the Denver Broncos from making misrepresentations about their membership in any privacy or security program sponsored by the government or any other self-regulatory or standard-setting organization, including, but not limited to, the U.S.-EU Safe Harbor Framework.

Parts II through VI of the proposed order are reporting and compliance provisions. Part II requires the Denver Broncos to retain documents relating to 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 the Denver Broncos submit an initial compliance report to the FTC, and make available to the FTC subsequent reports. Part VI is a provision "sunsetting" the order after twenty (20) years, with certain exceptions.

The purpose of 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

FANTAGE.COM, INC.

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

Docket No. C-4469; File No. 142 3026
Complaint, June 19, 2014 – Decision, June 19, 2014

This consent order addresses Fantage.com, Inc.'s alleged false or misleading representations that Fantage made to consumers concerning its participation in the Safe Harbor privacy framework agreed upon by the U.S. and the European Union. The complaint alleges that Fantage falsely represented that it was a "current" participant in the U.S.-EU Safe Harbor Framework when, in fact, from June 2012 until January 2014, Fantage was not a "current" participant in the Safe Harbor Framework. The consent order prohibits Fantage from making misrepresentations about its membership in any privacy or security program sponsored by the government or any other self-regulatory or standard-setting organization, including, but not limited to, the U.S.-EU Safe Harbor Framework.

Participants

For the *Commission*: *Jessica Lyon, Katie Race Brin*, and *Katherine White.*

For the *Respondent*: *Daniel Jeong, CFO, pro se.*

COMPLAINT

The Federal Trade Commission, having reason to believe that Fantage.com, Inc., 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. Respondent Fantage.com, Inc. ("Fantage") is a New Jersey corporation with its principal office or place of business at 400 Kelby Street, 19th Floor, Fort Lee, New Jersey 07024.

2. Respondent developed and operates a massively multiplayer online role-playing game directed at children ages 6-16.

3. The acts and practices of respondent as alleged in this complaint have been in or affecting commerce, as "commerce" is defined in Section 4 of the FTC Act.

4. Respondent has set forth on its website, www.fantage.com, privacy policies and statements about its practices, including statements related to its participation in the Safe Harbor privacy framework agreed upon by the U.S. and the European Union ("U.S.-EU Safe Harbor Framework").

The Framework

5. The U.S.-EU Safe Harbor Framework provides a method for U.S. companies to transfer personal data outside of Europe that is consistent with the requirements of the European Union Directive on Data Protection ("Directive"). Enacted in 1995, the Directive sets forth European Union ("EU") requirements for privacy and the protection of personal data. Among other things, it requires EU Member States to implement legislation that prohibits the transfer of personal data outside the EU, with exceptions, unless the European Commission ("EC") has made a determination that the recipient jurisdiction's laws ensure the protection of such personal data. This determination is referred to commonly as meeting the EU's "adequacy" standard.

6. To satisfy the EU adequacy standard for certain commercial transfers, the U.S. Department of Commerce ("Commerce") and the EC negotiated the U.S.-EU Safe Harbor Framework, which went into effect in 2000. The U.S.-EU Safe Harbor Framework allows U.S. companies to transfer personal data lawfully from the EU. To join the U.S.-EU Safe Harbor Framework, a company must self-certify to Commerce that it complies with seven principles and related requirements that have been deemed to meet the EU's adequacy standard.

7. Companies under the jurisdiction of the U.S. Federal Trade Commission ("FTC"), as well as the U.S. Department of Transportation, are eligible to join the U.S.-EU Safe Harbor Framework. A company under the FTC's jurisdiction that claims it has self-certified to the Safe Harbor principles, but failed to self-certify to Commerce, may be subject to an enforcement

action based on the FTC's deception authority under Section 5 of the FTC Act.

8. Commerce maintains a public website, www.export.gov/safeharbor, where it posts the names of companies that have self-certified to the U.S.-EU Safe Harbor Framework. The listing of companies indicates whether their self-certification is "current" or "not current" and a date when recertification is due. Companies are required to re-certify every year in order to retain their status as "current" members of the Safe Harbor Framework.

Violations of Section 5 of the FTC Act

9. In June 2011, respondent submitted to Commerce a self-certification of compliance with the U.S.-EU Safe Harbor Framework.

10. In June 2012, respondent did not renew its self-certification to the U.S.-EU Safe Harbor Framework, and Commerce subsequently updated respondent's status to "not current" on its public website. In January 2014, respondent renewed its self-certification to the Safe Harbor Framework.

11. Since June 2011, except for a one-month period from November to December 2013, respondent has disseminated or caused to be disseminated privacy policies and statements on the www.fantage.com website, including but not limited to, the following statements:

> When we collect personal information from residents of the European Union, we follow the privacy principles of the U.S.-EU Safe Harbor Framework, which covers the transfer, collection, use, and retention of personal data from the European Union.

12. Through the means described in Paragraph 11, respondent represents, expressly or by implication, that it is a "current" participant in the U.S.-EU Safe Harbor Framework.

13. In truth and in fact, from June 2012 until January 2014 respondent was not a "current" participant in the U.S.-EU Safe Harbor Framework. Therefore, the representation set forth in Paragraph 12 was false and misleading.

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

THEREFORE, the Federal Trade Commission this nineteenth day of June, 2014, has issued this complaint against respondent.

By the Commission, Commissioner McSweeny not participating.

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, 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 Decision and Order ("Order"):

1. Respondent Fantage.com, Inc. ("Fantage") is a New Jersey corporation with its principal office or place of business at 400 Kelby Street, 19th Floor, Fort Lee, New Jersey 07024.

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

ORDER

DEFINITIONS

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

A. Unless otherwise specified, "respondent" shall mean Fantage.com, Inc. and its successors and assigns.

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

I.

IT IS ORDERED that respondent and its officers, agents, representatives, and employees, whether acting directly or indirectly, in connection with the advertising, marketing, promotion, offering for sale, or sale of any product or service, in or affecting commerce, shall not misrepresent in any manner, expressly or by implication, the extent to which respondent is a member of, adheres to, complies with, is certified by, is endorsed by, or otherwise participates in any privacy or security program sponsored by the government or any other self-regulatory or standard-setting organization, including, but not limited to, the U.S.-EU Safe Harbor Framework and the U.S.-Swiss Safe Harbor Framework.

II.

IT IS FURTHER ORDERED that respondent shall maintain and upon request make available to the Federal Trade Commission for inspection and copying, a print or electronic copy of, for a period of five (5) years from the date of preparation or dissemination, whichever is later, all documents relating to compliance with this order, including but not limited to:

A. all advertisements, promotional materials, and any other statements containing any representations covered by this order, with all materials relied upon in disseminating the representation; and

B. any documents, whether prepared by or on behalf of respondent, that call into question respondent's compliance with this order.

III.

IT IS FURTHER ORDERED that respondent shall deliver a copy of this order to all current and future principals, officers, directors, and managers, and to all current and future employees, agents, and representatives having responsibilities relating to the subject matter of this order. 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 IV, delivery shall be at least ten (10) days prior to the change in structure. Respondent must secure a signed and dated statement acknowledging receipt of this order, within thirty (30) days of delivery, from all persons receiving a copy of the order pursuant to this section.

IV.

IT IS FURTHER ORDERED that respondent shall notify the Commission at least thirty (30) days prior to any change in the corporation(s) that may affect compliance obligations arising under this order, including, but not limited to: a dissolution, assignment, sale, merger, or other action that would result in the emergence of a successor corporation; the creation or dissolution of a subsidiary, parent, or affiliate that engages in any acts or practices subject to this order; the proposed filing of a bankruptcy petition; or a change in the corporate name or address. *Provided, however*, that, with respect to any proposed change in the corporation(s) about which respondent learns fewer than thirty (30) days prior to the date such action is to take place, respondent shall notify the Commission as soon as is practicable after obtaining such knowledge. 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 of Enforcement, Bureau of Consumer Protection, Federal Trade Commission, 600 Pennsylvania Avenue, N.W., Washington, D.C. 20580. The subject line must begin: *In re Fantage.com, Inc.*, FTC File No. 1423026.

V.

IT IS FURTHER ORDERED that respondent, and its successors and assigns, within sixty (60) days after the date of service of this order, shall file with the Commission a true and accurate report, in writing, setting forth in detail the manner and form of its compliance with this order. Within ten (10) days of

receipt of written notice from a representative of the Commission, it shall submit an additional true and accurate written report.

VI.

This order will terminate on June 19, 2034, 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 McSweeny not participating.

ANALYSIS OF CONSENT ORDER TO AID PUBLIC COMMENT

The Federal Trade Commission ("FTC" or "Commission") has accepted, subject to final approval, a consent agreement applicable to Fantage.com, Inc. ("Fantage").

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

This matter concerns alleged false or misleading representations that Fantage made to consumers concerning its participation in the Safe Harbor privacy framework agreed upon by the U.S. and the European Union ("EU") ("U.S.-EU Safe Harbor Framework" or "Safe Harbor Framework"). It is among several actions the Commission is bringing to enforce the promises that companies make when they certify that they participate in the Safe Harbor Framework. The Safe Harbor framework allows U.S. companies to transfer data outside the EU consistent with European law. To join the Safe Harbor framework, a company must self-certify to the U.S. Department of Commerce ("Commerce") that it complies with a set of principles and related requirements that have been deemed by the European Commission as providing "adequate" privacy protection. These principles include notice, choice, onward transfer, security, data integrity, access, and enforcement. Commerce maintains a public website, www.export.gov/safeharbor, where it posts the names of companies that have self-certified to the Safe Harbor framework. The listing of companies indicates whether their self-certification is "current" or "not current." Companies are required to re-certify every year in order to retain their status as "current" members of the Safe Harbor framework.

Fantage developed and operates a massively multiplayer online role-playing game directed at children ages 6-16.

Analysis to Aid Public Comment

According to the Commission's complaint, since June 2011, except for a one-month period from November to December 2013, Fantage set forth on its website, www.fantage.com, privacy policies and statements about its practices, including statements related to its participation in the U.S-EU Safe Harbor Framework.

The Commission's complaint alleges that Fantage falsely represented that it was a "current" participant in the U.S.-EU Safe Harbor Framework when, in fact, from June 2012 until January 2014, Fantage was not a "current" participant in the Safe Harbor Framework. The Commission's complaint alleges that in June 2011, Fantage submitted a Safe Harbor self-certification. Fantage did not renew its self-certification in June 2012 and Commerce subsequently updated Fantage's status to "not current" on its public website. In January 2014, Fantage renewed its self-certification to the Safe Harbor Framework, and its status was changed to "current" on Commerce's website.

Part I of the proposed order prohibits Fantage from making misrepresentations about its membership in any privacy or security program sponsored by the government or any other self-regulatory or standard-setting organization, including, but not limited to, the U.S.-EU Safe Harbor Framework.

Parts II through VI of the proposed order are reporting and compliance provisions. Part II requires Fantage to retain documents relating to its compliance with the order for a five-year period. Part III requires dissemination of the order now and in the future to persons with responsibilities relating to the subject matter of the order. Part IV ensures notification to the FTC of changes in corporate status. Part V mandates that Fantage submit an initial compliance report to the FTC, and make available to the FTC subsequent reports. Part VI is a provision "sunsetting" the order after twenty (20) years, with certain exceptions.

The purpose of 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

LEVEL 3 COMMUNICATIONS, LLC

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

Docket No. C-4470; File No. 142 3028
Complaint, June 19, 2014 – Decision, June 19, 2014

This consent order addresses Level 3 Communications, LLC's alleged false or misleading representations that Level 3 made to consumers concerning its participation in the Safe Harbor privacy frameworks agreed upon by the U.S. and the European Union and the U.S. and Switzerland. The complaint alleges that Level 3 falsely represented that it was a "current" participant in the Safe Harbor Frameworks when, in fact, from June 2012 until November 2013, Level 3 was not a "current" participant in the Safe Harbor Frameworks. The consent order prohibits Level 3 from making misrepresentations about its membership in any privacy or security program sponsored by the government or any other self-regulatory or standard-setting organization, including, but not limited to, the U.S.-EU Safe Harbor Framework and the U.S.-Swiss Safe Harbor Framework.

Participants

For the *Commission*: *Jessica Lyon, Katie Race Brin*, and *Katherine White.*

For the *Respondents*: *Kristine Devine* and *Madeleine Findley, Wiltshire & Grannis LLP.*

COMPLAINT

The Federal Trade Commission, having reason to believe that Level 3 Communications, LLC, a limited liability company, 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. Respondent Level 3 Communications, LLC ("Level 3") is a Delaware limited liability company with its principal office or place of business at 1025 Eldorado Boulevard, Broomfield, Colorado 80021.

2. Respondent is an international communications provider and one of the six largest internet service providers in the world.

3. The acts and practices of respondent as alleged in this complaint have been in or affecting commerce, as "commerce" is defined in Section 4 of the FTC Act.

4. Respondent has set forth on its website, www.level3.com, privacy policies and statements about its practices, including statements related to its participation in the Safe Harbor privacy frameworks agreed upon by the U.S. and the European Union ("U.S.-EU Safe Harbor Framework") and the U.S. and Switzerland ("U.S.-EU Safe Harbor Framework").

The Frameworks

5. The U.S.-EU Safe Harbor Framework provides a method for U.S. companies to transfer personal data outside of Europe that is consistent with the requirements of the European Union Directive on Data Protection ("Directive"). Enacted in 1995, the Directive sets forth European Union ("EU") requirements for privacy and the protection of personal data. Among other things, it requires EU Member States to implement legislation that prohibits the transfer of personal data outside the EU, with exceptions, unless the European Commission ("EC") has made a determination that the recipient jurisdiction's laws ensure the protection of such personal data. This determination is referred to commonly as meeting the EU's "adequacy" standard.

6. To satisfy the EU adequacy standard for certain commercial transfers, the U.S. Department of Commerce ("Commerce") and the EC negotiated the U.S.-EU Safe Harbor Framework, which went into effect in 2000. The U.S.-EU Safe Harbor Framework allows U.S. companies to transfer personal data lawfully from the EU. To join the U.S.-EU Safe Harbor Framework, a company must self-certify to Commerce that it complies with seven principles and related requirements that have been deemed to meet the EU's adequacy standard.

7. Companies under the jurisdiction of the U.S. Federal Trade Commission ("FTC"), as well as the U.S. Department of

Transportation, are eligible to join the U.S.-EU Safe Harbor Framework. A company under the FTC's jurisdiction that claims it has self-certified to the Safe Harbor principles, but failed to self-certify to Commerce, may be subject to an enforcement action based on the FTC's deception authority under Section 5 of the FTC Act.

8. The U.S.-Swiss Safe Harbor Framework is identical to the U.S.-EU Safe Harbor Framework and is consistent with the requirements of the Swiss Federal Act on Data Protection.

9. Commerce maintains a public website, www.export.gov/safeharbor, where it posts the names of companies that have self-certified to the U.S.-EU Safe Harbor Framework. The listing of companies indicates whether their self-certification is "current" or "not current" and a date when recertification is due. Companies are required to re-certify every year in order to retain their status as "current" members of the Safe Harbor Frameworks.

Violations of Section 5 of the FTC Act

10. In June 2001, respondent submitted to Commerce a self-certification of compliance with the Safe Harbor Frameworks.

11. In June 2012, respondent did not renew its self-certification to the Safe Harbor Frameworks, and Commerce subsequently updated respondent's status to "not current" on its public website.

12. From at least June 2001 until November 2013, respondent disseminated or caused to be disseminated privacy policies and statements on the www.level3.com website, including but not limited to, the following statements:

> Transfers of personally identifiable information made by Level 3 are made in compliance with the Safe Harbor principles to which Level 3 has self-certified its adherence to as can be viewed on the Safe Harbor web site at http://export.gov/safeharbor/.

13. Through the means described in Paragraph 12, respondent represented, expressly or by implication, that it was a "current" participant in the U.S.-EU Safe Harbor and U.S.-Swiss Safe Harbor Frameworks.

14. In truth and in fact, from June 2012 until November 2013, respondent was not a "current" participant in the U.S.-EU Safe Harbor Framework or the U.S.-Swiss Safe Harbor Framework. Therefore, the representation set forth in Paragraph 13 is false and misleading.

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

THEREFORE, the Federal Trade Commission this nineteenth day of June, 2014, has issued this complaint against respondent.

By the Commission, Commissioner McSweeny not participating.

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 Decision and Order ("Order"):

1. Respondent Level 3 Communications, LLC ("Level 3") is a Delaware limited liability company with its principal office or place of business at 1025 Eldorado Boulevard, Broomfield, Colorado 80021.

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

ORDER

DEFINITIONS

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

A. Unless otherwise specified, "respondent" shall mean Level 3 Communications, LLC and its successors and assigns.

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

I.

IT IS ORDERED that respondent and its officers, agents, representatives, and employees, whether acting directly or indirectly, in connection with the advertising, marketing, promotion, offering for sale, or sale of any product or service, in or affecting commerce, shall not misrepresent in any manner, expressly or by implication, the extent to which respondent is a member of, adheres to, complies with, is certified by, is endorsed by, or otherwise participates in any privacy or security program sponsored by the government or any other self-regulatory or standard-setting organization, including, but not limited to, the U.S.-EU Safe Harbor Framework and the U.S.-Swiss Safe Harbor Framework.

II.

IT IS FURTHER ORDERED that respondent shall maintain and upon request make available to the Federal Trade Commission for inspection and copying, a print or electronic copy of, for a period of five (5) years from the date of preparation or dissemination, whichever is later, all documents relating to compliance with this order, including but not limited to:

A. all advertisements, promotional materials, and any other statements containing any representations covered by this order, with all materials relied upon in disseminating the representation; and

B. any documents, whether prepared by or on behalf of respondent, that call into question respondent's compliance with this order.

III.

IT IS FURTHER ORDERED that respondent shall deliver a copy of this order to all current and future principals, officers, directors, and managers, and to all current and future employees, agents, and representatives having responsibilities relating to the subject matter of this order. 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 IV, delivery shall be at least ten (10) days prior to the change in structure. Respondent must secure a signed and dated statement acknowledging receipt of this order, within thirty (30) days of delivery, from all persons receiving a copy of the order pursuant to this section.

IV.

IT IS FURTHER ORDERED that respondent shall notify the Commission at least thirty (30) days prior to any change in the company that may affect compliance obligations arising under this order, including, but not limited to: a dissolution, assignment, sale, merger, or other action that would result in the emergence of a successor company; the creation or dissolution of a subsidiary, parent, or affiliate that engages in any acts or practices subject to this order; the proposed filing of a bankruptcy petition; or a change in the company name or address. *Provided, however*, that, with respect to any proposed change in the company about which respondent learns fewer than thirty (30) days prior to the date such action is to take place, respondent shall notify the Commission as soon as is practicable after obtaining such knowledge. Unless otherwise directed by a representative of the Commission in writing, all notices required by this Part shall be emailed to Debrief@ftc.gov or sent by overnight courier (not the U.S. Postal Service) to: Associate Director of Enforcement, Bureau of Consumer Protection, Federal Trade Commission, 600 Pennsylvania Avenue, N.W., Washington, D.C. 20580. The subject line must begin: *In re Level 3 Communications, LLC*, FTC File No. 1423028.

V.

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

VI.

This order will terminate on June 19, 2034, 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 McSweeny not participating.

ANALYSIS OF CONSENT ORDER TO AID PUBLIC COMMENT

The Federal Trade Commission ("FTC" or "Commission") has accepted, subject to final approval, a consent agreement applicable to Level 3 Communications, LLC ("Level 3").

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

This matter concerns alleged false or misleading representations that Level 3 made to consumers concerning its participation in the Safe Harbor privacy frameworks agreed upon by the U.S. and the European Union ("EU") ("U.S.-EU Safe Harbor Framework") and the U.S. and Switzerland ("U.S.-Swiss Safe Harbor Framework"). It is among several actions the Commission is bringing to enforce the promises that companies make when they certify that they participate in the U.S.-EU Safe Harbor Framework and/or U.S.-Swiss Safe Harbor Framework ("Safe Harbor Frameworks"). The Safe Harbor Frameworks allow U.S. companies to transfer data outside the EU and Switzerland consistent with European law. To join the Safe Harbor Frameworks, a company must self-certify to the U.S. Department of Commerce ("Commerce") that it complies with a set of principles and related requirements that have been deemed by the European Commission and Switzerland as providing "adequate" privacy protection. These principles include notice, choice, onward transfer, security, data integrity, access, and enforcement. Commerce maintains a public website, www.export.gov/safeharbor, where it posts the names of companies that have self-certified to the Safe Harbor Frameworks. The listing of companies indicates whether their self-certification is "current" or "not current." Companies are required to re-certify every year in order to retain their status as "current" members of the Safe Harbor Frameworks.

Analysis to Aid Public Comment

Level 3 is an international communications provider and one of the six largest internet service providers in the world. According to the Commission's complaint, from June 2001 until November 2013, Level 3 set forth on its website, www.level3.com, privacy policies and statements about its practices, including statements related to its participation in the U.S-EU Safe Harbor Framework and the U.S.-Swiss Safe Harbor Framework.

The Commission's complaint alleges that Level 3 falsely represented that it was a "current" participant in the Safe Harbor Frameworks when, in fact, from June 2012 until November 2013, Level 3 was not a "current" participant in the Safe Harbor Frameworks. The Commission's complaint alleges that in June 2001, Level 3 submitted a self-certification to the Safe Harbor Frameworks. Level 3 did not renew its self-certification in June 2012 and Commerce subsequently updated Level 3's status to "not current" on its public website.

Part I of the proposed order prohibits Level 3 from making misrepresentations about its membership in any privacy or security program sponsored by the government or any other self-regulatory or standard-setting organization, including, but not limited to, the U.S.-EU Safe Harbor Framework and the U.S.-Swiss Safe Harbor Framework.

Parts II through VI of the proposed order are reporting and compliance provisions. Part II requires Level 3 to retain documents relating to its compliance with the order for a five-year period. Part III requires dissemination of the order now and in the future to persons with responsibilities relating to the subject matter of the order. Part IV ensures notification to the FTC of changes in company status. Part V mandates that Level 3 submit an initial compliance report to the FTC, and make available to the FTC subsequent reports. Part VI is a provision "sunsetting" the order after twenty (20) years, with certain exceptions.

The purpose of 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

REYNOLDS CONSUMER PRODUCTS INC.

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

Docket No. C-4471; File No. 142 3030
Complaint, June 19, 2014 – Decision, June 19, 2014

This consent order addresses Reynolds Consumer Products Inc.'s alleged false or misleading representations that Reynolds made to consumers concerning its participation in the Safe Harbor privacy framework agreed upon by the U.S. and the European Union. The complaint alleges that Reynolds falsely represented that it was a "current" participant in the Safe Harbor when, in fact, from April 2010 until November 2013, Reynolds was not a "current" participant in the U.S.-EU Safe Harbor Framework with respect to the customer data it handles. The complaint further alleges that, from April 2011 until November 2013, Reynolds was not a "current" participant in the U.S.-EU Safe Harbor Framework with respect to the human resources data it handles. The consent order prohibits Reynolds from making misrepresentations about its membership in any privacy or security program sponsored by the government or any other self-regulatory or standard-setting organization, including, but not limited to, the U.S.-EU Safe Harbor Framework.

Participants

For the *Commission*: *Jessica Lyon, Katie Race Brin*, and *Katherine White.*

For the *Respondents*: *C. David Watson, Senior Counsel, Reynolds Consumer Products Inc.*

COMPLAINT

The Federal Trade Commission, having reason to believe that Reynolds Consumer Products Inc. 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. Respondent Reynolds Consumer Products Inc. ("Reynolds") is a Delaware corporation with its principal office or place of business at 1900 West Field Court, Lake Forest, Illinois 60045.

2. Respondent manufactures and sells food wrapping foil and a variety of other household products for cooking, storage, and disposal.

3. The acts and practices of respondent as alleged in this complaint have been in or affecting commerce, as "commerce" is defined in Section 4 of the FTC Act.

4. Respondent has set forth on its website, www.reynoldspkg.com, privacy policies and statements about its practices, including statements related to its participation in the Safe Harbor privacy framework agreed upon by the U.S. and the European Union ("U.S.-EU Safe Harbor Framework").

The Framework

5. The U.S.-EU Safe Harbor Framework provides a method for U.S. companies to transfer personal data outside of Europe that is consistent with the requirements of the European Union Directive on Data Protection ("Directive"). Enacted in 1995, the Directive sets forth European Union ("EU") requirements for privacy and the protection of personal data. Among other things, it requires EU Member States to implement legislation that prohibits the transfer of personal data outside the EU, with exceptions, unless the European Commission ("EC") has made a determination that the recipient jurisdiction's laws ensure the protection of such personal data. This determination is referred to commonly as meeting the EU's "adequacy" standard.

6. To satisfy the EU adequacy standard for certain commercial transfers, the U.S. Department of Commerce ("Commerce") and the EC negotiated the U.S.-EU Safe Harbor Framework, which went into effect in 2000. The U.S.-EU Safe Harbor Framework allows U.S. companies to transfer personal data lawfully from the EU. To join the U.S.-EU Safe Harbor Framework, a company must self-certify to Commerce that it complies with seven principles and related requirements that have been deemed to meet the EU's adequacy standard.

7. Companies under the jurisdiction of the U.S. Federal Trade Commission ("FTC"), as well as the U.S. Department of

Transportation, are eligible to join the U.S.-EU Safe Harbor Framework. A company under the FTC's jurisdiction that claims it has self-certified to the Safe Harbor principles, but failed to self-certify to Commerce, may be subject to an enforcement action based on the FTC's deception authority under Section 5 of the FTC Act.

8. Commerce maintains a public website, www.export.gov/safeharbor, where it posts the names of companies that have self-certified to the U.S.-EU Safe Harbor Framework. The listing of companies indicates whether their self-certification is "current" or "not current" and a date when recertification is due. Companies are required to re-certify every year in order to retain their status as "current" members of the Safe Harbor Framework.

Violations of Section 5 of the FTC Act

9. In April 2009, respondent submitted to Commerce a self-certification of compliance with the U.S.-EU Safe Harbor Framework with respect to the customer data it handles.

10. In April 2009, respondent submitted to Commerce a self-certification of compliance with the U.S.-EU Safe Harbor Framework with respect to the human resources data it handles.

11. In April 2010, respondent did not renew its self-certification to the U.S.-EU Safe Harbor Framework with respect to the customer data it handles, and Commerce subsequently updated respondent's status to "not current" on its public website.

12. In April 2011, respondent did not renew its self-certification to the U.S.-EU Safe Harbor Framework with respect to the human resources data it handles, and Commerce subsequently updated respondent's status to "not current" on its public website.

13. From at least April 2009 until November 2013, respondent disseminated or caused to be disseminated privacy policies and statements on the www.reynoldspkg.com website, including but not limited to, the following statements:

> Due to the global nature of Reynolds' business, transfers of Personal Data across national boundaries may occur. As a result, this Privacy Policy complies with the Safe Harbor Principles as agreed upon by the United States Department of Commerce and the European Commission regarding the collection, use, processing, disclosure, transfer and retention (collectively "Processing") of Personal Data with respect to Personal Data transferred from the European Economic Area (EEA) to the United States.

14. Through the means described in Paragraph 13, respondent represented, expressly or by implication, that it was a "current" participant in the U.S.-EU Safe Harbor Framework.

15. In truth and in fact, from April 2010 until November 2013, respondent was not a "current" participant in the U.S.-EU Safe Harbor Framework with respect to the customer data it handles. Further, from April 2011 until November 2013, respondent was not a "current" participant in the U.S.-EU Safe Harbor Framework with respect to the human resources data in handles. Therefore, the representation set forth in Paragraph 14 is false and misleading.

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

THEREFORE, the Federal Trade Commission this nineteenth day of June, 2014, has issued this complaint against respondent.

By the Commission, Commissioner McSweeny not participating.

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 Decision and Order ("Order"):

1. Respondent Reynolds Consumer Products Inc. ("Reynolds") is a Delaware corporation with its principal office or place of business at 1900 West Field Court, Lake Forest, Illinois 60045.

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

ORDER

DEFINITIONS

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

A. Unless otherwise specified, "respondent" shall mean Reynolds Consumer Products Inc. and its successors and assigns.

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

I.

IT IS ORDERED that respondent and its officers, agents, representatives, and employees, whether acting directly or indirectly, in connection with the advertising, marketing, promotion, offering for sale, or sale of any product or service, in or affecting commerce, shall not misrepresent in any manner, expressly or by implication, the extent to which respondent is a member of, adheres to, complies with, is certified by, is endorsed by, or otherwise participates in any privacy or security program sponsored by the government or any other self-regulatory or standard-setting organization, including, but not limited to, the U.S.-EU Safe Harbor Framework and the U.S.-Swiss Safe Harbor Framework.

II.

IT IS FURTHER ORDERED that respondent shall maintain and upon request make available to the Federal Trade Commission for inspection and copying, a print or electronic copy of, for a period of five (5) years from the date of preparation or dissemination, whichever is later, all documents relating to compliance with this order, including but not limited to:

A. all advertisements, promotional materials, and any other statements containing any representations covered by this order, with all materials relied upon in disseminating the representation; and

B. any documents, whether prepared by or on behalf of respondent, that call into question respondent's compliance with this order.

III.

IT IS FURTHER ORDERED that respondent shall deliver a copy of this order to all current and future principals, officers, directors, and managers, and to all current and future employees, agents, and representatives having responsibilities relating to the subject matter of this order. 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 IV, delivery shall be at least ten (10) days prior to the change in structure. Respondent must secure a signed and dated statement acknowledging receipt of this order, within thirty (30) days of delivery, from all persons receiving a copy of the order pursuant to this section.

IV.

IT IS FURTHER ORDERED that respondent shall notify the Commission at least thirty (30) days prior to any change in the corporation(s) that may affect compliance obligations arising under this order, including, but not limited to: a dissolution, assignment, sale, merger, or other action that would result in the emergence of a successor corporation; the creation or dissolution of a subsidiary, parent, or affiliate that engages in any acts or practices subject to this order; the proposed filing of a bankruptcy petition; or a change in the corporate name or address. *Provided, however*, that, with respect to any proposed change in the corporation(s) about which respondent learns fewer than thirty (30) days prior to the date such action is to take place, respondent shall notify the Commission as soon as is practicable after

obtaining such knowledge. 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 of Enforcement, Bureau of Consumer Protection, Federal Trade Commission, 600 Pennsylvania Avenue, N.W., Washington, D.C. 20580. The subject line must begin: *In re Reynolds Consumer Products Inc.*, FTC File No. 1423030.

V.

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

VI.

This order will terminate on June 19, 2034, 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 McSweeny not participating.

ANALYSIS OF CONSENT ORDER TO AID PUBLIC COMMENT

The Federal Trade Commission ("FTC" or "Commission") has accepted, subject to final approval, a consent agreement applicable to Reynolds Consumer Products Inc. ("Reynolds").

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

This matter concerns alleged false or misleading representations that Reynolds made to consumers concerning its participation in the Safe Harbor privacy framework agreed upon by the U.S. and the European Union ("EU") ("U.S.-EU Safe Harbor Framework" or "Safe Harbor framework"). It is among several actions the Commission is bringing to enforce the promises that companies make when they certify that they participate in the Safe Harbor framework. The Safe Harbor framework allows U.S. companies to transfer data outside the EU consistent with European law. To join the Safe Harbor framework, a company must self-certify to the U.S. Department of Commerce ("Commerce") that it complies with a set of

principles and related requirements that have been deemed by the European Commission as providing "adequate" privacy protection. These principles include notice, choice, onward transfer, security, data integrity, access, and enforcement. Commerce maintains a public website, www.export.gov/safeharbor, where it posts the names of companies that have self-certified to the Safe Harbor framework. The listing of companies indicates whether their self-certification is "current" or "not current." Companies are required to re-certify every year in order to retain their status as "current" members of the Safe Harbor framework.

Reynolds manufactures and sells food wrapping foil and a variety of other household products for cooking, storage, and disposal. According to the Commission's complaint, from April 2009 until November 2013, Reynolds set forth on its website, www.reynoldspkg.com, privacy policies and statements about its practices, including statements related to its participation in the U.S-EU Safe Harbor Framework.

The Commission's complaint alleges that Reynolds falsely represented that it was a "current" participant in the Safe Harbor when, in fact, from April 2010 until November 2013, Reynolds was not a "current" participant in the U.S.-EU Safe Harbor Framework with respect to the customer data it handles. Further, from April 2011 until November 2013, Reynolds was not a "current" participant in the U.S.-EU Safe Harbor Framework with respect to the human resources data it handles. The Commission's complaint alleges that in April 2009, Reynolds submitted a Safe Harbor self-certification with respect to the customer data it handles and a Safe Harbor self-certification with respect to the human resources data it handles. Reynolds did not renew its self-certification with respect to the customer data it handles in April 2010 and Commerce subsequently updated Reynolds' status to "not current" on its public website. Reynolds did not renew its self-certification with respect to the human resources data it handles in April 2011 and Commerce subsequently updated Reynolds' status to "not current" on its public website.

Part I of the proposed order prohibits Reynolds from making misrepresentations about its membership in any privacy or security program sponsored by the government or any other self-regulatory or standard-setting organization, including, but not limited to, the U.S.-EU Safe Harbor Framework.

Parts II through VI of the proposed order are reporting and compliance provisions. Part II requires Reynolds to retain documents relating to its compliance with the order for a five-year period. Part III requires dissemination of the order now and in the future to persons with responsibilities relating to the subject matter of the order. Part IV ensures notification to the FTC of changes in corporate status. Part V mandates that Reynolds submit an initial compliance report to the FTC, and make available to the FTC subsequent reports. Part VI is a provision "sunsetting" the order after twenty (20) years, with certain exceptions.

The purpose of 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

THE RECEIVABLE MANAGEMENT SERVICES CORPORATION

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

Docket No. C-4472; File No. 142 3031
Complaint, June 19, 2014 – Decision, June 19, 2014

This consent order addresses The Receivable Management Services Corporation's ("RMS") alleged false or misleading representations that RMS made to consumers concerning its participation in the Safe Harbor privacy framework agreed upon by the U.S. and the European Union. The complaint alleges that RMS, through its statements and use of the mark, falsely represented that it was a "current" participant in the Safe Harbor when, in fact, from February 2010 until November 2013, RMS was not a "current" participant in the Safe Harbor. The consent order prohibits RMS from making misrepresentations about its membership in any privacy or security program sponsored by the government or any other self-regulatory or standard-setting organization, including, but not limited to, the U.S.-EU Safe Harbor Framework.

Participants

For the *Commission*: *Jessica Lyon, Katie Race Brin,* and *Katherine White.*

For the *Respondent*: *Nancy Perkins, Arnold & Porter LLP.*

COMPLAINT

The Federal Trade Commission, having reason to believe that The Receivable Management Services Corporation, 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. Respondent The Receivable Management Services Corporation is a Delaware corporation with its principal office or place of business at 240 Emery Street, Bethlehem, PA 18015.

2. Respondent is a collection agency.

3. The acts and practices of respondent as alleged in this complaint have been in or affecting commerce, as "commerce" is defined in Section 4 of the FTC Act.

4. Respondent has set forth on its website, www.rmsna.com, privacy policies and statements about its practices, including statements related to its participation in the Safe Harbor privacy framework agreed upon by the U.S. and the European Union ("U.S.-EU Safe Harbor Framework").

The Framework

5. The U.S.-EU Safe Harbor Framework provides a method for U.S. companies to transfer personal data outside of Europe that is consistent with the requirements of the European Union Directive on Data Protection ("Directive"). Enacted in 1995, the Directive sets forth European Union ("EU") requirements for privacy and the protection of personal data. Among other things, it requires EU Member States to implement legislation that prohibits the transfer of personal data outside the EU, with exceptions, unless the European Commission ("EC") has made a determination that the recipient jurisdiction's laws ensure the protection of such personal data. This determination is referred to commonly as meeting the EU's "adequacy" standard.

6. To satisfy the EU adequacy standard for certain commercial transfers, the U.S. Department of Commerce ("Commerce") and the EC negotiated the U.S.-EU Safe Harbor Framework, which went into effect in 2000. The U.S.-EU Safe Harbor Framework allows U.S. companies to transfer personal data lawfully from the EU. To join the U.S.-EU Safe Harbor Framework, a company must self-certify to Commerce that it complies with seven principles and related requirements that have been deemed to meet the EU's adequacy standard.

7. Companies under the jurisdiction of the U.S. Federal Trade Commission ("FTC"), as well as the U.S. Department of Transportation, are eligible to join the U.S.-EU Safe Harbor Framework. A company under the FTC's jurisdiction that claims it has self-certified to the Safe Harbor principles, but failed to self-certify to Commerce, may be subject to an enforcement

action based on the FTC's deception authority under Section 5 of the FTC Act.

8. Commerce maintains a public website, www.export.gov/safeharbor, where it posts the names of companies that have self-certified to the U.S.-EU Safe Harbor Framework. The listing of companies indicates whether their self-certification is "current" or "not current" and a date when recertification is due. Companies are required to re-certify every year in order to retain their status as "current" members of the Safe Harbor Framework.

The U.S.-EU Safe Harbor Framework Certification Mark

9. In 2008, Commerce developed the U.S.-EU Safe Harbor Framework Certification Mark ("the mark"). Upon request, Commerce provides the mark to those organizations that maintain a "current" self-certification to the U.S.-EU Safe Harbor Framework. In addition, Commerce has established certain rules for using the mark, such as requirements relating to the mark's placement on a website and the inclusion of a link to www.export.gov/safeharbor. The mark appears as follows:

Violations of Section 5 of the FTC Act

10. In February 2009, respondent submitted to Commerce a self-certification of compliance with the Safe Harbor.

11. In February 2010, respondent did not renew its self-certification to the Safe Harbor, and Commerce subsequently updated respondent's status to "not current" on its public website.

12. From at least February 2009 until November 2013, respondent disseminated or caused to be disseminated privacy

policies and statements on the www.rmsna.com website, including, but not limited to, the following statements:

> RMS is registered with the U.S. Department of Commerce's Safe Harbor program, and adheres to the U.S. Safe Harbor principles of Notice, Choice, Onward Transfer, Security, Data Integrity, Access, and Enforcement as defined by the agency…

13. From at least February 2009 until November 2013, respondent displayed the mark on the www.rmsna.com website.

14. Through the means described in Paragraphs 12 and 13, respondent represented, expressly or by implication, that it was a "current" participant in the U.S.-EU Safe Harbor Framework.

15. In truth and in fact, from February 2010 until November 2013, respondent was not a "current" participant in the U.S.-EU Safe Harbor Framework. Therefore, the representations set forth in Paragraph 14 are false and misleading.

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

THEREFORE, the Federal Trade Commission this nineteenth day of June, 2014, has issued this complaint against respondent.

By the Commission, Commissioner McSweeny not participating.

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 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 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 The Receivable Management Services Corporation is a Delaware corporation with its principal office or place of business at 240 Emery Street, Bethlehem, PA 18015.

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

ORDER

DEFINITIONS

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

A. Unless otherwise specified, "respondent" shall mean The Receivable Management Services Corporation and its successors and assigns.

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

I.

IT IS ORDERED that respondent and its officers, agents, representatives, and employees, whether acting directly or indirectly, in connection with the advertising, marketing, promotion, offering for sale, or sale of any product or service, in or affecting commerce, shall not misrepresent in any manner, expressly or by implication, the extent to which respondent is a member of, adheres to, complies with, is certified by, is endorsed by, or otherwise participates in any privacy or security program sponsored by the government or any other self-regulatory or standard-setting organization, including, but not limited to, the U.S.-EU Safe Harbor Framework and the U.S.-Swiss Safe Harbor Framework.

II.

IT IS FURTHER ORDERED that respondent shall maintain and upon request make available to the Federal Trade Commission for inspection and copying, a print or electronic copy of, for a period of five (5) years from the date of preparation or dissemination, whichever is later, all documents relating to compliance with this order, including but not limited to:

A. all advertisements, promotional materials, and any other statements containing any representations covered by this order, with all materials relied upon in disseminating the representation; and

B. any documents, whether prepared by or on behalf of respondent, that call into question respondent's compliance with this order.

III.

IT IS FURTHER ORDERED that respondent shall deliver a copy of this order to all current and future principals, officers, directors, and managers, and to all current and future employees, agents, and representatives having responsibilities relating to the subject matter of this order. 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 IV, delivery shall be at least ten (10) days prior to the change in structure. Respondent must secure a signed and dated statement acknowledging receipt of this order, within thirty (30) days of delivery, from all persons receiving a copy of the order pursuant to this section.

IV.

IT IS FURTHER ORDERED that respondent shall notify the Commission at least thirty (30) days prior to any change in the corporation(s) that may affect compliance obligations arising under this order, including, but not limited to: a dissolution, assignment, sale, merger, or other action that would result in the emergence of a successor corporation; the creation or dissolution of a subsidiary, parent, or affiliate that engages in any acts or practices subject to this order; the proposed filing of a bankruptcy petition; or a change in the corporate name or address. *Provided, however*, that, with respect to any proposed change in the corporation(s) about which respondent learns fewer than thirty (30) days prior to the date such action is to take place, respondent shall notify the Commission as soon as is practicable after

obtaining such knowledge. 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 of Enforcement, Bureau of Consumer Protection, Federal Trade Commission, 600 Pennsylvania Avenue, N.W., Washington, D.C. 20580. The subject line must begin: *In re The Receivable Management Services Corporation*, FTC File No. 1423031.

V.

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

VI.

This order will terminate on June 19, 2034, 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 McSweeny not participating.

ANALYSIS OF CONSENT ORDER TO AID PUBLIC COMMENT

The Federal Trade Commission ("FTC" or "Commission") has accepted, subject to final approval, a consent agreement applicable to The Receivable Management Services Corporation ("RMS").

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

This matter concerns alleged false or misleading representations that RMS made to consumers concerning its participation in the Safe Harbor privacy framework ("Safe Harbor") agreed upon by the U.S. and the European Union ("EU") ("U.S.-EU Safe Harbor Framework"). It is among several actions the Commission is bringing to enforce the promises that companies make when they certify that they participate in the Safe Harbor Framework. The Safe Harbor framework allows U.S. companies to transfer data outside the EU consistent with European law. To join the Safe Harbor framework, a company

must self-certify to the U.S. Department of Commerce ("Commerce") that it complies with a set of principles and related requirements that have been deemed by the European Commission as providing "adequate" privacy protection. These principles include notice, choice, onward transfer, security, data integrity, access, and enforcement. Commerce maintains a public website, www.export.gov/safeharbor, where it posts the names of companies that have self-certified to the Safe Harbor framework. The listing of companies indicates whether their self-certification is "current" or "not current." Companies are required to re-certify every year in order to retain their status as "current" members of the Safe Harbor framework.

In 2008, Commerce developed the U.S.-EU Safe Harbor Framework Certification Mark ("the mark") to allow companies to highlight for consumers their compliance with the Safe Harbor Framework. Upon request, Commerce provides the mark to those organizations that maintain a "current" self-certification to the U.S.-EU Safe Harbor Framework. Commerce has established certain rules for using the mark, such as requirements related to the mark's placement on a website and the inclusion of a link to www.export.gov/safeharbor.

RMS is a collection agency. According to the Commission's complaint, from at least February 2009 until November 2013, RMS set forth on its website, www.rmsna.com, privacy policies and statements about its practices, including statements related to its participation in the U.S-EU Safe Harbor Framework. In addition, from at least February 2009 until November 2013, RMS displayed the mark on its website.

The Commission's complaint alleges that RMS, through its statements and use of the mark, falsely represented that it was a "current" participant in the Safe Harbor when, in fact, from February 2010 until November 2013, RMS was not a "current" participant in the Safe Harbor. The Commission's complaint alleges that in February 2009, RMS submitted a Safe Harbor self-certification. RMS did not renew its self-certification in February 2010 and Commerce subsequently updated RMS's status to "not current" on its public website.

Analysis to Aid Public Comment

Part I of the proposed order prohibits RMS from making misrepresentations about its membership in any privacy or security program sponsored by the government or any other self-regulatory or standard-setting organization, including, but not limited to, the U.S.-EU Safe Harbor Framework.

Parts II through VI of the proposed order are reporting and compliance provisions. Part II requires RMS to retain documents relating to its compliance with the order for a five-year period. Part III requires dissemination of the order now and in the future to persons with responsibilities relating to the subject matter of the order. Part IV ensures notification to the FTC of changes in corporate status. Part V mandates that RMS submit an initial compliance report to the FTC, and make available to the FTC subsequent reports. Part VI is a provision "sunsetting" the order after twenty (20) years, with certain exceptions.

The purpose of 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

TENNESSEE FOOTBALL, INC.

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

Docket No. C-4473; File No. 142 3032
Complaint, June 19, 2014 – Decision, June 19, 2014

This consent order addresses Tennessee Football, Inc.'s ("the Tennessee Titans") alleged false or misleading representations that the Tennessee Titans made to consumers concerning their participation in the Safe Harbor privacy framework agreed upon by the U.S. and the European Union. The complaint alleges that the Tennessee Titans falsely represented that they were a "current" participant in the Safe Harbor when, in fact, from August 2009 until November 2013, the Tennessee Titans were not a "current" participant in the U.S.-EU Safe Harbor Framework. The consent order prohibits the Tennessee Titans from making misrepresentations about their membership in any privacy or security program sponsored by the government or any other self-regulatory or standard-setting organization, including, but not limited to, the U.S.-EU Safe Harbor Framework.

Participants

For the *Commission*: *Jessica Lyon*, *Katie Race Brin*, and *Katherine White.*

For the *Respondents*: *John Graubert* and *Kurt Wimmer*, *Covington & Burling LLP.*

COMPLAINT

The Federal Trade Commission, having reason to believe that Tennessee Football, Inc. 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. Respondent Tennessee Football, Inc., which owns and operates the Tennessee Titans football team ("Tennessee Titans"), is a Delaware corporation with its principal office or place of business at 460 Great Circle Road, Nashville, TN 37228.

2. Respondent is a professional football team and a member of the National Football League.

3. The acts and practices of respondent as alleged in this complaint have been in or affecting commerce, as "commerce" is defined in Section 4 of the FTC Act.

4. Respondent has set forth on its website, www.titansonline.com, privacy policies and statements about its practices, including statements related to its participation in the Safe Harbor privacy framework agreed upon by the U.S. and the European Union ("U.S.-EU Safe Harbor Framework").

The Framework

5. The U.S.-EU Safe Harbor Framework provides a method for U.S. companies to transfer personal data outside of Europe that is consistent with the requirements of the European Union Directive on Data Protection ("Directive"). Enacted in 1995, the Directive sets forth European Union ("EU") requirements for privacy and the protection of personal data. Among other things, it requires EU Member States to implement legislation that prohibits the transfer of personal data outside the EU, with exceptions, unless the European Commission ("EC") has made a determination that the recipient jurisdiction's laws ensure the protection of such personal data. This determination is referred to commonly as meeting the EU's "adequacy" standard.

6. To satisfy the EU adequacy standard for certain commercial transfers, the U.S. Department of Commerce ("Commerce") and the EC negotiated the U.S.-EU Safe Harbor Framework, which went into effect in 2000. The U.S.-EU Safe Harbor Framework allows U.S. companies to transfer personal data lawfully from the EU. To join the U.S.-EU Safe Harbor Framework, a company must self-certify to Commerce that it complies with seven principles and related requirements that have been deemed to meet the EU's adequacy standard.

7. Companies under the jurisdiction of the U.S. Federal Trade Commission ("FTC"), as well as the U.S. Department of Transportation, are eligible to join the U.S.-EU Safe Harbor

Framework. A company under the FTC's jurisdiction that claims it has self-certified to the Safe Harbor principles, but failed to self-certify to Commerce, may be subject to an enforcement action based on the FTC's deception authority under Section 5 of the FTC Act.

8. Commerce maintains a public website, www.export.gov/safeharbor, where it posts the names of companies that have self-certified to the U.S.-EU Safe Harbor Framework. The listing of companies indicates whether their self-certification is "current" or "not current" and a date when recertification is due. Companies are required to re-certify every year in order to retain their status as "current" members of the U.S.-EU Safe Harbor Framework.

Violations of Section 5 of the FTC Act

9. In August 2005, respondent submitted to Commerce a self-certification of compliance to the U.S.-EU Safe Harbor Framework.

10. In August 2009, respondent did not renew its self-certification to the U.S.-EU Safe Harbor Framework, and Commerce subsequently updated respondent's status to "not current" on its public website.

11. From at least August 2005 until November 2013, respondent disseminated or caused to be disseminated privacy policies and statements on the www.titansonline.com website, including, but not limited to, the following statements:

> The Website complies with [the] EU Safe Harbor framework as set forth by the Department of Commerce regarding the collection, use, and retention of data from the European Union.

12. Through the means described in Paragraph 11, respondent represented, expressly or by implication, that it was a "current" participant in the U.S.-EU Safe Harbor Framework.

13. In truth and in fact, from August 2009 until November 2013, respondent was not a "current" participant in the U.S.-EU Safe Harbor Framework. Therefore, the representation set forth in Paragraph 12 is false and misleading.

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

THEREFORE, the Federal Trade Commission this nineteenth day of June, 2014, has issued this complaint against respondent.

By the Commission, Commissioner McSweeny not participating.

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 Tennessee Football, Inc., which owns and operates the Tennessee Titans football team, is a Delaware corporation with its principal office or place of business at 460 Great Circle Road, Nashville, TN 37228.

2. Respondent neither admits nor denies any of the allegations in the draft complaint, except as specifically stated in this order. Only for purposes of this action, respondent admits the facts necessary to establish jurisdiction.

ORDER

DEFINITIONS

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

A. Unless otherwise specified, "respondent" shall mean Tennessee Football, Inc. and its successors and assigns.

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

I.

IT IS ORDERED that respondent and its officers, agents, representatives, and employees, whether acting directly or indirectly, in connection with the advertising, marketing, promotion, offering for sale, or sale of any product or service, in or affecting commerce, shall not misrepresent in any manner, expressly or by implication, the extent to which respondent is a member of, adheres to, complies with, is certified by, is endorsed by, or otherwise participates in any privacy or security program sponsored by the government or any other self-regulatory or standard-setting organization, including, but not limited to, the U.S.-EU Safe Harbor Framework and the U.S.-Swiss Safe Harbor Framework.

II.

IT IS FURTHER ORDERED that respondent shall maintain and upon request make available to the Federal Trade Commission for inspection and copying, a print or electronic copy of, for a period of five (5) years from the date of preparation or dissemination, whichever is later, all documents relating to compliance with this order, including but not limited to:

A. all advertisements, promotional materials, and any other statements containing any representations covered by this order, with all materials relied upon in disseminating the representation; and

B. any documents, whether prepared by or on behalf of respondent, that call into question respondent's compliance with this order.

III.

IT IS FURTHER ORDERED that respondent shall deliver a copy of this order to all current and future principals, officers, directors, and managers, and to all current and future employees, agents, and representatives having responsibilities relating to the subject matter of this order. 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. Respondent must secure a signed and dated statement acknowledging receipt of this order, within thirty (30) days of delivery, from all persons receiving a copy of the order pursuant to this section.

IV.

IT IS FURTHER ORDERED that respondent shall notify the Commission within fourteen (14) days of 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. 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 of Enforcement, Bureau of Consumer Protection, Federal Trade Commission, 600 Pennsylvania Avenue, N.W., Washington, D.C. 20580. The subject line must begin: *In re Tennessee Football, Inc.*, FTC File No. 1423032.

V.

IT IS FURTHER ORDERED that respondent, 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 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.

VI.

This order will terminate on June 19, 2034, 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 McSweeny not participating.

ANALYSIS OF CONSENT ORDER TO AID PUBLIC COMMENT

The Federal Trade Commission ("FTC" or "Commission") has accepted, subject to final approval, a consent agreement applicable to Tennessee Football, Inc. ("the Tennessee Titans").

The proposed consent order has been placed on the public record for thirty (30) days for receipt of comments by interested persons. Comments received during this period will become part

of the public record. After thirty (30) days, the Commission will again review the agreement and the comments received, and will decide whether it should withdraw from the agreement and take appropriate action or make final the agreement's proposed order.

This matter concerns alleged false or misleading representations that the Tennessee Titans made to consumers concerning their participation in the Safe Harbor privacy framework ("Safe Harbor") agreed upon by the U.S. and the European Union ("EU") ("U.S.-EU Safe Harbor Framework"). It is among several actions the Commission is bringing to enforce the promises that companies make when they certify that they participate in the Safe Harbor Framework. The Safe Harbor framework allows U.S. companies to transfer data outside the EU consistent with European law. To join the Safe Harbor framework, a company must self-certify to the U.S. Department of Commerce ("Commerce") that it complies with a set of principles and related requirements that have been deemed by the European Commission as providing "adequate" privacy protection. Commerce maintains a public website, www.export.gov/safeharbor, where it posts the names of companies that have self-certified to the Safe Harbor framework. The listing of companies indicates whether their self-certification is "current" or "not current." Companies are required to re-certify every year in order to retain their status as "current" members of the Safe Harbor framework.

The Tennessee Titans are a professional football team and a member of the National Football League. According to the Commission's complaint, from August 2005 until November 2013, the Tennessee Titans set forth on their website, www.titansonline.com, privacy policies and statements about their practices, including statements related to their participation in the U.S-EU Safe Harbor Framework.

The Commission's complaint alleges that the Tennessee Titans falsely represented that they were a "current" participant in the Safe Harbor when, in fact, from August 2009 until November 2013, the Tennessee Titans were not a "current" participant in the U.S.-EU Safe Harbor Framework. The Commission's complaint alleges that in August 2005, the Tennessee Titans submitted a

Safe Harbor self-certification. The Tennessee Titans did not renew the self-certification in August 2009, and Commerce subsequently updated the Tennessee Titans' status to "not current" on its public website.

Part I of the proposed order prohibits the Tennessee Titans from making misrepresentations about their membership in any privacy or security program sponsored by the government or any other self-regulatory or standard-setting organization, including, but not limited to, the U.S.-EU Safe Harbor Framework.

Parts II through VI of the proposed order are reporting and compliance provisions. Part II requires the Tennessee Titans to retain documents relating to 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 the Tennessee Titans submit an initial compliance report to the FTC, and make available to the FTC subsequent reports. Part VI is a provision "sunsetting" the order after twenty (20) years, with certain exceptions.

The purpose of 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

IN THE MATTER OF

PINNACLE ENTERTAINMENT, INC.
AND
AMERISTAR CASINOS, INC.

Docket No. 9355. Order, January 6, 2014

Letter approving application to divest the Lumiere Assets to Tropicana Entertainment, Inc.

LETTER ORDER APPROVING DIVESTITURE OF CERTAIN ASSETS

Jonathan S. Gowdy, Esquire
Morrison & Foerster LLP

Dear Mr. Gowdy:

This letter responds to the Application for Approval of Divestiture of the Lumiere Assets ("Lumiere Application") filed by Pinnacle Entertainment, Inc. on September 13, 2013. The Lumiere Application requests that the Federal Trade Commission approve, pursuant to the Order in this matter, Pinnacle's proposed divestiture of the Lumiere Assets to Tropicana Entertainment, Inc. The Application was placed on the public record for comments until November 12, 2013, and no comments were received.

After consideration of the proposed divestiture as set forth in Pinnacle's Lumiere 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 Pinnacle's Lumiere Application and has assumed them to be accurate and complete.

By direction of the Commission.

Interlocutory Orders, Etc.

IN THE MATTER OF

LABMD, INC.

Docket No. 9357. Order, January 16, 2014

Opinion and Order denying respondent's motion to dismiss the Complaint in this adjudicatory proceeding, arguing that the Commission has no authority to address private companies' data security practices as "unfair . . . acts or practices" under Section 5(a)(1) of the Federal Trade Commission Act.

ORDER DENYING RESPONDENT LABMD'S MOTION TO DISMISS

By Commissioner Joshua D. Wright, for a unanimous Commission:[1]

This case presents fundamental questions about the authority of the Federal Trade Commission ("FTC" or "the Commission") to protect consumers from harmful business practices in the increasingly important field of data security. In our interconnected and data-driven economy, businesses are collecting more personal information about their customers and other individuals than ever before. Companies store this information in digital form on their computer systems and networks, and often transact business by transmitting and receiving such data over the Internet and other public networks. This creates a fertile environment for hackers and others to exploit computer system vulnerabilities, covertly obtain access to consumers' financial, medical, and other sensitive information, and potentially misuse it in ways that can inflict serious harms on consumers. Businesses that store, transmit, and use consumer information can, however, implement safeguards to reduce the likelihood of data breaches and help prevent sensitive consumer data from falling into the wrong hands.

Respondent LabMD, Inc. ("LabMD") has moved to dismiss the Complaint in this adjudicatory proceeding, arguing that the Commission has no authority to address private companies' data security practices as "unfair . . . acts or practices" under Section

[1] Commissioner Brill did not take part in the consideration or decision herein.

5(a)(1) of the Federal Trade Commission Act ("FTC Act" or "the Act"), 15 U.S.C. § 45(a)(1). This view, if accepted, would greatly restrict the Commission's ability to protect consumers from unwanted privacy intrusions, fraudulent misuse of their personal information, or even identity theft that may result from businesses' failure to establish and maintain reasonable and appropriate data security measures. The Commission would be unable to hold a business accountable for its conduct, even if its data security program is so inadequate that it "causes or is likely to cause substantial injury to consumers [that] is not reasonably avoidable by consumers themselves and [such injury is] not outweighed by countervailing benefits to consumers or competition." 15 U.S.C. § 45(n).

LabMD's Motion to Dismiss Complaint with Prejudice and to Stay Administrative Proceedings ("Motion to Dismiss" or "Motion"), filed November 12, 2013, calls on the Commission to decide whether the FTC Act's prohibition of "unfair . . . acts or practices" applies to a company's failure to implement reasonable and appropriate data security measures. We conclude that it does. We also reject LabMD's contention that, by enacting the Health Insurance Portability and Accountability Act ("HIPAA") and other statutes touching on data security, Congress has implicitly stripped the Commission of authority to enforce Section 5 of the FTC Act in the field of data security, despite the absence of any express statutory language to that effect. Nor can we accept the premise underlying LabMD's "due process" arguments – that, in effect, companies are free to violate the FTC Act's prohibition of "unfair . . . acts or practices" without fear of enforcement actions by the Commission, unless the Commission has first adopted regulations. Accordingly, we deny LabMD's Motion to Dismiss.

PROCEDURAL BACKGROUND

On August 28, 2013, the Commission issued an administrative complaint ("Complaint") against LabMD, a Georgia-based company in the business of conducting clinical laboratory tests on specimen samples from consumers and reporting test results to consumers' health care providers. The Complaint alleges that LabMD engaged in "practices that, taken together, failed to provide reasonable and appropriate security for personal

information on its computer networks," *see* Complaint, ¶ 10; that these practices caused harm to consumers, including exposure to identity theft and disclosure of sensitive, private medical information, *id.*, ¶¶ 12, 17-21; and, consequently, that LabMD engaged in "unfair . . . acts or practices" in violation of the FTC Act. *Id*., ¶¶ 22-23. LabMD submitted its Answer and Affirmative Defenses to the Administrative Complaint ("Answer") on September 17, 2013.

LabMD filed its Motion to Dismiss on November 12, 2013.[2] On November 22, 2013, Complaint Counsel filed its Response in Opposition to Respondent's Motion to Dismiss Complaint with Prejudice ("CC Opp."). LabMD filed its Reply to Complaint Counsel's Response in Opposition to Respondent's Motion to Dismiss ("Reply") on December 2, 2013. Factual discovery is now underway and is scheduled to close on March 5, 2014. The evidentiary hearing before the Administrative Law Judge is scheduled to begin on May 20, 2014.

STANDARD OF REVIEW

We review LabMD's Motion to Dismiss using the standards a reviewing court would apply in assessing a motion to dismiss for failure to state a claim.[3] *See* Fed. R. Civ. P. 12(b)(6); *see also* Motion at 8; CC Opp. at 3; *S.C. State Bd. of Dentistry*, 138 F.T.C. 230, 232-33 (2004); *Union Oil Co.*, 138 F.T.C. 1, 16 (2004). Under this framework, "[o]ur task is to determine whether the

[2] The Commission issued an Order on December 13, 2013, denying both LabMD's request for a stay of the administrative proceedings pending resolution of its Motion to Dismiss (*see* Motion at 29-30) and a separate Motion for Stay Pending Judicial Review that LabMD filed on November 26, 2013.

[3] The Commission's administrative adjudicatory proceedings are governed by the FTC Act and the Commission's Rules of Practice, rather than the rules and standards that govern federal courts. Nonetheless, "since many adjudicative rules are derived from the Federal Rules of Civil Procedure, the latter may be consulted for guidance and interpretation of Commission rules where no other authority exists." FTC Op. Manual § 10.7. Here, the most relevant provision in the Commission's Rules of Practice (16 C.F.R. § 3.11(b)(2)) is very similar to the analogous court rule (Fed. R. Civ. P. 8(a)(2)). Thus, in this instance, we exercise our discretion to apply the pleading standards summarized above.

[Complaint] contains sufficient factual matter . . . to state a claim to relief that is plausible on its face." *Resnick v. AvMed, Inc.*, 693 F.3d 1317, 1326 (11th Cir. 2010) (citation omitted). For purposes of this analysis, we "accept[] the allegations in the complaint as true and construe them in the light most favorable to [Complaint Counsel]." *Am. Dental Ass'n v. Cigna Corp.*, 605 F.3d 1283, 1288 (11th Cir. 2010).

ANALYSIS

I. THE COMMISSION HAS AUTHORITY TO ENFORCE THE FTC ACT BY ADJUDICATING WHETHER THE DATA SECURITY PRACTICES ALLEGED IN THE COMPLAINT ARE "UNFAIR."

LabMD contends that the Commission lacks statutory authority to regulate or bring enforcement action with respect to the data security practices alleged. Motion at 9-21. We disagree. As discussed below, the Commission's authority to protect consumers from unfair practices relating to deficient data security measures is well-supported by the FTC Act, is fully consistent with other statutes, and is confirmed by extensive case law.[4]

A. Congress Intended to Delegate Broad Authority to the Commission to Proscribe Activities that Qualify as "Unfair Acts or Practices."

LabMD's broadest argument is that Section 5 does not authorize the FTC to address *any* data security practices. *See*,

[4] At some points in the Motion, LabMD frames its arguments as challenges to the scope of the Commission's "jurisdiction" (*e.g.*, at 1, 2, 8, 16, 18, 19), while elsewhere it acknowledges the Commission's "Section 5 'unfairness' authority" but asserts that we cannot apply such authority to LabMD's data security practices. *Id.* at 18. As the Supreme Court recently clarified, "there is *no difference*, insofar as the validity of agency action is concerned, between an agency's exceeding the scope of its authority (its 'jurisdiction') and its exceeding authorized application of authority that it unquestionably has." *City of Arlington v. FCC*, 133 S. Ct. 1863, 1870 (2013). This is because, "for agencies charged with administering congressional statutes[,] [b]oth their power to act and how they are to act is authoritatively prescribed by Congress." *Id.* at 1869; *see* Motion at 9.

e.g., Motion at 10 ("even if Section 5 does authorize the FTC to regulate data-security, which it does not"); *id.* at 17 (asserting "the Commission's lack of power to regulate data security through its general Section 5 'unfairness' authority'"). Motion at 16. LabMD points out that "there is nothing in Section 5 explicitly authorizing the FTC to directly regulate . . . data-security practices." *Id.* at 20. Ignoring the facially broad reach of Section 5's prohibition of "unfair . . . acts or practices in or affecting commerce," LabMD urges the Commission to conclude from the absence of explicit "data security" authority in the FTC Act that the Commission has no such authority. *See, e.g.*, Motion at 14 ("When Congress has wanted the FTC to have data security authority, it has said so"); *id.* ("However, Congress has never given the Commission such authority and has, in fact, repeatedly made it clear that the FTC's power is very limited in application and very narrow in scope."); *id.* at 16 ("Section 5 does not give the FTC the authority to regulate data-security practices as 'unfair' acts or practices"); *id.* at 21 ("Section 5 does not contain a clear and manifest statement from Congress to authorize the Commission's [authority over] data security"). The statutory text, legislative history, and nearly a century of case law refute LabMD's argument.

As the courts have long recognized, "[n]either the language nor the history of the [FTC] [A]ct suggests that Congress intended to confine the forbidden methods to fixed and unyielding categories." *FTC v. R.F. Keppel & Bro., Inc.*, 291 U.S. 304, 310 (1934). Rather, the legislative history of the FTC Act confirms that Congress decided to delegate broad authority "to the [C]ommission to determine what practices were unfair," rather than "enumerating the particular practices to which [the term 'unfair'] was intended to apply. . . . There is no limit to human inventiveness in this field. Even if all known unfair practices were specifically defined and prohibited, it would be at once necessary to begin over again." *FTC v. Sperry & Hutchinson Co.*, 405 U.S. 233, 240 (1972) (quoting S. Rep. No. 597, 63d Cong., 2d Sess., 13 (1914), and H.R. Conf. Rep. No.1142, 63d Cong., 2d Sess., 19 (1914)). *See also Atl. Refining Co. v. FTC*, 381 U.S. 357, 367 (1965) (Congress "intentionally left development of the term 'unfair' to the Commission rather than attempting to define 'the many and variable unfair practices which prevail in

commerce.'") (quoting S. Rep. No. 592, 63d Cong., 2d Sess., 13 (1914)).

This legislative history pertains to Congress' enactment of the prohibition of "unfair methods of competition" in 1914. Similar considerations motivated Congress's reuse of the same broad term ("unfair") when it amended the statute in 1938 to proscribe "unfair and deceptive acts and practices" as well as "unfair methods of competition." The 1938 amendment perpetuated and expanded the broad congressional delegation of authority to the Commission by "overturn[ing] . . . attempts [in some court decisions] to narrowly circumscribe the FTC's authority." *Am. Fin. Servs. Ass'n v. FTC*, 767 F.2d 957, 966 (D.C. Cir. 1985). Congress thus clarified that "the Commission can prevent such acts or practices which injuriously affect the general public as well as those which are unfair to competitors." *Id.* (quoting H.R. Rep. No. 1613, 75th Cong., 1st Sess. 3 (1937)).

As LabMD points out (*see* Motion at 18), Congress enacted legislation in 1994 that provided a sharper focus for the application of the Commission's "unfairness" authority, by amending the FTC Act to incorporate three specific criteria governing the application of "unfair . . . acts or practices" in adjudicatory and rulemaking proceedings. Specifically, the new Section 5(n) of the Act provides that, in enforcement actions or rulemaking proceedings, the Commission has authority to determine that an act or practice is "unfair" if that act or practice "[1] causes or is likely to cause substantial injury to consumers which is [2] not reasonably avoidable by consumers themselves and [3] not outweighed by countervailing benefits to consumers or competition." 15 U.S.C. 45(n). These criteria, derived from the Commission's pre-existing *Policy Statement on Unfairness*, codified the analytical framework that the Commission already had been applying for the preceding decade in its efforts to combat "unfair . . . acts or practices." *See* Commission Statement of Policy on the Scope of Consumer Unfairness Jurisdiction (Dec. 17, 1980) ("*Policy Statement on Unfairness*"), *reprinted in Int'l Harvester Co.*, 104 F.T.C. 949, 1070, 1073 (1984). Section 5(n)'s specific criteria provide greater certainty for businesses by setting forth the factors to be used to evaluate whether their acts or practices are "unfair." That fact alone refutes LabMD's

contention that the "general statutory terms" in Section 5 are too "vague" to be applied to the conduct alleged in the Complaint. *See* Motion at 19.

At the same time, Congress, in enacting Section 5(n), confirmed its intent to allow the Commission to continue to ascertain, on a case-by-case basis, which specific practices should be condemned as "unfair." Thus, to this day, "Congress has not at any time withdrawn the broad discretionary authority originally granted the Commission in 1914 to define unfair practices on a flexible, incremental basis." *Am. Fin. Servs. Ass'n*, 767 F.2d at 966.

The Commission and the federal courts have been applying these three "unfairness" factors for decades and, on that basis, have found a wide range of acts or practices that satisfy the applicable criteria to be "unfair," even though – like the data security practices alleged in this case – "there is nothing in Section 5 explicitly authorizing the FTC to directly regulate" such practices (*see* Motion at 20). *See, e.g., FTC v. Neovi, Inc.*, 604 F.3d 1150, 1155 (9th Cir. 2010) (creating and delivering unverified checks that enabled fraudsters to take unauthorized withdrawals from consumers' bank accounts); *FTC v. Accusearch, Inc.*, 570 F.3d 1187, 1193 (10th Cir. 2009) (covert retrieval and sale of consumers' telephone billing information); *Orkin Exterminating Co. v. FTC*, 849 F.2d 1354, 1364 (11th Cir.1988) (unilateral breach of standardized service contracts); *Am. Fin. Servs. Ass'n,* 767 F.2d at 971 (oppressive litigation conduct to repossess household goods sold on credit).

LabMD cites *American Bar Association v. FTC*, 430 F.3d 457 (D.C. Cir. 2005), for the proposition that the Commission is overstepping the bounds of its authority to interpret the FTC Act. *See* Motion at 20. But that case is inapposite. *ABA* concerned the agency's determination, in construing the Gramm-Leach-Bliley Act ("GLB Act"), that attorneys fell within that statute's definition of "financial institutions" – a defined term that, in turn, incorporated by reference a set of lengthy and detailed definitions imported from other statutes and other agencies' regulations. The court found it "difficult to believe" that, in enacting a statutory "scheme of the length, detail, and intricacy of the one" under

review, Congress could have left sufficient remaining ambiguity, "hidden beneath an incredibly deep mound of specificity," to support imposing GLB Act requirements upon "a profession never before regulated by federal [financial service] regulators, and never mentioned in the statute." 430 F.3d at 469. By contrast, the statutory text at issue in this case – "unfair . . . acts or practices" – conveys a far broader scope of interpretive flexibility, particularly given that this term is at the core of the Commission's own organic statute, the FTC Act.

LabMD similarly invokes *FDA v. Brown & Williamson Tobacco Corp.*, 529 U.S. 120, 133 (2000), for the proposition that "simple 'common sense as to the manner in which Congress is likely to delegate a policy decision of such economic and political magnitude' . . . reinforces the conclusion that the FTC lacks the authority to regulate the acts or practices alleged in the Complaint." Motion at 19 (quoting *Brown & Williamson*, 529 U.S. at 133). But *Brown & Williamson* is inapposite as well. In that case, the Court found that the Food and Drug Administration's attempts to regulate tobacco products conflicted directly with concrete manifestations of congressional intent. In particular, the Court concluded that, if the FDA had the authority it claimed, its own findings would have compelled it to ban tobacco products outright, whereas various tobacco-related statutes made clear that Congress wished *not* to ban such products. *See* 529 U.S. at 137-39. Here, of course, LabMD can cite no similar congressional intent to preserve inadequate data security practices that unreasonably injure consumers.

Similarly, the Court found that "Congress' specific intent when it enacted the FDCA" (Food, Drug & Cosmetics Act) in 1938 was to deny the FDA authority to regulate tobacco products. 529 U.S. at 146. The Court reasoned that, "*given the economic and political significance of the tobacco industry at the time*, it is extremely unlikely that Congress could have intended to place tobacco within the ambit of the FDCA absent any discussion of the matter." *Id.* at 147 (emphasis added).[5] By contrast, when

[5] As the D.C. Circuit has recently recognized, these considerations are essential to the holding of *Brown & Williamson*, and, in their absence, that case does not justify restricting agency action under a broad statutory mandate. *See Verizon v. FCC*, No. 11-1355, at 23-25 (D.C. Cir., Jan. 14, 2014) (slip op.).

enacting the FTC Act in 1914 and amending it in 1938, Congress had no way of anticipating the "economic and political significance" of data security practices in today's online environment. Accordingly, the fact that "there is no evidence in the text of the [FTC Act] or its legislative history that Congress in 1938 even considered the applicability of the Act" to data security practices is completely irrelevant. Congress could not possibly have had any "specific intent" to deny the FTC authority over data security practices. It did, however, intend to delegate broad authority to the FTC to address emerging business practices – including those that were unforeseeable when the statute was enacted. That is the only congressional intent that matters here.

B. The Commission Has Consistently Affirmed Its Authority under the FTC Act to Take Enforcement Action against Unreasonable Data Security Activities that Qualify as Unfair Acts and Practices

LabMD similarly attempts to draw support from the *Brown & Williamson* Court's determination that the FDA's 1996 "assertion of authority to regulate tobacco products" contradicted the agency's previous "consistent and repeated statements [over the preceding 73 years] that it lacked authority . . . to regulate tobacco absent claims of therapeutic benefit by the manufacturer," and the Court's conclusion that congressional enactments "against the backdrop" of the FDA's historic disavowal of authority confirmed that Congress did not intend to authorize such regulation. 529 U.S. at 132, 144-46. LabMD argues, by analogy, that "the Commission [previously] did not claim Section 5 'unfairness' authority to regulate patient-information (or any other) data-security practices," but "recently reversed course without explanation," thus purportedly defying congressional intent. Motion at 16, 18.

That analogy, too, is without merit. Unlike the FDA, the Commission has never disavowed authority over online privacy or data security matters. To the contrary, "[t]he Commission has been involved in addressing online privacy issues for almost as long as there has been an online marketplace," and has repeatedly

and consistently affirmed its authority to challenge unreasonable data security measures as "unfair . . . acts or practices" in violation of Section 5. *See* FTC Report to Congress, *Privacy Online*, at 2 (June 1998) ("*1998 Online Privacy Report*").[6] LabMD cites out-of-context snippets from the Commission's 1998 and 2000 reports to Congress for the unfounded proposition that, at that time, the Commission believed its authority over data security matters was "limited to ensuring that Web sites follow their stated information practices."[7] LabMD's characterization does not withstand scrutiny. Neither the text it quotes nor the reports as a whole can plausibly be read as disavowing the Commission's authority to take enforcement action against data security practices that violate Section 5's prohibition of "unfair . . . acts or practices," as defined in Section 5(n). Indeed, the Commission clearly stated that certain conduct relating to online data security is "likely to be an unfair practice," and, in both reports, confirmed its view that the FTC Act "provides a basis for government enforcement" against information practices [that] may be inherently . . . unfair, regardless of whether the entity has publicly adopted any fair information practice policies."[8] In context, the sentences from the 1998 and 2000 reports relied upon

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[6] *See* http://www.ftc.gov/sites/default/files/documents/reports/privacy-online-report-congress/priv-23a.pdf.

[7] Motion at 16 n.12 (quoting *1998 Online Privacy Report* at 41) ("As a general matter, the Commission lacks authority to require firms to adopt information practice policies."); Reply at 7-8 (quoting FTC Report to Congress, *Privacy Online: Fair Information Practices in the Electronic Age* (May 2000) ("*2000 Online Privacy Report*") (http://www.ftc.gov/sites/default/files/documents/reports/privacy-online-fair-information-practices-electronic-marketplace-federal-trade-commission-report/privacy2000.pdf) ("As a general matter, . . . the Commission lacks authority to require firms to adopt information practice policies or to abide by the fair information practice principles on their Web sites").

[8] *1998 Online Privacy Report* at 12-13, 40-41. *See also 2000 Online Privacy Report* at 33-34 ("The Commission's authority over the collection and dissemination of personal data collected online stems from Section 5[,]" which "prohibits unfair and deceptive practices in and affecting commerce," and thus "authorizes the Commission to seek injunctive and other equitable relief, including redress, for violations of the Act, and provides a basis for government enforcement of certain [norms concerning] fair information practices").

by LabMD simply recognize that the Commission's existing authority may not be sufficient to effectively protect consumers with regard to *all* data privacy issues of potential concern (such as aspects of children's online privacy) and that expanded rulemaking authority and enforcement remedies could enhance the Commission's ability to meaningfully address a broader range of such concerns.[9] The same error infects LabMD's mischaracterization of testimony that Commissioners and high-level Commission staff members delivered to various congressional committees and subcommittees.[10]

Since the late 1990s, the Commission has repeatedly affirmed its authority to take action against unreasonable data security measures as "unfair . . . acts or practices" in violation of Section 5, in reports, testimony to Congress, and other publicly-released documents.[11] The Commission has also confirmed this view by

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[9] *See 1998 Online Privacy Report* at 42 (recognizing that "Section 5 may only have application to some but not all practices that raise concern about the online collection and use of information from children," and recommending legislation authorizing the Commission to promulgate "standards of practice governing the online collection and use of information from children."); *2000 Online Privacy Report* at 36-37 (seeking legislation granting "authority to promulgate more detailed standards pursuant to the Administrative Procedure Act," including "rules or regulations [that] could provide further guidance to Web sites by defining fair information practices with greater specificity[,]"such as "what constitutes 'reasonable access' and 'adequate security'"). *See also* Motion at 17 n.13 (quoting same).

[10] *See* Motion at 16-17, nn.12, 13, 14 (citing testimony by Chairman Robert Pitofsky in 1998, then-Commissioner Edith Ramirez in 2011, Chairman Jonathan Leibowitz in 2012, and Bureau Directors Eileen Harrington and David Vladeck in 2009 and 2011, respectively). In such testimony, the FTC representatives conveyed the Commission's support for draft data security legislation that would expand the FTC's *existing* authority by providing it with rulemaking authority under the Administrative Procedure Act and civil penalty authority. *See, e.g.*, Prepared Statement of the FTC, *Data Security*, presented by Commissioner Edith Ramirez to House Comm. on Energy & Commerce, Subcomm. on Commerce, Mfg., and Trade, at 11-12 (June 5, 2011) (http://www.ftc.gov/sites/default/files/documents/public_statements/prepared-statement-federal-trade-commission-data-security/110615datasecurityhouse.pdf).

[11] *See, e.g.*, Prepared Statement of the FTC, *Identity Theft: Innovative Solutions for an Evolving Problem*, presented by Bureau Dir. Lydia B. Parnes to Senate Comm. on the Judiciary, Subcomm. on Terrorism, Tech., and

bringing administrative adjudicatory proceedings and cases in federal court challenging practices that compromised the security of consumers' data and resulted in improper disclosures of personal information collected from consumers online. For example, on May 1, 2006, the Commission filed a complaint in the U.S. District Court for the District of Wyoming, charging that defendant Accusearch, Inc. and its principal obtained consumers' private information (specifically, data concerning their telecommunications usage) and caused such data to be disclosed to unauthorized third parties without consumers' knowledge or consent. *FTC v. Accusearch, Inc.*, Case No. 2:06-cv-0105, Complaint, at ¶¶ 9-13. The Commission alleged that this conduct was "an unfair practice in violation of Section 5(a) of the FTC Act," *id.*, ¶ 14, because it "caused or [was] likely to cause substantial injury to consumers that [was] not reasonably avoidable by consumers and [was] not outweighed by countervailing benefits to consumers or competition." *Id.*, ¶ 13. The district court agreed, granting summary judgment to the Commission in 2007, and the Tenth Circuit affirmed in 2009. *See Accusearch*, *supra*, 570 F.3d 1187. Since then, the Commission has taken the same position in dozens of other enforcement proceedings, including administrative adjudications,[12] as well as

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Homeland Security, at 5-6 (Mar. 21, 2007) (http://www.ftc.gov/sites/default/files/documents/public_statements/prepared-statement-federal-trade-commission-identity-theft-innovative-solutions-evolving-problem/p065409identitytheftsenate03212007.pdf); FTC Staff Report, *Protecting Consumers in the Next Tech-ade*, at 29-30 (Spring 2008) (http://www.ftc.gov/sites/default/files/documents/reports/protecting-consumers-next-tech-ade-report-staff-federal-trade-commission/p064101tech.pdf); FTC Report, *Security in Numbers, SSNs and ID Theft*, at 7 (Dec. 2008) (http://www.ftc.gov/os/2008/12/P075414ssnreport.pdf); Prepared Statement of the FTC, *Protecting Social Security Numbers From Identity Theft*, presented by Assoc. Bureau Dir. Maneesha Mithal to House Comm. on Ways and Means, Subcomm. on Soc. Security, at 8 (April 13, 2011) (http://ftc.gov/os/testimony/110411ssn-idtheft.pdf); FTC Report, *Protecting Consumer Privacy in an Era of Rapid Change*, at 14, 73 (March 26, 2012) (http://www.ftc.gov/reports/protecting-consumer-privacy-era-rapid-change-recommendations-businesses-policymakers). *See also* note 13, *infra*.

[12] *See BJ's Wholesale Club, Inc.*, 140 F.T.C. 465, 470 (2005); *DSW, Inc.*, 141 F.T.C. 117, 122 (2006); *CardSystems Solutions, Inc.*, Docket No. C-4168, 2006 WL 2709787, *3 (Sept. 5, 2006); *Reed Elsevier, Inc.*, Docket No. C-4226, 2008 WL 3150420, *4 (July 29, 2008); *TJX Cos., Inc.*, Docket No. C-4227, 2008 WL 3150421, *3 (Sept. 29, 2008). In these and similar cases, the Commission

complaints filed in federal courts, *see* CC Opp. at 12-13 n.9 (citing cases). In these cases, the Commission challenged allegedly unreasonable data security measures (or other practices that enabled unauthorized third parties to harm consumers by obtaining access to their confidential personal data) as "unfair acts or practices" in violation of Section 5. And in each case, it clearly reaffirmed its position that it possessed jurisdiction over the allegedly "unfair" data security practices under Section 5.

The fact that the Commission initially focused its enforcement efforts primarily on "deceptive" data security practices, and began pursuing "unfair" practices in 2005, does not mean that the Commission lacked jurisdiction over "unfair" practices before then. As then-Commissioner Orson Swindle testified to a House subcommittee in 2004, "To date, the Commission's security cases have been based on its authority to prevent deceptive practices," but it "also has authority to challenge practices as unfair if they cause consumers substantial injury that is neither reasonably avoidable nor offset by countervailing benefits. The Commission has used this authority in appropriate cases to challenge a variety of injurious practices, including unauthorized charges in connection with 'phishing.'"[13] LabMD cites Commissioner Swindle's reference to the Commission's "deceptiveness" authority over data security practices, *see* Motion at 16 n.12, but neglects to mention his reference to the Commission's "unfairness" authority over such practices.

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issues its final Decisions & Orders only after placing the relevant proposed consent orders on the public record, issuing Notices in the Federal Register that summarize and explain the provisions of the proposed orders and invite public comment, and considering comments filed by interested members of the public. *See* 16 C.F.R. § 2.34(c) & (e).

[13] Prepared Statement of the FTC, *Protecting Information Security and Preventing Identity Theft*, presented by Commissioner Orson Swindle to House Comm. on Gov't Reform, Subcomm. on Tech., Info. Policy, Intergovernmental Relations, and the Census, at 7, 14 n.24 (Sept. 22, 2004) (http://www.ftc.gov/sites/default/files/documents/public_statements/prepared-statement-federal-trade-commission-protecting-information-security-and-preventing-identity/040922infosecidthefttest.pdf) ("*Comm'r Swindle's 2004 Information Security Testimony*").

LabMD also misinterprets the Commission's expressions of support for legislation relating to data security as requests for authority to fill regulatory "gaps" that it could not fill without such legislation. *Id.* at 17 & nn.13, 14. LabMD refers to three data security-related laws that the Commission supported, and that Congress ultimately enacted – *i.e.*, the GLB Act,[14] the Children's Online Privacy Protection Act ("COPPA"),[15] and the Fair and Accurate Credit Transactions Act of 2003 ("FACTA").[16] But these laws *recognized* the Commission's *existing* enforcement authority, *expanded* that authority in particular respects, and affirmatively *directed* the Commission to take particular actions to protect consumer interests in specified contexts. For example, in COPPA, Congress authorized the Commission to sue for civil penalties in addition to the equitable monetary relief available under existing law, and authorized and directed the Commission to promulgate rules to protect children's online privacy pursuant to the streamlined procedures of the Administrative Procedure Act ("APA"), rather than using the more time-consuming procedures mandated by Section 18 of the FTC Act, 15 U.S.C. § 57a. Similarly, in both FACTA and the GLB Act, Congress directed the Commission to adopt rules addressing specified topics using streamlined APA procedures; and in FACTA, Congress also expanded the range of remedies available in Commission enforcement actions.

Finally, even if they were otherwise plausible, LabMD's arguments about the intended meaning of the past statements of the Commission or its members or staff would still be immaterial to the ultimate question of the Commission's statutory authority. "An agency's initial interpretation of a statute that it is charged with administering is not 'carved in stone,'" and agencies "must be given ample latitude to 'adapt their rules and policies to the demands of changing circumstances." *Brown & Williamson*, 529 U.S. at 156-57 (quoting *Chevron U.S.A. Inc. v. Natural Resources*

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[14] Pub. L. 106-102 (1999) (codified in pertinent part at 15 U.S.C. § 6804(a)(1)).

[15] Pub. L. 105-277 (1998) (codified in pertinent part at 15 U.S.C. §§ 6502(b), 6505(d)).

[16] Pub. L. 108-159 (2003) (codified in pertinent part at 15 U.S.C. § 1681s(a)).

Defense Council, Inc., 467 U.S. 837, 863 (1984); *Smiley v. Citibank (S.D.)*, 517 U.S. 735, 742 (1996); *Motor Vehicle Mfrs. Ass'n v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 42 (1983); and *Permian Basin Area Rate Cases*, 390 U.S. 747, 784 (1968)); *see also Verizon v. FCC*, *supra* note 5, at 19-20. Presented with the concrete circumstances of this case, the Commission concludes that it can and should address whether or not LabMD's data security procedures constitute "unfair . . . acts or practices" within the meaning of the FTC Act. To conclude otherwise would disregard Congress's instruction to the Commission to protect consumers from harmful practices in evolving technological and marketplace environments.

C. HIPAA and Other Statutes Do Not Shield LabMD from the Obligation to Refrain from Committing Unfair Data Security Practices that Violate the FTC Act.

Contrary to LabMD's contention, Congress has never enacted any legislation that, expressly or by implication, forecloses the Commission from challenging data security measures that it has reason to believe are "unfair . . . acts or practices." LabMD relies on numerous "targeted statutes" that Congress has enacted in recent years "specifically delegating" to the Commission or to other agencies "statutory authority over data-security" in certain narrower fields. Motion at 15. But LabMD has not identified a single provision in any of these statutes that expressly withdraws any authority from the Commission. Thus, its argument that these more specific statutes implicitly repeal the FTC's preexisting authority is unpersuasive. "The cardinal rule is that repeals by implication are not favored. Where there are two acts upon the same subject, effect should be given to both if possible." *Posadas v. Nat'l City Bank of N.Y.*, 296 U.S. 497, 503 (1936). Thus, one cannot conclude that Congress implicitly repealed or narrowed the scope of an existing statute (*i.e.*, Section 5) by subsequently enacting a new law unless "the intention of the legislature to repeal [is] clear and manifest; otherwise, at least as a general thing, the later act is to be construed as a continuation of, and not a substitute for, the first act . . . ." *Id.*; *see also Branch v. Smith*, 538 U.S. 254, 273 (2003) ("An implied repeal will only be found where provisions in two statutes are in 'irreconcilable conflict,' or

where the [later] Act covers the whole subject of the earlier one and 'is clearly intended as a substitute.'"); *Morton v. Moncari*, 417 U.S. 535, 551 (1974) ("when two statutes are capable of co-existence, it is the duty of the courts, absent a clearly expressed congressional intention to the contrary, to regard each as effective").

Nothing in HIPAA, HITECH,[17] or any of the other statutes LabMD cites reflects a "clear and manifest" intent of Congress to restrict the Commission's authority over allegedly "unfair" data security practices such as those at issue in this case. LabMD identifies no provision that creates a "clear repugnancy" with the FTC Act, nor any requirement in HIPAA or HITECH that is "clearly incompatible" with LabMD's obligations under Section 5. *See* Motion at 13. To the contrary, the patient-information protection requirements of HIPAA are largely consistent with the data security duties that the Commission has enforced pursuant to the FTC Act. Indeed, the FTC and the Department of Health and Human Services ("HHS") have worked together "to coordinate enforcement actions for violations that implicate both HIPAA and the FTC Act." HHS, *Modifications to the HIPAA Privacy, Security, Enforcement, and Breach Notification Rules*, Final Rule, 78 Fed. Reg. 5566, 5579 (Jan. 25, 2013). And the two agencies have obtained favorable results by jointly investigating the data security practices of companies that may have violated each of these statutes.[18]

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[17] *See* Health Insurance Portability and Accountability Act of 1996 ("HIPAA"), Pub. L. 104-191 (1996) (codified in pertinent part at 42 U.S.C. §§ 1320d *et seq.*); American Recovery and Reinvestment Act of 2009, Pub. L. 111-5, Div. A, Title XIII, and Div. B, Title IV ("Health Information Technology for Economic and Clinical Health Act") ("HITECH") (codified at 42 U.S.C. §§ 1320d-5 *et seq.*).

[18] For example, in 2009, CVS Caremark simultaneously settled HHS charges of HIPAA violations and FTC charges of FTC Act violations, stemming from the two agencies' coordinated investigations of the company's failure to securely dispose of documents containing consumers' sensitive financial and medical information. *See* FTC Press Release: *CVS Caremark Settles FTC Charges: Failed to Protect Medical and Financial Privacy of Customers and Employees; CVS Pharmacy Also Pays $2.25 Million to Settle Allegations of HIPAA Violations* (Feb. 18, 2009) (http://www.ftc.gov/news-events/press-releases/2009/02/cvs-caremark-settles-ftc-chargesfailed-protect-medical-financial); *CVS Caremark Corp.*, Consent Order, FTC Docket No. C-4259,

LabMD further argues that HIPAA's comprehensive framework governing "patient-information data-security practices" by HIPAA-regulated entities somehow trumps the application of the FTC Act to that category of practices. Motion at 11-12. But HIPAA evinces no congressional intent to preserve anyone's ability to engage in inadequate data security practices that unreasonably injure consumers in violation of the FTC Act, and enforcement of that Act thus fully comports with congressional intent under HIPAA. LabMD similarly contends that, by enacting HIPAA, Congress vested HHS with "exclusive administrative and enforcement authority with respect to HIPAA-covered entities under these laws." *Id.* at 11. That argument is also without merit. To be sure, the Commission cannot enforce HIPAA and does not seek to do so.[19] But nothing in HIPAA or in HHS's rules negates the Commission's authority to enforce the FTC Act.[20]

2009 WL 1892185 (June 18, 2009). *See also* HHS Press Release: *CVS Pays $2.25 Million and Toughens Practices to Settle HIPAA Privacy Case* (Feb. 18, 2009) (http://www.hhs.gov/news/press/2009pres/02/20090218a.html). Similarly, in 2010, Rite Aid entered consent decrees to settle both FTC charges of FTC Act violations and HHS charges of HIPAA violations, which the two agencies had jointly investigated. *See Rite Aid Corp.*, Consent Order, 150 F.T.C. 694 (2010); HHS Press Release: Rite Aid Agrees to Pay $1 Million to Settle HIPAA Privacy Case (July 27, 2010) (http://www.hhs.gov/news/press/2010pres/07/20100727a.html).

[19] LabMD repeatedly – but incorrectly – asserts that "the FTC agrees that LabMD has not violated HIPAA or HITECH." *See, e.g.*, Motion at 13; *see also* Reply at 4 ("a company FTC admits *complied* with HIPAA/HITECH in all respects") (emphasis in original); *id.* at 5 ("FTC admits LabMD has always complied with all applicable data-security regulations"); *id.* at 12 ("FTC *admits* that LabMD, a HIPAA-covered entity, always complied with HIPAA/HITECH regulations") (emphasis in original). The Commission does not enforce HIPAA or HITECH, and has never expressed any view on whether LabMD has, or has not, violated those statutes.

[20] Both HHS (pursuant to HIPAA and HITECH) and the FTC (pursuant to the American Recovery and Reinvestment Act of 2009) have promulgated regulations establishing largely congruent requirements concerning notification of data breaches involving consumers' private health information, but they are applicable to two different categories of firms. *Compare* 16 C.F.R. Part 318 (FTC rule) *with* 45 C.F.R. Part 164, Subparts D & E (HHS rule). LabMD correctly notes that this FTC rule does not apply to HIPAA-covered entities, *see* Motion at 12 & n.9, but the conclusion it draws from this fact is unfounded. Significantly, the Complaint in the present proceeding alleges only statutory

Indeed, the FTC Act makes clear that, when Congress wants to exempt a particular category of entities or activities from the Commission's authority, it knows how to do so explicitly – further undermining LabMD's claim to an implicit "carve-out" from the Commission's jurisdiction over HIPAA-covered entities or their "patient-information data security practices." Section 5(a)(2) specifically lists categories of businesses whose acts and practices are not subject to the Commission's authority under the FTC Act. These include banks, savings and loans, credit unions, common carriers subject to the Acts to regulate commerce, air carriers, and entities subject to certain provisions in the Packers and Stockyards Act of 1921. 15 U.S.C. § 45(a)(2). Congress could have added "HIPAA-covered entities" to that list, but it did not. Similarly, the statute identifies certain types of practices that the Commission may not address, such as commerce with foreign nations in certain circumstances. *Id.* § 45(a)(3). But it provides no carve-out for data security practices relating to patient information, to which HIPAA may apply.

LabMD relies on *Credit Suisse Securities, LLC v. Billing*, 551 U.S. 264 (2007), for the proposition that industry-specific requirements in other statutes may trump more general laws such as the FTC Act. *See* Motion at 13. *Credit Suisse* is clearly distinguishable. As LabMD concedes, there was a "possible conflict between the [securities and antitrust] laws," creating a "risk that the specific securities and general antitrust laws, if both applicable, would produce conflicting guidance, requirements, . . . or standards of conduct." *Id.* By contrast, nothing in the FTC Act compels LabMD to engage in practices forbidden by HIPAA, or vice versa. It is not unusual for a party's conduct to be governed by more than one statute at the same time, as "we live in 'an age of overlapping and concurrent regulatory jurisdiction[.]'" *FTC v. Ken Roberts Co.*, 276 F.3d 583, 593 (D.C. Cir. 2001) (quoting *Thompson Med. Co. v. FTC*, 791 F.2d 189, 192 (D.C. Cir. 1996)). LabMD and other companies may well be obligated to ensure their data security practices comply with both HIPAA and the FTC Act. But so long as the requirements of those statutes do not conflict with one another, a party cannot plausibly assert that,

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violations; it does not allege violations of the FTC's Health Breach Notification Rule.

because it complies with one of these laws, it is free to violate the other. Indeed, courts have consistently ruled that "the FTC may proceed against unfair practices even if those practices [also] violate some other statute that the FTC lacks authority to administer." *Accusearch*, 570 F.3d at 1194-95 (concluding that conduct may be an unlawful "unfair . . . act or practice" under the FTC Act even if it also violates the Telecommunications Act of 1996). *See also Orkin Exterminating Co.*, 849 F.2d at 1353 (rejecting proposition that a "mere breach of contract . . . is outside the ambit of [the "unfairness" prohibition in] section 5"); *Am. Fin. Servs. Ass'n*, 767 F.2d at 982-83 (FTC may ban certain creditor remedies, such as wage assignments and repossession of consumers' household goods, as "unfair . . . acts or practices" under the FTC Act, even where such conduct also ran counter to state laws against enforcing unconscionable contracts of adhesion).

Finally, LabMD argues that Congress' enactment of three new statutes addressing the Commission's authority over certain data protection matters in discrete contexts implies that Congress must have believed that, in other respects, the Commission lacked statutory authority to address data protection matters under the FTC Act. That argument, too, is without merit. First, as discussed above, in each of these statutes Congress *expanded* the enforcement and rulemaking tools that the Commission *already* possessed for addressing data security problems in discrete areas. *See supra* at 8 n.10, 9-10. LabMD identifies nothing in any of those bills or their legislative histories indicating that the Commission's authority to enforce Section 5's prohibition of "unfair . . . acts or practices" was limited in any way. Moreover, these statutes affirmatively *directed* the Commission to take particular actions to protect consumer interests in specified contexts.[21] Of course, by *compelling* the Commission to take particular steps in those contexts, Congress did not somehow divest the Commission of its preexisting and much broader *authority* to protect consumers against "unfair" practices.

[21] For example, in COPPA, Congress directed the Commission to promulgate rules addressing the specific duties of child-directed website operators to provide specific notices and obtain parental consent before collecting or disclosing children's personal information. *See* 15 U.S.C. § 6502(b).

Congress commonly authorizes agencies to oversee entire fields while specifying, in a few areas, what minimum steps those agencies must take in exercising that authority, and the enumeration of those minimum steps does not cast doubt on the agencies' broader authority. *See, e.g.*, *Cablevision Sys. Corp. v. FCC*, 649 F.3d 695, 705-06 (D.C. Cir. 2011). And LabMD's reliance on data security-related bills that ultimately were *not* enacted into law (*see* Motion at 17-18 & n.15; Reply at 9) contradicts basic principles of statutory interpretation.[22]

In sum, we reject LabMD's contention that the Commission lacks authority to apply the FTC Act's prohibition of "unfair . . . acts or practices" to data security practices, in the field of patient information or in other contexts; and we decline to dismiss the Complaint on that basis.

[22] The fact that a proposed bill was not enacted into law does not mean that Congress consciously "rejected" it. Enacting a bill into law is a notoriously difficult and time-consuming process, given the procedural and political hurdles to be overcome before obtaining majority votes of both Houses of Congress, reconciliation of any differences between the two Houses' versions, and signature by the President. Thus, "the fact that Congress has considered, but failed to enact, several bills" typically sheds little, if any, light on what Congress believed or intended; and the adjudicator's "task . . . is not to construe bills that Congress has failed to enact, but to construe statutes that Congress has enacted." *Wright v. West*, 505 U.S. 277, 294 n.9 (1992) (Thomas, J.) (plurality op.); *see also Verizon v. FCC*, *supra* note 5, at 25 ("pieces of subsequent failed legislation tell us little if anything about the original meaning" of a statute, and thus such later, unenacted legislative proposals provide "an unreliable guide to legislative intent") (citations omitted).

II. THE COMMISSION HAS AUTHORITY TO ENFORCE THE STATUTE BY ADJUDICATING ALLEGED VIOLATIONS, DESPITE THE ABSENCE OF REGULATIONS, WITHOUT INFRINGING LABMD'S DUE PROCESS RIGHTS.

A. Administrative Agencies May Interpret and Enforce Statutory Requirements in Case-by-Case Adjudications, as Well as By Rulemaking.

LabMD argues that the Commission may not adjudicate whether the alleged conduct violated Section 5 of the FTC Act because the Commission "has not prescribed regulations or legislative rules under Section 5 establishing patient-information (or any other) data-security standards that have the force of law." Motion at 23. LabMD asserts that "[t]he FTC's refusal to issue regulations is wrongful and makes no sense." *Id.* at 24. LabMD's position conflicts with longstanding case law confirming that administrative agencies may – indeed, must – enforce statutes that Congress has directed them to implement, regardless whether they have issued regulations addressing the specific conduct at issue. Thus, in the leading case of *SEC v. Chenery*, the Supreme Court recognized that the SEC had not exercised its statutory rulemaking authority with regard to the matter at issue, and squarely rejected the contention "that the failure of the Commission to anticipate this problem and to promulgate a general rule withdrew all power from that agency to perform its statutory duty in this case." 332 U.S. 194, 201-02 (1947). To the contrary: "the Commission had a statutory duty to decide the issue at hand in light of the proper standards[,] and . . . this duty remained 'regardless of whether those standards previously had been spelled out in a general rule or regulation.'" *NLRB v. Bell Aerospace Co.*, 416 U.S. 267, 292 (1974) (quoting *Chenery*, 332 U.S. at 201).

The Commission has long recognized that "information security is an ongoing process of assessing risks and vulnerabilities: no one static standard can assure appropriate security, as security threats and technology constantly evolve." *See Comm'r Swindle's 2004 Information Security Testimony* at 3. Such complex questions relating to data security practices in an

online environment are particularly well-suited to case-by-case development in administrative adjudications or enforcement proceedings, given the difficulty of drafting generally applicable regulations that fully anticipate the concerns that arise over emerging business arrangements in this rapidly changing area. As the Supreme Court has explained,

> [P]roblems may arise . . . [that] must be solved despite the absence of a relevant general rule. Or the agency may not have had sufficient experience with a particular problem to warrant rigidifying its tentative judgment into a hard and fast rule. Or the problem may be so specialized and varying in nature as to be impossible of capture within the boundaries of a general rule. In those situations, the agency must retain power to deal with the problems on a case-to-case basis if the administrative process is to be effective. There is thus a very definite place for the case-by-case evolution of statutory standards. And the choice made between proceeding by general rule or by individual, ad hoc litigation is one that lies primarily in the informed discretion of the administrative agency.

Chenery, 332 U.S. at 202-03. Accordingly, "agency discretion is at its peak in deciding such matters as whether to address an issue by rulemaking or adjudication[,] [and] [t]he Commission seems on especially solid ground in choosing an individualized process where important factors may vary radically from case to case." *American Gas Ass'n v. FERC*, 912 F.2d 1496, 1519 (D.C. Cir. 1990). *See also FTC v. Colgate-Palmolive Co.*, 380 U.S. 374, 384-85 (1965) ("the proscriptions [of unfair or deceptive acts and practices] in Section 5 are flexible, to be defined with particularity by the myriad of cases from the field of business," which "necessarily give[] the Commission an influential role in interpreting Section 5 and in *applying it to the facts of particular cases arising out of unprecedented situations*.") (emphasis added).

The Commission has enforced Section 5's prohibition of "unfair . . . acts or practices" primarily through case-by-case adjudication and litigation from the time the statute was enacted. Indeed, numerous recent cases have condemned conduct that facilitated identity theft or involved misuse of confidential consumer information as unlawful "unfair . . . acts or practices," although the practices were unprecedented and not covered by any preexisting rules. Thus, even though the Commission had never promulgated any regulations governing the creation of online checks or bank drafts without adequate verification procedures, the Ninth Circuit, in *Neovi*, easily affirmed both the district court's holding that the defendants had committed "unfair acts or practices," 604 F.3d at 1155-58, and its requirement that the defendants disgorge all revenue from the unlawful conduct. *Id.* at 1159-60. Similarly, despite the absence of any regulation prohibiting online data brokers from gathering and selling consumers' confidential information gleaned from telephone records, the Tenth Circuit affirmed a district court decision finding that the defendants' conduct constituted "unfair acts and practices" and imposing an equitable disgorgement remedy. *See generally Accusearch*, 570 F.3d 1187.

B. This Proceeding Respects LabMD's Due Process Rights

The Commission's decision to proceed through adjudication without first conducting a rulemaking also does not violate LabMD's constitutional due process rights. The courts have rejected such due process challenges to agency adjudications on numerous occasions. For example, in *Gonzalez v. Reno*, 212 F.3d 1338 (11th Cir. 2000), the court held that the agency did not violate due process in interpreting and implementing the immigration statute in an enforcement proceeding, even though its "policy was developed in the course of an informal adjudication, rather than during formal rulemaking." 212 F.3d at 1350. *See also Taylor v. Huerta*, 723 F.3d 210, 215 (D.C. Cir. 2013) (statute enabling agency to revoke pilot's license following administrative adjudicatory proceeding "represented nothing more than an ordinary exercise of Congress' power to decide the proper division of regulatory, enforcement, and adjudicatory functions between agencies in a split-enforcement regime . . . . [Petitioner]

cites no authority, and presents no persuasive rationale, to support his claim that due process requires more."); *RTC Transp., Inc. v. ICC*, 731 F.2d 1502, 1505 (11th Cir. 1984) (rejecting contention that agency's "application of its policy . . . denied them due process because the policy was announced in adjudicatory proceedings, . . . rather than being promulgated in rulemaking proceedings with notice and opportunity for comment"); *Shell Oil Co. v. FERC*, 707 F.2d 230, 235-36 (5th Cir. 1983) (noting that parties in administrative adjudicatory proceedings are not denied due process even when agencies establish new, binding standards of general application in such proceedings, so long as affected parties are given meaningful opportunities to address the factual predicates for imposing liability).

To be sure, constitutional due process concerns may arise if the government imposes criminal punishment or civil penalties for past conduct (or unduly restricts expression protected by the First Amendment) pursuant to a law that "fails to provide a person of ordinary intelligence fair notice of what is prohibited, or is so standardless that it authorizes or encourages seriously discriminatory enforcement." *FCC v. Fox Television Stations, Inc.*, 132 S. Ct. 2307, 2317 (2012) (quoting *United States v. Williams*, 553 U.S. 285, 304 (2008)). But, as the D.C. Circuit held in rejecting a constitutional due process challenge to the Commission's implementation of the Fair Credit Reporting Act,

> [E]conomic regulation is subject to a less strict vagueness test because its subject matter is often more narrow, and because businesses, which face economic demands to plan behavior carefully, can be expected to consult relevant legislation in advance of action. The regulated enterprise . . . may have the ability to clarify the meaning of the regulation by its own inquiry, or by resort to an administrative process. Finally, the consequences of imprecision are qualitatively less severe when laws have . . . civil rather than criminal penalties.

Trans Union Corp. v. FTC, 245 F.3d 809, 817 (D.C. Cir. 2001) (quoting *Village of Hoffman Estates v. Flipside, Hoffman Estates, Inc.*, 455 U.S. 489, 498-99 (1982)).

Here, the three-part statutory standard governing whether an act or practice is "unfair," set forth in Section 5(n), should dispel LabMD's concern about whether the statutory prohibition of "unfair . . . acts or practices" is sufficient to give fair notice of what conduct is prohibited. In enacting Section 5(n), Congress endorsed the Commission's conclusion that "the unfairness standard is the result of an evolutionary process . . . . [that] must be arrived at by . . . a gradual process of judicial inclusion and exclusion." *Policy Statement on Unfairness*, 104 F.T.C. at 1072. This is analogous to the manner in which courts in our common-law system routinely develop or refine the rules of tort or contract law when applying established precedents to new factual situations. As the Supreme Court has recognized, "[b]roadly worded constitutional and statutory provisions necessarily have been given concrete meaning and application by a process of case-by-case judicial decision in the common-law tradition." *Northwest Airlines, Inc. v. Transp. Workers Union of Am.*, 451 U.S. 77, 95 (1981).

LabMD's due process claim is particularly untenable when viewed against the backdrop of the common law of negligence. Every day, courts and juries subject companies to tort liability for violating uncodified standards of care, and the contexts in which they make those fact-specific judgments are as varied and fast-changing as the world of commerce and technology itself. The imposition of such tort liability under the common law of 50 states raises the same types of "predictability" issues that LabMD raises here in connection with the imposition of liability under the standards set forth in Section 5(n) of the FTC Act. In addition, when factfinders in the tort context find that corporate defendants have violated an unwritten rule of conduct, they – unlike the FTC – can normally impose compensatory and even punitive damages. Even so, it is well-established that the common law of negligence does not violate due process simply because the standards of care are uncodified. There is similarly no basis to conclude that the FTC's application of the Section 5(n) cost-benefit analysis violates due process, particularly where, as here, the complaint does not even seek to impose damages, let alone retrospective penalties.

III. LABMD'S ALLEGED PRACTICES ARE "IN OR AFFECTING COMMERCE" UNDER THE FTC ACT

In Section III of the Motion to Dismiss, LabMD contends that the acts and practices alleged in the Complaint do not satisfy the statutory definition of "commerce" set forth in Section 4 of the FTC Act – *i.e.*, "commerce 'among' or 'between' states." *See* Motion at 28 (citing and paraphrasing 15 U.S.C. § 44, and asserting that LabMD's principal place of business is in Georgia; the alleged acts or practices were committed in Georgia; and its servers and computer network are located in Georgia). This argument is frivolous. The Complaint plainly alleges that LabMD "tests samples from consumers located throughout the United States." Complaint, ¶ 5; *see also* ¶ 2. Indeed, LabMD concedes in its Answer to the Complaint that it "tests samples . . . which may be sent from six states outside of Georgia: Alabama, Mississippi, Florida, Missouri, Louisiana, and Arizona." Answer, ¶ 5. Thus, the complaint unquestionably alleges that LabMD's acts and practices "have been in or affecting commerce, as 'commerce' is defined in Section 4[.]" Complaint, ¶ 2.

IV. THE ALLEGATIONS IN THE COMPLAINT STATE A PLAUSIBLE CLAIM THAT LABMD ENGAGED IN "UNFAIR . . . ACTS OR PRACTICES"

We turn next to LabMD's contention that "the Complaint does not state a plausible claim for relief" on the ground that the "Complaint's allegations are nothing more than inadequate 'legal conclusions couched as factual allegations.'" Motion at 28-29 (quoting *Bell Atlantic Corp. v. Twombly*, 550 U.S. 554, 555 (2007)).

That is incorrect. The Complaint quite clearly sets forth specific allegations concerning LabMD's conduct and other elements of the charged violation. In particular, it includes plausible allegations that satisfy each element of the statutory standard for unfairness: that (1) the alleged conduct caused, or was likely to cause, substantial injury to consumers; (2) such injury could not reasonably have been avoided by consumers themselves; and (3) such injury was not outweighed by benefits to consumers or competition. 15 U.S.C. § 45(n). We emphasize

that, for purposes of addressing LabMD's Motion to Dismiss, we presume – without deciding – that these allegations are true. But the Commission's ultimate decision on LabMD's liability will depend on the factual evidence to be adduced in this administrative proceeding.

A. Causation or Likely Causation of Substantial Injury to Consumers

The Complaint contains sufficient allegations to satisfy the criterion that the respondent's acts or practices "cause[d], or [were] likely to cause, substantial injury to consumers." *Id.* First, the Complaint alleges that LabMD collected and stored on its computer system highly sensitive information on consumers' identities (*e.g.*, names linked with addresses, dates of birth, Social Security numbers, and other information), their medical diagnoses and health status, and their financial transactions with banks, insurance companies, and health care providers. *See* Complaint, ¶¶ 6-9, 19, 21.

Second, the Complaint contains allegations that LabMD implemented unreasonable data security measures. These measures allegedly included (*i*) "acts of commission," such as installing Limewire, a peer-to-peer file sharing application, on a billing manager's computer, *see id.*, ¶¶ 13-19, as well as (*ii*) "acts of omission," such as failing to institute any of a range of readily-available safeguards that could have helped prevent data breaches. *See id.*, ¶¶ 10(a)-(g)).

Third, the Complaint alleges that LabMD's actions and failures to act, collectively, directly caused "substantial injury" resulting from both (*i*) actual data breaches, enabling unauthorized persons to obtain sensitive consumer information, *id.*, ¶¶ 17-21, as well as (*ii*) increased risks of other potential breaches. *Id.*, ¶¶ 11-12, 22. Notably, the Complaint's allegations that LabMD's data security failures led to *actual* security breaches, if proven, would lend support to the claim that the firm's data security procedures caused, or were likely to cause, harms to consumers – but the mere fact that such breaches occurred, standing alone, would not necessarily establish that LabMD engaged in "unfair . . . acts or practices." The

Commission has long recognized that "the occurrence of a breach does not necessarily show that a company failed to have reasonable security measures. There is no such thing as perfect security, and breaches can happen even when a company has taken every reasonable precaution." *See Comm'r Swindle's 2004 Information Security Testimony* at 4.[23] Accordingly, we will need to determine whether the "substantial injury" element is satisfied by considering not only whether the facts alleged in the Complaint actually occurred, but also whether LabMD's data security procedures were "unreasonable" in light of the circumstances. Whether LabMD's security practices were unreasonable is a factual question that can be addressed only on the basis of evidence to be adduced in this proceeding.

Fourth, the Complaint alleges that the actual and potential data breaches it attributes to LabMD's data security practices caused or were likely to cause cognizable, "substantial injury" to consumers, including increased risks of "identity theft, medical identity theft," and "disclosure of sensitive private medical information." *See* Complaint, ¶ 12; *see also id.*, ¶¶ 11, 21-22. These allegations clearly refute LabMD's contentions that the Complaint contains "no allegations of monetary loss or other actual harm" nor "any actual, completed economic harms or threats to health or safety." Motion at 28-29. Moreover, occurrences of actual data security breaches or "actual, completed economic harms" (*id.* at 29) are not necessary to substantiate that the firm's data security activities caused or likely caused consumer injury, and thus constituted "unfair . . . acts or practices." *Accord Policy Statement on Unfairness*, 104 F.T.C. at 949 n.12 (act or practice may cause "substantial injury" if it causes a "small harm to a large number of people" or "raises a significant *risk* of concrete harm") (emphasis added); *accord*

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[23] *See also In re SettlementOne Credit Corp.*, File No. 082 3209, Letter to Stuart K. Pratt, Consumer Data Industry Association, from Donald S. Clark, Secretary, by Direction of the Commission, at 2 (Aug. 17, 2011) (http://www.ftc.gov/sites/default/files/documents/cases/2011/08/110819lettercdia_1.pdf) (affirming, in resolving three cases concerning data security practices alleged to violate the Fair Credit Reporting Act, that it had "applied the standard that is consistent with its other data security cases – that of reasonable security. This reasonableness standard is flexible and recognizes that there is no such thing as perfect security.")

Neovi, 604 F.3d at 1157 (quoting *Am. Fin. Servs.*, 767 F.2d at 972).

B. Avoidability

The Complaint contains plausible allegations that these harms could not reasonably be avoided by consumers. Consumers allegedly did not have any "way of independently knowing about respondent's security failures," let alone taking any action to remedy them or avoid the resulting harm. Complaint, ¶ 12.

C. Countervailing Benefits to Consumers or Competition

Finally, the Complaint alleges that the alleged conduct did not even benefit LabMD, much less anyone else (*id.*, ¶ 20), and that LabMD could have remedied the risks of data breaches "at relatively low cost" (*id.*, ¶ 11). These allegations provide a plausible basis for finding that the harms to consumers were not outweighed by other benefits to consumers or competition. Again, Complaint Counsel will need to prove these allegations, and LabMD will have the opportunity to refute them, on the basis of factual evidence presented at the upcoming hearing.

* * * * *

For the reasons discussed above, we deny LabMD's Motion to Dismiss.

Accordingly,

IT IS ORDERED THAT Respondent LabMD, Inc.'s Motion to Dismiss Complaint with Prejudice **IS DENIED**.

By the Commission, Commissioner Brill recused.

Interlocutory Orders, Etc.

IN THE MATTER OF

COURTESY AUTO GROUP, INC.

Docket No. 9359. Order, January 29, 2014

Order withdrawing this matter from adjudication.

ORDER WITHDRAWING MATTER FROM ADJUDICATION FOR THE PURPOSE OF CONSIDERING A PROPOSED CONSENT AGREEMENT

Complaint Counsel and Respondent having filed a joint motion to withdraw this matter from adjudication to enable the Commission to consider a proposed Consent Agreement; and

Complaint Counsel and Counsel for the Respondent having submitted a proposed Consent Agreement containing a proposed Decision and Order, executed by the Respondent and by Complaint Counsel, and approved by the Director of the Bureau of Consumer Protection, which, if accepted by the Commission, would resolve this matter in its entirety;

IT IS ORDERED, pursuant to Rule 3.25(c) of the Commission Rules of Practice, 16 C.F.R. § 3.25(c), that this matter in its entirety be, and it is hereby is, withdrawn from adjudication, and that all proceedings before the Administrative Law Judge are hereby stayed while the Commission evaluates the proposed Consent Agreement, pursuant to Rule 3.25(f), 16 C.F.R. § 3.25(f); and

IT IS FURTHER ORDERED, pursuant to Rule 3.25(b) of the Commission Rules of Practice, 16 C.F.R. § 3.25(b), that the Consent Agreement shall not be placed on the public record unless and until it is accepted by the Commission.

By the Commission.

Interlocutory Orders, Etc.

IN THE MATTER OF

HERTZ GLOBAL HOLDINGS, INC.

Docket No. C-4376. Order, January 30, 2014

Letter responding to the Petition for Approval for the Sale of Simply Wheelz D/B/A Advantage filed by Franchise Services of North America.

LETTER ORDER APPROVING DIVESTITURE OF CERTAIN ASSETS

Craig M. Geno, Esquire
Law Offices of Craig M. Geno, PLLC

Dear Mr. Geno:

This letter responds to the Petition for Approval for the Sale of Simply Wheelz D/B/A Advantage ("Advantage") filed by Franchise Services of North America ("FSNA") on January 2, 2014 ("Petition"). The Petition requests that the Federal Trade Commission approve, pursuant to the Order in this matter, the sale and assignment of certain Advantage assets to The Catalyst Capital Group Inc. The Petition was placed on the public record for comments until January 22, 2014, and four comments were received.

After consideration of the proposed divestiture as set forth in FSNA's Petition and supplemental documents, as well as other available information, the Commission has determined to approve the proposed sale. In according its approval, the Commission has relied upon the accuracy and completeness of information submitted and representations made in connection with FSNA's Petition. Among the representations relied on is the representation that Catalyst agrees that the assets it acquires from FSNA remain, for three years from the date the Order became final (until July 10, 2016), subject to the prior approval requirements of the Order.

By direction of the Commission, Commissioner Wright not participating.

Interlocutory Orders, Etc.

IN THE MATTER OF

TESORO CORPORATION
AND
TESORO LOGISTICS OPERATIONS LLC

Docket No. C-4405. Order, March 4, 2014

Letter approving the Application for Approval for the divestiture of the Boise Terminal Business and Boise Terminal Assets to Sinclair Transportation Co.

LETTER ORDER APPROVING DIVESTITURE OF CERTAIN ASSETS

Marc Schildkraut, Esq.
Cooley LLP

Dear Mr. Schildkraut:

This is in reference to the Application For Approval of Proposed Divestiture filed by Tesoro Corporation and Tesoro Logistics Operations LLC (collectively "Tesoro") and received on December 17, 2013 ("Application"). Pursuant to the Decision and Order in Docket No. C-4405, Tesoro requests prior Commission approval of its proposal to divest certain assets to Sinclair Transportation Company ("STC").

After consideration of Tesoro's Application and other available information, the Commission has determined to approve the proposed divestiture as set forth in the Application. In according its approval, the Commission has relied upon the information submitted and the representations made by Tesoro and STC in connection with Tesoro's Application and has assumed them to be accurate and complete.

By direction of the Commission.

Interlocutory Orders, Etc.

IN THE MATTER OF

ARDAGH GROUP, S.A.;
SAINT-GOBAIN CONTAINERS, INC.;
AND
COMPAGNIE DE DAINT-GOBAIN

Docket No. 9356. Order, March 17, 2014

Order withdrawing this matter from adjudication.

ORDER WITHDRAWING MATTER FROM ADJUDICATION FOR THE PURPOSE OF CONSIDERING A CONSENT PROPOSAL

Complaint Counsel and Respondents, having jointly moved that this matter be withdrawn from adjudication because there is a reasonable possibility of a settlement, and the Commission having been satisfied that there is a likelihood of settlement of this matter in its entirety;

IT IS ORDERED, pursuant to Rule 3.25(c) of the Commission Rules of Practice, 16 C.F.R. § 3.25(c), that this matter in its entirety be withdrawn from adjudication and that all proceedings before the Administrative Law Judge are hereby stayed until April 16, 2014, pending a determination by the Commission with respect to the Consent Proposal;

IT IS FURTHER ORDERED, pursuant to Rule 3.25(b) of the Commission Rules of Practice, that the Consent Proposal shall not be placed on the public record unless and until it is accepted by the Commission.

By the Commission.

Interlocutory Orders, Etc.

IN THE MATTER OF

NIELSEN HOLDINGS, N.V.
AND
ARBITRON INC.

Docket No. C-4439; Order, March 31, 2014

Letter approving application to divest the Linkmeter Assets and Related Agreements to comScore Inc.

LETTER ORDER APPROVING DIVESTITURE OF CERTAIN ASSETS

Aidan Synnott
Paul, Weiss, Rifkind, Wharton & Garrison LLP

Dear Mr. Synnott:

This responds to the Application for Approval of Divestiture of Linkmeter Assets and Related Agreements ("Application") to comScore Inc. filed by Nielsen Holdings N.V. dated January 17, 2014. Pursuant to the Decision and Order in Docket No. C-4439, Nielsen requests prior Commission approval of its proposal to divest certain assets to comScore. The Application was placed on the public record for comments for thirty days, until February 24, 2014, and one comment was received.

After consideration of the Application and other available information, the Commission has determined to approve the proposed divestiture to comScore as set forth in the Application. In according its approval, the Commission has relied upon the information submitted and the representations made by Nielsen and comScore in connection with Nielsen's Application and has assumed them to be accurate and complete.

This also responds to Respondents' Request for Extension of Time ("Request") filed by Nielsen dated December 11, 2013. Pursuant to Commission Rule 4.3(b), 16 C.F.R. § 4.3(b), Nielsen requests an extension of time in which to complete the divestiture required by the Decision and Order in this matter. Pursuant to the terms of the Decision and Order, Nielsen was required to complete the divestiture within three months from the date

Respondents executed the Agreement Containing Consent Order, or by December 12, 2013. Rule 4.3(b) provides that "the Commission, for good cause shown, may extend any time limit prescribed by the rules in this chapter or order of the Commission." Under applicable precedent, Nielsen has the burden of demonstrating good cause, and granting an extension of time rests in the discretion of the Commission. United States v. Swingline, Inc., 371 F. Supp. 37, 45 (E.D.N.Y. 1974). The Commission has reviewed Nielsen's Request, its compliance reports and other information and, after careful consideration, has determined to grant the Request and extend the time in which Nielsen must complete the divestiture to comScore as approved by the Commission today. Nielsen has shown that it began its divestiture efforts immediately upon reaching the consent agreement with the Commission staff, that it has acted diligently throughout the entire divestiture period, and that the delays in completing negotiations were not due to unreasonable demands or other conduct of Nielsen. The Commission expects that Nielsen will complete the divestiture promptly upon the Commission's approval.

By direction of the Commission, Commissioner Ohlhausen recused and Commissioner Wright dissenting.

Interlocutory Orders, Etc.

IN THE MATTER OF

ECM BIOFILMS, INC.
D/B/A
ENVIROPLASTICS INTERNATIONAL

Docket No. 9358; Order, April 8, 2014

Order responding to Complaint Counsel's motion seeking a continuance of the evidentiary hearing.

ORDER RESCHEDULING HEARING DATE

On October 18, 2013, the Federal Trade Commission issued the Administrative Complaint in this adjudicative proceeding and scheduled the evidentiary hearing for June 18, 2014. On March 18, 2014, Complaint Counsel filed a Motion which, among other things, requests that the Commission continue the evidentiary hearing for three months, arguing that such additional time is "the time minimally necessary to complete discovery."[1] Respondent opposes any such delay, arguing that a three-month delay "will substantially increase costs but will not yield any more substantive information than Complaint Counsel now possesses."[2]

On April 1, 2014, Chief Administrative Law Judge Chappell issued an Order ruling on Complaint Counsel's Motion.[3] As

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[1] Complaint Counsel's Motion To Certify Scheduling Issues to the Commission and Request for Interim Relief at 12, In the Matter of ECM Biofilms, Inc. et al, F.T.C. Docket No. 9358 (Mar. 18, 2014) [hereinafter Motion], *available at* http://www.ftc.gov/system/files/documents/cases/140318ccmtntocertify.pdf.

[2] ECM BioFilm's Opposition To Complaint Counsel's Motion To Certify Scheduling Issues and For Interim Relief, *in camera*, at 2, In the Matter of ECM Biofilms, Inc. et al, F.T.C. Docket No. 9358 (Mar. 28, 2014) (quoted language public, but redacted public version of Opposition not yet filed).

[3] Order On Complaint Counsel's Motion To Certify Scheduling Issues To the Commission and Request For Interim Relief, In the Matter of Biofilms, Inc. et al, F.T.C. Docket No. 9358 (Apr. 1, 2014) [hereinafter ALJ Order], *available at* http://www.ftc.gov/system/files/documents/cases/140401ordercertifycommn.pdf.

Judge Chappell points out, the only issue raised by the Motion that is certifiable to the Commission is Complaint Counsel's request for a continuance of the evidentiary hearing.[4] As authorized by the Commission Rules, Judge Chappell has addressed and resolved all of the other issues raised by Complaint Counsel's Motion, and we need not address them here.

On the issue before us – Complaint Counsel's request for a 90-day continuance of the evidentiary hearing – Judge Chappell recommends that the hearing be continued for 45 days. He concludes that, while the parties "are entitled to full and fair discovery," Complaint Counsel's request for a 90-day continuance "is not sufficiently justified."[5] Specifically, Judge Chappell notes that Complaint Counsel asked that the discovery deadlines in the case be extended by 45 days but at the same time requested a 90-day continuance. As Judge Chappell also observes, Respondent opposes the request for continuance, but, in its own motion to compel and for sanctions, also seeks to extend the fact discovery deadline. Judge Chappell therefore recommends that the Commission continue the evidentiary hearing for 45 days, to August 5, 2014.[6] We agree with the recommendation of Judge Chappell.

Based on the foregoing, we find there is good cause to continue the evidentiary hearing to August 5, 2014. Accordingly,

IT IS ORDERED that the evidentiary hearing in this proceeding be, and it hereby is, rescheduled to begin at 10:00 a.m. on August 5, 2014, at the Federal Trade Commission offices at 600 Pennsylvania Avenue, N.W., Room 532, Washington, D.C. 20580.

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[4] Commission Rule 3.22(a), 16 C.F.R. § 3.22(a), provides that during the time an adjudicative proceeding is before an Administrative Law Judge, all motions on which the ALJ has the authority to rule "shall be addressed to and decided by the Administrative Law Judge." Only the Commission has the authority to change the date of the hearing. *See* Commission Rule 3.21(c), 16 C.F.R. § 3.21(c).

[5] ALJ Order, *supra* note 3, at 3.

[6] *Id.* at 1.

By the Commission.

Interlocutory Orders, Etc.

IN THE MATTER OF

MCWANE, INC.
AND
STAR PIPE PRODUCTS, LTD.

Docket No. 9351; Order, April 11, 2014

Opinion and Order denying respondent's application for a stay of the Commission's Final Order in this matter.

DECISION AND ORDER DENYING RESPONDENT'S APPLICATION FOR STAY OF ORDER PENDING REVIEW BY U.S. COURT OF APPEALS

On March 13, 2014, Respondent McWane, Inc. applied for a stay of the Commission's Final Order in this matter, pending judicial review by an appropriate U.S. court of appeals. Complaint Counsel opposes the stay. For the reasons discussed below, McWane has failed to demonstrate that a stay is warranted. It has shown neither a likelihood of success on appeal, nor that it will suffer irreparable harm absent a stay. It has also failed to show that staying the order would be in the public interest. Accordingly, the Commission denies McWane's application.[1]

The Commission's Opinion and Final Order in this matter issued on January 30, 2014.[2] The Commission held that McWane unlawfully maintained its monopoly of the domestic ductile iron pipe fittings market by means of exclusive dealing imposed through its Full Support Program. The Commission's order prohibits McWane from: (1) implementing or enforcing any condition, policy, or practice requiring exclusivity with a customer; (2) implementing or enforcing any retroactive rebate

[1] Commissioner Wright dissents from the Commission's decision to deny McWane's request for a stay on the ground that he believes McWane is likely to succeed on the merits of its appeal, for reasons stated in his dissenting opinion on the merits of this case.

[2] The Commission's opinion in this matter is available at http://www.ftc.gov/system/files/documents/cases/140206mcwaneopinion.pdf. The order is available at http://www.ftc.gov/system/files/documents/cases/140206mcwaneorder.pdf.

program that would effectively demand exclusivity; (3) "[d]iscriminating against, penalizing or otherwise retaliating" against any customer that purchases a competitor's domestic fittings or that "otherwise refuses to enter into or continue any condition [or] agreement" requiring exclusivity; and (4) "enforcing any condition, requirement, policy, agreement, contract or understanding that is inconsistent with the terms of [the] Order." Order, ¶¶ II.A-D. We explain our reasons for denying McWane's application below.

Applicable Standard

Section 5(g) of the Federal Trade Commission Act provides that Commission cease and desist orders (except divestiture orders) take effect "upon the sixtieth day after such order is served," unless "stayed, in whole or in part and subject to such conditions as may be appropriate, by . . . the Commission" or "an appropriate court of appeals of the United States." 15 U.S.C. § 45(g)(2).

Pursuant to Commission Rule 3.56(c), an application for a stay must address the following four factors: (1) the likelihood of the applicant's success on appeal; (2) whether the applicant will suffer irreparable harm absent a stay; (3) the degree of injury to other parties if a stay is granted; and (4) whether the stay is in the public interest. *See* 16 C.F.R. § 3.56(c); *In re North Carolina Bd. of Dental Exam'rs*, 2012 WL 588756, at *1 (FTC Feb. 10, 2012); *In re Toys "R" Us, Inc.*, 126 F.T.C. 695, 696 (1998). The required likelihood of success is "inversely proportional to the amount of irreparable injury suffered absent the stay," *In re North Texas Specialty Physicians*, 141 F.T.C. 456, 457-58 & n.2 (2006), and varies based on the assessment of the balance of equities described by the last three factors. *Id.*; *see also North Carolina Bd.*, 2012 WL 588756, at *1. We consider these factors below.

Analysis

McWane argues first that the Commission's opinion is contrary to well-settled case law because it relies on harm to a single competitor, Star Pipe Products, Ltd., rather than harm to competition. McWane argues further that the evidence even

failed to show harm to Star, and that even if such harm had been proved, it should be disregarded because Star was a less efficient competitor than McWane and, in any event, Star had successfully entered the market.

These arguments are familiar to us. McWane advanced each of them in its appeal to the Commission, and the Commission carefully considered and, for reasons explained in our opinion, rejected them. Although McWane now cites to the dissent issued by Commissioner Wright in support of its application, its repetition of the dissent's arguments neither changes the Commission's conclusion that it engaged in illegal monopoly maintenance nor establishes a likelihood of success on appeal. *See Toys "R" Us*, 126 F.T.C. at 697 (emphasizing that the renewal of previously-rejected arguments alone cannot justify the granting of a stay).

In fact, rather than showing the requisite likelihood of success on appeal, McWane instead contends that it need only show that its appeal involves serious and substantial questions going to the merits of the Commission's decision. While such a showing might support a stay when a serious legal question is involved and the balance of the equities weighs heavily in favor of granting the stay, *NTSP*, 141 F.T.C. at 458 n.3, as discussed below, the balance of the equities here falls far short of that. Indeed, even assuming, *arguendo*, that the existence of serious and substantial questions would be sufficient to satisfy the first factor, "Respondent's mere disagreement with our decision does not establish serious and substantial questions going to the merits." *In re Realcomp II, Ltd.*, 2010 WL 5576189, at *2 (FTC Jan. 7, 2010).

We briefly address why we are not swayed by McWane's arguments. McWane's assertion that the Commission opinion is contrary to case law is unpersuasive; our ruling adheres closely to the analysis in the three leading opinions that have considered the use of exclusive dealing. *See ZF Meritor LLC v. Eaton Corp.*, 696 F.3d 254 (3d Cir. 2012); *United States v. Dentsply, Int'l, Inc.*, 399 F.3d 181 (3d Cir. 2005); *United States v. Microsoft Corp.*, 253 F.3d 34 (D.C. Cir. 2001). Moreover, McWane's argument that the Commission failed to identify harm to Star, let alone to

competition, is directly belied by the evidence, detailed in the Commission opinion, showing that McWane's exclusive dealing program raised barriers to entry and kept its only rival from achieving the critical sales level necessary to challenge McWane's monopoly. We explained that McWane's program foreclosed Star from accessing a substantial share of distributors and deprived Star of the sales volume needed to operate its own domestic foundry, thereby preventing Star from substantially reducing its costs and threatening McWane's monopoly. Finally, the Commission also rejected McWane's claim that Star's purported inefficiency rendered its exclusion meaningless to competition, explaining that the fundamental concern with exclusive dealing when the dominant firm is already a monopolist is that the conduct prevents the *development* of effective competition.

Turning to the equities, McWane bears the burden of demonstrating that its alleged irreparable injury "is both substantial and likely to occur absent the stay." *NTSP*, 141 F.T.C. at 457. "Simple assertions of harm or conclusory statements based on unsupported assumptions will not suffice. A party seeking a stay must show, with particularity, that the alleged irreparable injury is substantial and likely to occur absent a stay." *In re California Dental Ass'n*, 1996 FTC LEXIS 277, at *6 (May 22, 1996); *see also Toys "R" Us*, 126 F.T.C. at 698. Because McWane failed to demonstrate likely success on the merits, its burden for demonstrating irreparable harm is high, *California Dental*, 1996 FTC LEXIS 277, at *10, and McWane's showing falls far short of this standard.

McWane provided no supporting affidavits or sworn statements with its application to support its argument of irreparable harm. *See* 16 C.F.R. § 3.56(c). Instead, McWane falls back on conclusory statements and claimed evidence of factory conditions dating back more than five years, which provides no basis for assessing the potential for irreparable injury today. Respondent's Application for Stay of Order Pending Review by U.S. Court of Appeals, at 10. As a result, McWane's assertions that the Commission's order will "unquestionably threaten the viability of McWane's last remaining domestic foundry," *id.*, carry little weight. Similarly, citations to trial testimony

suggesting that Star might "cherry pick[]" McWane's business by "simply buying a few dozen patterns" and offering just the most common fittings, *id*., had little relevance by June 2010, at which time "Star had a Domestic Fittings pattern stock comparable to McWane's." *In re McWane, Inc.*, Initial Decision, 2013 FTC LEXIS 76, at *355 (May 8, 2013).

Indeed, McWane's unsubstantiated claims of irreparable injury are particularly suspect in light of its protestations on appeal of the Initial Decision that "[t]he proposed injunctive remedy," which contained the provisions currently at issue, was "moot." Respondent's Appeal Brief at 41. McWane there insisted that its exclusionary conduct was an outgrowth of "a short-term stimulus statute" that had expired, leaving "no threat of recurrence." *Id*. at 41, 43. McWane's current argument that exclusive arrangements in the domestic fittings market are now vital to its well-being is thus belied by its prior assertions. *See Toys "R" Us*, 126 F.T.C. at 699 (recognizing that it would be illogical for a respondent to argue that it would be irreparably harmed by a Commission order prohibiting conduct that the respondent claims it no longer engages).

McWane also argues that the Commission's order is overbroad and will deprive the company and many of its customers of the benefits of lawful exclusive dealing and discounting. Yet the Commission's opinion found *unlawful* exclusive dealing, and to prevent a recurrence of anticompetitive conduct, the order prohibits McWane from repeating its harmful conduct and other arrangements with similar anticompetitive effects.[3]

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[3] *See FTC v. Ruberoid Co.*, 343 U.S. 470, 473 (1952) (FTC orders need not be restricted to the "narrow lane" of the respondent's violation, but rather may "close all roads to the prohibited goal, so that its order may not be by-passed with impunity"); *see also FTC v. National Lead Co.*, 352 U.S. 419, 430-31 (1957) (noting the need "not only to suppress the unlawful practice but to take such reasonable action as is calculated to preclude the revival of the illegal practices" and observing that "those caught violating the Act must expect some fencing in"); *Toys "R" Us, Inc. v. FTC*, 221 F.3d 928, 940 (7th Cir. 2000) ("[T]he FTC is not limited to restating the law in its remedial orders. Such orders can restrict the options for a company that has violated § 5, to ensure that the violation will cease and competition will be restored.").

Indeed, the Commission's order is carefully tailored to prohibit only conduct similar to McWane's anticompetitive exclusive dealing practices. It prohibits practices that require exclusivity and penalties against customers who sell competitors' products. It also bars discounts that are conditioned on exclusivity and retroactive incentives, which could effectively demand exclusivity,[4] but expressly preserves McWane's ability to offer discounts that are volume-based, above average cost, and not retroactive incentives. The claim that the Commission's order places McWane at a disadvantage to its competitors is belied by a specific order proviso permitting McWane to provide discounts, rebates, or other price or non-price incentives that are "designed to meet competition." Order, ¶ II.

Finally, the Commission must consider the potential injury to other market players if a stay is granted, as well as whether a stay is in the public interest. The Commission considers these factors together because, in enforcing the law, Complaint Counsel is responsible for representing the public interest. *North Carolina Bd.*, 2012 WL 588756, at *3; *California Dental*, 1996 FTC LEXIS 277, at *8.

On these points, McWane repeats its claims that the Commission's order will harm consumers by denying them the benefit of lawful competitive practices and by exposing them to lost jobs and higher prices if McWane closes its last domestic foundry. As discussed above, the first contention ignores both the anticompetitive use McWane made of its exclusive dealing program and the narrow scope of the order's provisions, which expressly permit procompetitive conduct. McWane is free to cut its prices and offer discounts that are not structured or conditioned so as to result in exclusivity. Further, McWane's contentions concerning any impact of the order on the viability of McWane's domestic foundry are unpersuasive because they are both unsupported and speculative.

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[4] *See, e.g.*, Willard K. Tom, David A. Balto & Neil W. Averitt, *Anticompetitive Aspects of Market-Share Discounts and other Incentives to Exclusive Dealing*, 67 Antitrust L.J. 615 (2000) (explaining that discounts structured to produce total or partial exclusivity should be evaluated like exclusive dealing).

On the other hand, staying the order would cause harm to competition and consumers. The Commission found that McWane's exclusivity arrangements unlawfully maintained its monopoly and deprived consumers of the benefits of price competition and the ability to choose between competing suppliers. Although McWane contends that it has dropped its Full Support Program, the record showed that McWane has not publicly withdrawn its policy or notified distributors of any changes and that at least some distributors remain concerned that the exclusive dealing policy has continued. *See* Commission Opinion at 39-40. Exposing consumers to the continued effects of the Full Support Program or to similar policies and prolonging McWane's ability to unlawfully maintain its monopoly would not be in the public interest.

Conclusion

For the foregoing reasons, we find that McWane has failed to meet its burden for a stay of the Final Order pending appeal. Accordingly,

IT IS ORDERED THAT Respondent McWane's Application for Stay of Order Pending Review by an appropriate U.S. Court of Appeals is **DENIED**.

By the Commission, Commissioner Wright dissenting.

Interlocutory Orders, Etc.

IN THE MATTER OF

TOYS "R" US INC.

Docket No. 9278. Order, April 11, 2014

Order responding to respondent's petition to reopen and modify the consent order.

ORDER REOPENING AND MODIFYING ORDER

On January 3, 2014, Toys "R" Us, Inc. ("TRU") filed a petition pursuant to Section 5(b) of the Federal Trade Commission Act, 15 U.S.C.§ 45(b), and Section 2.51 of the Commission's Rules of Practice, 16 C.F.R. § 2.51, asking the Commission to reopen and modify the consent order in Docket No. 9278 ("Order") issued by the Commission on October 13, 1998.

The Order requires TRU to refrain from certain actions in connection with its suppliers. The Order also requires TRU to maintain records of all its communications with its suppliers. In its petition, TRU requests that the Commission eliminate Paragraphs II.A., II.B., and II.C. of the Order, and modify Paragraph IV.B. of the Order.

TRU bases its petition on changed conditions of fact that it claims are sufficient to warrant reopening and modifying the Order. TRU asserts that it has lost significant market share in the toy markets that were the subject of the Commission's action, and that other large retailers have overtaken TRU in sales rankings. According to TRU, the reasons for the Order provisions that TRU asks be modified have ended. For similar reasons, TRU also claims that the proposed modification would be in the public interest. For the reasons stated below, the Commission has determined to grant the petition.

Background

On May 22, 1996, the Commission issued its Complaint alleging that TRU entered into a series of agreements with major toy manufacturers to prevent the toy manufacturers from selling

to club stores the same products they sold to TRU. The Complaint also alleged that TRU facilitated agreements among the toy manufacturers to the same end. On October 13, 1998, the Commission issued its Opinion and Final Order, finding that TRU had violated Section 1 of the Sherman Act as alleged in the Complaint. The Commission found that TRU' s facilitation of a horizontal agreement among the toy manufacturers violated the Sherman Act both on a per se and a rule of reason analysis. The Commission found that the vertical agreements between TRU and its suppliers violated the Sherman Act on a rule of reason analysis. The Commission found that TRU possessed market power as a purchaser and seller of toys. TRU appealed, and the Court of Appeals for the Seventh Circuit affirmed the Commission's decision on August I, 2000.

Paragraph II.A. of the Order requires TRU to cease and desist from "continuing, maintaining, entering into, and attempting to enter into any agreement or understanding with any supplier to limit supply or to refuse to sell toys and related products to any toy discounter."

Paragraph II.B. of the Order requires TRU to cease and desist from "urging, inducing, coercing, or pressuring, or attempting to urge, induce, coerce, or pressure, any supplier to limit supply or to refuse to sell toys and related products to any toy discounter."

Paragraph II.C. of the Order requires TRU to cease and desist from "requiring, soliciting, requesting or encouraging any supplier to furnish information to respondent relating to any supplier's sales or actual or intended shipments to any toy discounter."

Paragraph IV.B. of the Order requires TRU to "maintain and make available to the staff of the Federal Trade Commission for inspection and copying, upon reasonable notice, all records of communications with suppliers of respondent relating to any aspect of actual or potential purchase or distribution of toys and related products, and records pertaining to any action taken in connection with any activity covered by paragraphs II and III of this order."

Standard to Reopen and Modify

Section 5(b) of the Federal Trade Commission Act, 15 U.S.C. § 45(b) provides that the Commission shall reopen an order to consider whether it should be modified if the respondent "makes a satisfactory showing that changed conditions of law or fact" so require.[1] A satisfactory showing sufficient to require reopening is made when a request to reopen identifies significant changes in circumstances and shows that the changes either eliminate the need for the order or make continued application of it inequitable or harmful to competition.[2]

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.[3] In the case of "public interest" requests, FTC Rule of Practice 2.Sl(b) requires an initial "satisfactory showing" of how the modification would serve the public interest before the Commission determines whether to reopen an order.

A "satisfactory showing" requires, with respect to public interest requests, that the petitioner make a *prima facie* showing of a legitimate public interest reason or reasons justifying relief. A request to reopen and modify will not contain a "satisfactory showing" if it is merely conclusory or otherwise fails to set forth by affidavit(s) specific facts demonstrating in detail the reasons why the public interest would be served by the modification.[4]

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[1] *See Supplementary Information, Amendment to* 16 CFR 2.51(b), ("Amendment"), 65 Fed. Reg. 50636, August 21, 2000.

[2] 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).

[3] Hart Letter at 5; 16 C.F.R. § 2.51.

[4] 16 C.F.R. § 2.51.

This showing requires the requester to demonstrate, for example, that there is a more effective or efficient way of achieving the purposes of the order, that the order in whole or part is no longer needed, or that there is some other clear public interest that would be served if the Commission were to grant the requested relief. In addition, this showing must be supported by evidence that is credible and reliable.

If, after determining that the requester has made the required showing, the Commission decides to reopen the order, the Commission will then consider and balance all of the reasons for and against modification. In no instance does a decision to reopen an order oblige the Commission to modify it,[5] and the burden remains on the requester in all cases to demonstrate why the order should be reopened and modified. The petitioner's burden is not a light one in view of the public interest in repose and the finality of Commission orders.[6] All information and material that the requester wishes the Commission to consider shall be contained in the request at the time of filing.[7]

Changes of Fact Warrant Reopening and Modifying the Order

The Commission has determined that (i) changes of fact require that the Order be reopened and (ii) the Order should be modified to eliminate Paragraphs II.A., II.B., and II.C., and alter Paragraph IV.B.[8] Paragraphs II.A., II.B., and II.C. of the Order regulate TRU's vertical relationships with its suppliers. These provisions address the violation found as to the vertical

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[5] *See United States v. Louisiana-Pacific Corp.*, 967 F.2d 1372, 1376-77 (9th Cir. 1992) (reopening and modification are independent determinations).

[6] *See Federated Department Stores, Inc. v. Moitie*, 425 U.S. 394 (1981) (strong public interest considerations support repose and finality).

[7] 16 C.F.R. § 2.51(b).

[8] TRU has asserted both changed conditions of fact and public interest grounds in support of its petition. Because the Commission has determined that TRU has demonstrated changed conditions of fact support the modification, the Commission need not consider whether the public interest also justifies the modifications to the Order.

agreements TRU entered into to prevent its suppliers from selling toys to club stores, and contained broad fencing-in relief. This violation was based on a rule of reason analysis that found that TRU had market power as a buyer and distributor of toys. TRU has demonstrated that it no longer has market power as a buyer of toys. Walmart and Target have overtaken TRU in competitive strength and market share. TRU has submitted data showing that TRU's loss of competitive position is consistent across product categories. TRU has lost ground to Walmart and Target across the competitive landscape. In 2013, Walmart was the market leader, with TRU and Target sparring for second place. In addition, Target operates twice as many locations as TRU, while Walmart has four times as many. In addition to Walmart and Target, TRU has shown that it now faces significant competition from online firms. Online sales, as a proportion of total toy sales, have almost tripled between 2002 and 2012. At the time of the Order, the Commission found that TRU bought 30% or more of the large, traditional toy companies' total output. TRU has shown that it is no longer the largest customer of the major toy companies and that toy companies can and do distribute toys successfully without using TRU. TRU has shown that Walmart and Target have replaced TRU as the most important customer for Hasbro and Mattel, the two largest toy manufacturers.

The changes in market conditions also justify altering the record keeping requirements of Paragraph IV.B. Because TRU no longer has market power, which justifies eliminating Paragraphs II.A., II.B., and II.C. of the Order, it is no longer necessary that TRU maintain all its communications with its suppliers relating to any aspect of actual or potential purchase or distribution of toys and related products, as required by Paragraph IV.B. The only remaining prohibition in the Order is Paragraph II.D, which prohibits TRU from facilitating agreements between or among suppliers to limit the sale of toys and related products to a retailer.[9] Accordingly, Paragraph IV.B. should be modified to capture the communications prohibited by Paragraph II.D. TRU has shown that any attempt to facilitate agreements among suppliers, which are prohibited by Paragraph II.D. of the Order, would have to involve the officers of its merchandizing

[9] Paragraph II.E. has expired by its own terms.

organization, and therefore retaining records only from those persons would meet the Commission's needs.

Conclusion

For the reasons explained above, the Commission has determined to reopen and modify the Order.

Accordingly, **IT IS ORDERED** that this matter be, and it hereby is, reopened;

IT IS FURTHER ORDERED that Paragraphs II.A., II.B., and II.C. are eliminated; and

IT IS FURTHER ORDERED that Paragraph IV.B. of the Order be revised to read:

Maintain and make available to the staff of the Federal Trade Commission for inspection and copying, upon reasonable notice, all records of communications with suppliers of respondent by the officers of respondent within its merchandizing organization.

By the Commission.

Interlocutory Orders, Etc.

IN THE MATTER OF

SERVICE CORPORATION INTERNATIONAL
AND
STEWART ENTERPRISES, INC.

Docket No. C-4423. Order, May 9, 2014

Letter approving application to divest certain assets to Angeleno Mortuaries, Inc.

LETTER ORDER APPROVING DIVESTITURE OF CERTAIN ASSETS

Amanda Wait, Esq.
Hunton & Williams LLP

Dear Ms. Wait:

This is in reference to the Petition For Approval of Proposed Divestiture filed by Service Corporation International ("SCI") and received on February 28, 2014 ("Petition"). Pursuant to the Decision and Order in Docket No. C-4423, SCI requests prior Commission approval of its proposal to divest certain assets to Angeleno Mortuaries, Inc. ("Angeleno").

After consideration of SCI's Petition and other available information, the Commission has determined to approve the proposed divestiture as set forth in the Petition. In according its approval, the Commission has relied upon the information submitted and the representations made by SCI and Angeleno in connection with SCI's Petition and has assumed them to be accurate and complete.

By direction of the Commission.

Interlocutory Orders, Etc.

IN THE MATTER OF

SERVICE CORPORATION INTERNATIONAL
AND
STEWART ENTERPRISES, INC.

Docket No. C-4423. Order, May 9, 2014

Letter approving application to divest certain assets to Carriage Services, Inc.

LETTER ORDER APPROVING DIVESTITURE OF CERTAIN ASSETS

Amanda Wait, Esq.
Hunton & Williams LLP

Dear Ms. Wait:

This is in reference to the Petition For Approval of Proposed Divestiture filed by Service Corporation International ("SCI") and received on March 7, 2014 ("Petition"). Pursuant to the Decision and Order in Docket No. C-4423, SCI requests prior Commission approval of its proposal to divest certain assets to Carriage Services, Inc. ("Carriage").

After consideration of SCI's Petition and other available information, the Commission has determined to approve the proposed divestiture as set forth in the Petition. In according its approval, the Commission has relied upon the information submitted and the representations made by SCI and Carriage in connection with SCI's Petition and has assumed them to be accurate and complete.

By direction of the Commission.

Interlocutory Orders, Etc.

IN THE MATTER OF

SERVICE CORPORATION INTERNATIONAL
AND
STEWART ENTERPRISES, INC.

Docket No. C-4423. Order, May 9, 2014

Letter approving application to divest certain assets to Legacy Funeral Holdings, Inc.

LETTER ORDER APPROVING DIVESTITURE OF CERTAIN ASSETS

Amanda Wait, Esq.
Hunton & Williams LLP

Dear Ms. Wait:

This is in reference to the Petition For Approval of Proposed Divestiture filed by Service Corporation International ("SCI") and received on March 6, 2014 ("Petition"). Pursuant to the Decision and Order in Docket No. C-4423, SCI requests prior Commission approval of its proposal to divest certain assets to Legacy Funeral Holdings, Inc. ("Legacy").

After consideration of SCI's Petition and other available information, the Commission has determined to approve the proposed divestiture as set forth in the Petition. In according its approval, the Commission has relied upon the information submitted and the representations made by SCI and Legacy in connection with SCI's Petition and has assumed them to be accurate and complete.

By direction of the Commission.

Interlocutory Orders, Etc.

IN THE MATTER OF

SERVICE CORPORATION INTERNATIONAL
AND
STEWART ENTERPRISES, INC.

Docket No. C-4423. Order, May 9, 2014

Letter approving application to divest certain assets to StoneMor Partners L.P.

LETTER ORDER APPROVING DIVESTITURE OF CERTAIN ASSETS

Amanda Wait, Esq.
Hunton & Williams LLP

Dear Ms. Wait:

This is in reference to the Petition For Approval of Proposed Divestiture filed by Service Corporation International ("SCI") and received on March 21, 2014 ("Petition"). Pursuant to the Decision and Order in Docket No. C-4423, SCI requests prior Commission approval of its proposal to divest certain assets to StoneMor Partners L.P. ("StoneMor").

After consideration of SCI's Petition and other available information, the Commission has determined to approve the proposed divestiture as set forth in the Petition. In according its approval, the Commission has relied upon the information submitted and the representations made by SCI and StoneMor in connection with SCI's Petition and has assumed them to be accurate and complete.

By direction of the Commission.

Interlocutory Orders, Etc.

IN THE MATTER OF

LABMD, INC.

Docket No. 9357. Order, May 19, 2014

Opinion and Order denying respondent's motion seeking a summary decision dismissing with prejudice the Complaint in this matter.

ORDER DENYING RESPONDENT LABMD, INC.'S MOTION FOR SUMMARY DECISION

By Commissioner Joshua D. Wright, for a unanimous Commission:[1]

Respondent LabMD, Inc. ("LabMD") seeks a summary decision dismissing with prejudice the Complaint in this matter. Motion for Summary Decision, filed April 21, 2014 ("Motion"). It argues that there is "no genuine dispute as to any material fact regarding liability or relief" in this case, and that we should proceed to "issue a final decision and order" in LabMD's favor. Motion at 8 (quoting 16 C.F.R. § 3.24(a)(2)). Complaint Counsel opposes that request.[2] We find that there are genuine disputes about some of the facts asserted by LabMD in its Motion, and that other such facts are not material to the ultimate question of whether LabMD is liable for engaging in "unfair acts or practices" in violation of Section 5(a) of the Federal Trade Commission Act ("FTC Act), 15 U.S.C. § 45(a). That question must be resolved based on factual evidence presented at an evidentiary hearing. Accordingly, we deny LabMD's Motion for Summary Decision.

[1] Commissioner Brill did not take part in the consideration or decision herein.

[2] *See* Complaint Counsel's Response in Opposition to Respondent's Motion for Summary Decision, filed May 5, 2014 ("CC Opp."); Complaint Counsel's Separate and Concise Statement of Material Facts as to Which There Exist Genuine Issues for Trial, filed May 5, 2014 ("CC Stmt."). *See also* LabMD Reply in Support of Motion to Dismiss, filed May 12, 2013 ("LabMD Reply").

BACKGROUND

On August 28, 2013, the Commission issued an administrative Complaint commencing this adjudicatory proceeding. The Complaint alleges that LabMD's data security practices, "taken together, failed to provide reasonable and appropriate security for personal information stored on its computer networks," even though LabMD "could have corrected its security failures at relatively low cost using readily available security measures." Complaint, ¶¶ 10, 11. The Commission thus found "reason to believe" that LabMD's conduct could constitute "unfair . . . acts or practices" in violation of 15 U.S.C. § 45(a), and determined that an adjudicatory proceeding would be "in the public interest." *Id.*, Preamble & ¶¶ 22-23 (quoting 15 U.S.C. § 45(b)).

The Complaint sets forth specific allegations of "reasonable and appropriate" data security measures that LabMD allegedly should have implemented, but failed to implement, to minimize the risk of security breaches. Complaint, ¶¶ 10(a)-(g), 11. The Complaint goes on to allege that LabMD experienced two security breach incidents. First, unauthorized third parties allegedly retrieved a June 2007 "insurance aging report" and possibly other files containing sensitive consumer information from LabMD's computer systems via Limewire, a peer-to-peer file-sharing application that was installed on the computer of LabMD's billing manager. *Id.*, ¶¶ 17-20. Second, the Sacramento Police Department discovered identity thieves in possession of LabMD "day sheets" containing personal information and consumer checks payable to LabMD. *Id.*, ¶ 21.

The Complaint charges (1) that LabMD's purported data security failures caused, or were likely to cause, harm to consumers, including "identity theft, medical identity theft, and . . . disclosure of sensitive, private medical information" and other personal information including addresses, telephone numbers, social security numbers, bank account and credit card numbers. *Id.*, ¶¶ 6, 9, 12, 19, 21, 22; (2) that consumers could not have learned about LabMD's data security practices or avoided these potential injuries independently, *id.*, ¶ 12; and (3) that LabMD's alleged data security failures did not substantially benefit LabMD or anyone else, *id.*, ¶¶ 11, 20, 22.

In its Answer to the Complaint and Affirmative Defenses, filed September 17, 2013 ("Answer"), and its Objections and Responses to Complaint Counsel's Requests for Admission pursuant to 16 C.F.R. § 3.32, filed March 3, 2014 ("LabMD Admissions/Denials"), LabMD admits most, but not all, of the Complaint's allegations regarding the nature of its business, the services it provides, and the types of consumer information stored on its computer systems. *See* Answer, ¶¶ 1, 3-6, 8-9; LabMD Admissions/Denials, ¶¶ 1-13, 16-28, 35-38.[3] LabMD admits that Limewire had been installed on a computer used by its billing manager and that a company called Tiversa, Inc. had obtained access to LabMD's June 2007 insurance aging report. But in other respects, LabMD either denies, or pleads insufficient knowledge to admit or deny, most of the charges concerning the Limewire and Sacramento data breach incidents. Answer, ¶¶ 17-20; LabMD Admissions/Denials, ¶¶ 39-49. LabMD denies the Complaint's allegations concerning the list of specific data security measures that it did not implement. Answer, ¶¶ 10-11. It also generally denies the allegations regarding the causal relationship between its conduct and actual or potential consumer injury, and whether such injury was avoidable by consumers or whether its conduct had any countervailing benefits. *Id.*, ¶¶ 11-12, 22-23.

On November 12, 2013, LabMD filed a motion to dismiss the Complaint. It contended that (1) the Commission has no authority to address private companies' data security practices as "unfair . . . acts or practices" under Section 5(a)(1) of the FTC Act; (2) the Health Insurance Portability and Accountability Act ("HIPAA") and other statutes touching on data security implicitly strip the Commission of authority to enforce Section 5 in the field of data security; and (3) due process requires the Commission to adopt regulations governing data security before we may engage in an enforcement action. The Commission rejected those arguments and denied the motion. *See* Order Denying Respondent LabMD's

[3] LabMD denies that it maintained electronic copies on its computer networks of patients' checks, Answer, ¶ 9(c); LabMD Admissions/Denials, ¶¶ 33-34; and it takes issue with the allegations concerning the number of laboratory tests and the number of affected consumers. Answer, ¶ 7; LabMD Admissions/Denials, ¶¶ 14-15, 19-20.

Motion to Dismiss (issued January 16, 2014) ("MTD Denial Order").

From December 2013 through April 2014, LabMD and Complaint Counsel engaged in discovery concerning factual issues and expert testimony, including extensive document production, depositions, and requests for admissions. This Motion for Summary Decision followed.

STANDARD OF REVIEW

We review LabMD's Motion for Summary Decision pursuant to Rule 3.24 of our Rules of Practice, 16 C.F.R. § 3.24, whose "provisions are virtually identical to the provisions of Fed. R. Civ. P. 56, governing summary judgment in the federal courts." *N.C. Bd. of Dental Examiners*, 151 F.T.C. 607, 610-11 (2011); *see also Hearst Corp.*, 80 F.T.C. 1011, 1014 (1972). A party moving for summary decision must show that "there is no genuine dispute as to any material fact," and that it is "entitled to judgment as a matter of law." Fed. R. Civ. P. 56(a).

"[T]he substantive law will identify which facts are material . . . [*i.e.*, those] that might affect the outcome of the suit under the governing law." *Anderson v. Liberty Lobby*, 477 U.S. 242, 248 (1986). Here, the applicable substantive law is Section 5(n) of the FTC Act, which deems an act or practice to be "unfair" if it [1] "causes or is likely to cause substantial injury to consumers"; [2] such injury "is not reasonably avoidable by consumers themselves"; and [3] such injury "is not outweighed by countervailing benefits to consumers or competition." 15 U.S.C. § 45(n). Facts are "material" for present purposes only if they tend to prove or disprove that LabMD's data security practices satisfy one or more of these criteria. Facts that have no bearing on these dispositive questions "are irrelevant or unnecessary [and] will not be counted." *Anderson*, 477 U.S. at 248.

There is no "genuine" dispute over material facts where the "evidence favoring the non-moving party . . . is merely colorable, [but] not significantly probative." *Id.* at 249. The "party seeking summary judgment always bears the initial responsibility of . . . identifying" factual information in the record that "it believes

demonstrate[s] the absence of a genuine issue of material fact." *Celotex Corp. v. Catrett*, 477 U.S. 317, 323 (1986). Where, as here, the party opposing the motion bears the ultimate burden of proof, *see* 16 C.F.R. § 3.43(a) (imposing burden of proof on Complaint Counsel), the moving party may "discharge this initial responsibility" either by showing that "there is an absence of evidence to support the non-moving party's case" or by supplying "affirmative evidence demonstrating that the non-moving party will be unable to prove its case at trial." *Fitzpatrick v. City of Atlanta*, 2 F.3d 1112, 1115-16 (11th Cir. 1993). "Only when that burden has been met does the burden shift to the non-moving party to demonstrate that there is indeed a material issue of fact that precludes summary judgment." *Clark v. Coats & Clark, Inc.*, 929 F.2d, 604, 608 (11th Cir. 1991); *see also* 16 C.F.R. § 3.24(a)(3) ("When a motion for summary decision is made and *supported as provided in this rule*, a party opposing the motion . . . must set forth specific facts showing that there is a genuine issue of material fact for trial.") (emphasis added). "On summary judgment the inferences to be drawn from the underlying facts must be viewed in the light most favorable to the party opposing the motion." *Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574, 587 (1986) (citation omitted).

ANALYSIS

I. GENUINE ISSUES OF MATERIAL FACT

In a section of its Motion entitled "Statement of Facts," LabMD sets forth facts that it contends are both "material" and not subject to "genuine" dispute. *See* Motion at 4-8 ("LabMD Stmt."); *cf.* 16 C.F.R. § 3.24(a). We consider the assertions in each of the 24 paragraphs in this Statement,[4] as well as factual assertions set forth in other sections of LabMD's Motion, to determine (1) whether they constitute "material" facts; (2) if so, whether there is no "genuine" dispute about them; and (3)

[4] We refer to each of these paragraphs using the convention "[X.Y]," where X refers to the page number of the Motion and Y refers to the position of the paragraph in sequence of the paragraphs beginning on that page. Thus, "LabMD Stmt. 5.2" refers to the second full paragraph on page 5 of the Motion.

whether, on that basis, LabMD is entitled to a summary decision in its favor as a matter of law.

A. HIPAA Data Security Standards

LabMD asserts that "[a]ll information received, utilized, maintained and transmitted by LabMD is protected health information ('PHI') as defined by the Health Insurance Portability and Accountability Act of 1996 ('HIPAA')." Motion at 1 (citing 45 C.F.R. § 160.103).[5] LabMD's Statement of Facts includes five paragraphs relating to the data security requirements imposed by HIPAA and related statutes and rules (collectively, "HIPAA Standards"), and characterizes that text as a set of "material" facts that are not in "genuine" dispute.[6]

LabMD further contends that Complaint Counsel's expert witness, Dr. Raquel Hill, articulated data security standards pursuant to Section 5 "that are difficult to reconcile with," and are "far more stringent" than, the HIPAA Security Rule and other HIPAA Standards. Motion at 3, 20. For example, LabMD asserts that Dr. Hill's proposed standards "do not account, as required by HIPAA, for the needs and capabilities of small health care providers and rural health care providers," improperly "presume a level of technical knowledge generally not available to small health care providers," and are "inconsistent with HHS guidance that the risk assessment can be a qualitative and manual process." *Id.* at 21. From those asserted facts, LabMD contends that its

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[5] Significantly, LabMD does not assert that the scope of personal health information included in the definition of "PHI" is co-extensive with the scope of the "personal information" at issue here, as defined in the Complaint (¶ 6), nor does it refer to any evidence or legal authority that would support that proposition.

[6] *See* LabMD Stmt. 4.2 ("LabMD is a "Covered Entity" that receives, maintains and transmits PHI during the normal course of its business."); *id.* 5.5 ("LabMD is a HIPAA-covered entity. . . . It must comply with HHS's HIPAA and Health Information Technology for Economic and Clinical Health Act ("HITECH") regulations . . . ."); *id.*, 5.6 ("HIPAA's Security Rule establishes substantive data-security standards involving PHI with which HIPAA-covered entities, like LabMD, must comply."); *id.* 5.7 ("HHS exclusively enforces HIPAA and HITECH. . . ."); *id.*, 6.1 ("The FTC has not accused LabMD of violating HIPAA, HITECH or any implementing regulations. . . .").

"compliance with the HIPAA [Standards]" should not be deemed "irrelevant to . . . Section 5 unfairness claims," but rather should be a complete "defense" to such claims. *Id.* at 20.

Complaint Counsel responds that LabMD's asserted facts relating to HIPAA "are irrelevant or immaterial" and that it need not "demonstrate that [LabMD's] conduct violated other laws in order to establish that [LabMD's] practices were unfair under Section 5." CC Opp. at 4. Complaint Counsel contends that "the Commission [has] already rejected the argument that the FTC Act and HIPAA are at odds," *id.* at 12 (citing MTD Denial Order at 12), and asserts that LabMD's arguments "that the FTC's data security 'standards' are not scalable or presume too high a level of technical knowledge for small health care providers should be addressed at trial and do not support a summary decision." *Id.*

We conclude that LabMD's factual contentions regarding HIPAA data security standards do not justify a summary decision in LabMD's favor. As LabMD concedes, "[t]he FTC has not accused LabMD of violating HIPAA, HITECH or any implementing regulations," Motion at 6 (LabMD Stmt. 6.1), and "this case has nothing to do with HIPAA." *Id.* at 10 (quoting MTD Denial Order at 12). Rather, this case concerns LabMD's compliance with Section 5 of the FTC Act. Thus, the facts that LabMD alleges about HIPAA could be "material" for purposes of this Motion for Summary Decision only if LabMD were correct that, as a matter of law, the Commission could not hold LabMD liable under Section 5 if its data security practices complied with HIPAA Standards. Motion at 1. But that legal argument is now foreclosed. We held in the Order denying LabMD's Motion to Dismiss that HIPAA does not "trump" Section 5, and that LabMD therefore "cannot plausibly assert that, because it complies with [HIPAA], it is free to violate" requirements imposed independently by Section 5 of the FTC Act. MTD Denial Order at 11, 13; *see infra*, Part II.[7]

[7] Consistently, HHS, in adopting regulations implementing HIPAA, recognized that entities subject to HIPAA "may be required by other Federal law to adhere to additional or more stringent security measures," and consequently, that "[s]ecurity standards in [HHS's] final rule establish a minimum level of security that covered entities must meet." Health Insurance Reform: Security Standards, 68 Fed. Reg. 8334, 8355 (Feb. 20, 2003).

In any event, LabMD's statements of fact regarding HIPAA Standards would be insufficient to merit summary decision in its favor even if, counterfactually, those Standards *did* define the scope of Section 5 liability as a matter of law. LabMD points to no record evidence regarding what measures, if any, it implemented to prevent data breaches. It does not explain which HIPAA Standards apply to LabMD's actions or why LabMD's conduct satisfied them. Indeed, LabMD does not even assert that it *complied* with the applicable HIPAA Standards; it merely avers that the Commission has not accused it of *violating* those requirements. *See, e.g.*, LabMD Stmt. 6.1. The "party seeking summary judgment bears the initial responsibility of informing the [adjudicator] of the basis for its motion, and identifying those portions of the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, which it believes demonstrate the absence of a genuine issue of material fact." *Celotex*, 477 U.S. at 323 (quotation marks omitted). LabMD has not carried this burden.[8]

In sum, because we conclude that LabMD's HIPAA-related factual assertions are not "material" to the violations of law alleged in the complaint and, in any event, are not supported by any evidence, we need not determine whether they are in "genuine" dispute.

B. Alleged Limewire and Sacramento Security Breaches

LabMD identifies what it characterizes as "material" facts regarding the two specific security breaches alleged in the Complaint – *i.e.*, the alleged breach relating to the installation of

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[8] We cannot determine, on the present record, whether, in fact, LabMD *has* complied with or violated HIPAA Standards. For purposes of the present Motion, we must draw all reasonable inferences in support of the party opposing the Motion—*i.e.*, Complaint Counsel—and consequently, we cannot infer from LabMD's unsupported assertions that it complied with applicable HIPAA Standards. Moreover, we express no view on whether and to what extent such compliance or noncompliance might be a relevant factor in our assessment of whether LabMD violated Section 5. We agree with Complaint Counsel that any such arguments "should be addressed at trial." CC Opp. at 12.

Limewire on a billing computer,[9] and the alleged breach discovered by the Sacramento Police Department.[10]

We conclude that these factual claims, even if undisputed, are not material and would not support a summary decision in LabMD's favor. LabMD has not attempted to show how its factual assertions regarding the Limewire and Sacramento incidents are material to its liability as alleged in the Complaint. For example, even if we accepted as true the claims that Tiversa retrieved the Insurance Aging File without LabMD's knowledge or consent (LabMD Stmt. 4.3), that Tiversa improperly passed on that file to Professor Johnson or others (*id.*, 4.5), and that Tiversa touted its unique technology (*id.*, 4.3 n.2), these facts would not resolve the ultimate questions we must decide in this case. In particular, they would not compel us, as a matter of law, to dismiss the allegations in the Complaint that LabMD failed to implement reasonable and appropriate data security and that such failure caused, or was likely to cause, unavoidable and unjustified harm to consumers. To the contrary, LabMD's factual

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[9] *See* LabMD Stmt. 4.3 ("On or about February 5, 2008, without LabMD's knowledge or consent, Tiversa, Inc. ('Tiversa'), took possession of a single LabMD insurance aging file (the 'Insurance Aging File')."); *id.* n.2 ("Tiversa has testified before Congress that it possesses unique technology which among other things allows it to download computer files from unsuspecting third persons inadvertently sharing computer files via peer to peer ('P2P') networks."); *id.*, 4.4 ("The Insurance Aging File contained PHI for over 9,000 patients of LabMD's physician clients."); *id.*, 4.5 ("Subsequently, Tiversa made the Insurance Aging File available to Professor Eric Johnson, of Dartmouth College, who was conducting research under a government contract for his article entitled, 'Data Hemorrhages in the Health Care Sector'."); *id.*, 4.6 ("In January 2010, the FTC began a three year full investigation of LabMD's data security practices based upon the disclosure of the PHI contained in the Insurance Aging File.").

[10] *See* LabMD Stmt. 5.1, 5.2, and 5.3 ("In October 2012, during a raid of a house of suspected identity thieves, the Sacramento Police Department found LabMD 'day sheets' and copies of checks made payable to LabMD. Again, the day sheets and checks contained PHI from patients of LabMD's physician clients."); *id.* 5.2 ("In an attempt to notify LabMD of its find, the Sacramento police 'googled' LabMD, and discovered that LabMD was under investigation by the FTC."); *id.*, 5.3 ("The Sacramento police then notified the FTC of its find, but did not notify LabMD, despite Sacramento's awareness of LabMD's duty to notify under HIPAA.").

contentions concerning Tiversa and the Sacramento Police Department are fully consistent with the Complaint's allegations that LabMD failed to implement reasonable and appropriate data security procedures.

C. Genuine Disputes Over Reasonable and Appropriate Data Security Practices

LabMD raises a number of contentions that could be construed as addressing issues of material fact, but it fails to demonstrate that there is no "genuine dispute" over these issues. For example, LabMD criticizes the opinions of Complaint Counsel's expert witness concerning appropriate data security measures. *See* Motion at 13, 16, 18, 20-22; *id.*, Exh. 5. The issues addressed by this expert report are undoubtedly material. But there is plainly also a genuine dispute about them. Indeed, LabMD submitted the declaration of its own expert witness, whose report conflicts with that of Complaint Counsel's expert witness.[11] *See* Motion, Exh. 12; *see also* Motion at 22; LabMD Reply at 11-13. Such conflicting expert opinion is precisely the type of dispute that evidentiary hearings are held to resolve.

Similarly, LabMD's Statement asserts, "The FTC has never specified what data security standards were in place at any given point during the relevant time period or when LabMD specifically violated them." LabMD Stmt. 6.4. This contention could be read as encompassing both factual and legal issues,[12] of which at least

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[11] We decline to address Complaint Counsel's request that we strike Mr. Baker's declaration on the grounds that LabMD "did not timely designate Mr. Baker [as an expert] in this proceeding and its use of his declaration contravenes the Scheduling Order." CC Opp. at 4 n.2. The Commission (or the ALJ) may consider a Motion to Strike if submitted as a stand-alone pleading, rather than as a footnote to a brief regarding another motion.

[12] It is unclear whether LabMD, in using the term "the FTC" in Stmt. 6.4, intends to refer to Complaint Counsel or to the Commission. To the extent LabMD is contending that Complaint Counsel, in the course of this adjudication, has yet to identify with specificity what data security standards it alleges LabMD violated, this contention is not a material fact because the adjudication is still underway and, as discussed below, the Commission is not bound by Complaint Counsel's arguments or characterizations. *See infra* notes 15-18 and accompanying text. To the extent LabMD's statement is simply an alternative formulation of its legal argument that the Commission infringed its

some are genuinely disputed.[13] We cannot resolve such disputes on the present record, and LabMD has not shown, with respect to this contention, that it is entitled to judgment as a matter of law.

D. Other Immaterial Matters

We conclude that the remaining factual assertions in LabMD's Statement of Facts are immaterial. First, the procedural history of this case, even if undisputed, does not support any particular conclusion on whether LabMD's conduct violated the FTC Act.[14]

In addition, the propositions cited in LabMD's Statement of Facts characterizing the Commission's positions on the basis of Complaint Counsel's statements to the Administrative Law Judge during an Initial Pretrial Conference,[15] Complaint Counsel's

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Constitutional due process rights by providing inadequate advance notice, the statement is unavailing because we have already rejected that legal argument. *See infra* Section II; *see also* MTD Denial Order at 14-17 (rejecting LabMD's due process/fair notice argument); Motion at 11-18 (rearguing the same legal claim); LabMD Reply at 3-12 (same). We recognize that there may be other ways to interpret LabMD's statement that might implicate unresolved legal questions or material issues of fact; but for present purposes, we cannot draw inferences in LabMD's favor.

[13] *Compare* LabMD Stmt. 6.4, 6.5, and 7.1 *with* CC Stmt. ¶¶ 1-10 (and evidence cited therein) (genuine factual disputes over applicable standards and LabMD's conduct). *See also* LabMD Reply at 6-9 (citing and disputing legal arguments in Complaint Counsel's Pre-Trial Brief (filed May 6, 2014)).

[14] *See, e.g.*, LabMD Stmt. 4.6 ("In January 2010, the FTC began a three year full investigation of LabMD's data security practices . . . ."); *id.*, 5.4 ("In August, 2013, FTC filed an Administrative Complaint."); *id.*, 6.2 ("The FTC alleges that LabMD's data-security is inadequate to protect the PHI it possesses and that this failure to adequately protect PHI is an unfair practice affecting consumers in violation of Section 5 of the Federal Trade Commission Act.").

[15] *See* LabMD Stmt. 6.6 ("When asked by the ALJ whether 'the Commission issued guidelines for companies to utilize to protect...[sensitive] information or is there something out there for a company to look to,' the FTC admitted that '[t]here is nothing out there for a company to look to.'"); *id.*, 7.1 ("The FTC admits that it has never promulgated data-security regulations, guidance, or standards under Section 5: '[T]here is no rulemaking, and no rules have been issued . . . .'"); *id*., 7.2 ("When asked about other sources of data-security standards, FTC said, the 'Commission has entered into almost 57 negotiations and consent agreements that set out . . . the method by which the Commission

responses to LabMD's discovery demands[16] and requests for admissions,[17] and Complaint Counsel's objections to questions posed during a deposition,[18] do not constitute facts at all, let alone material facts. Just because Complaint Counsel has made particular statements or taken certain positions does not necessarily mean *the Commission* has adopted those positions. To the contrary, the Commission is not bound by characterizations employed by Complaint Counsel, and is free to reject Complaint Counsel's arguments or reject its evidence. Moreover, the statements of counsel cited by LabMD are not contained in sworn affidavits or testimony, as required under 16 C.F.R. § 3.24(a)(3) & (4), and thus are little more than "mere allegations or denials,"

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assesses reasonableness.' . . . . And finally the FTC argued that 'the IT industry has issued a tremendous number of guidance pieces and other pieces that basically set out the same methodology . . .,' except that the 'Commission's process' involves 'calculation of the potential consumer harm from unauthorized disclosure of information.'"); *id.*, 8.1 ("At the hearing, the ALJ asked: 'Are there any rules or regulations that you're going to allege were violated here that are not within the four corners of the complaint?' The FTC responded 'No.'"); *id.*, 8.2 ("The FTC also admits that '[n]either the complaint nor the notice order prescribes specific security practices that LabMD should implement going forward.'") (quoting colloquy between Complaint Counsel Alain Sheer and Chief Administrative Law Judge D. Michael Chappell, Transcript of Initial Pretrial Conference, September 25, 2013).

[16] *See* LabMD Stmt. 7.3 ("In response to LabMD's written discovery requesting documents relating to the standards the FTC enforces regarding data-security, the FTC produced thousands of pages of consent decrees, reports, PowerPoint presentations, and articles from the FTC's website, including many in Spanish.") (citing attachments to letters from Complaint Counsel transmitting responses to LabMD document requests).

[17] *See* LabMD Stmt. 6.5 ("The FTC claims it need not 'allege the specific industry standards Respondent failed to meet or specific hardware or software Respondent failed to use.'") (quoting Complaint Counsel's Amended Response to LabMD's First Set of Requests for Admission (filed as Exh. B to Complaint Counsel's Motion to Amend Complaint Counsel's Response to Respondent's First Set of Requests for Admission)).

[18] *See* Motion at 14 ("Respondent's counsel asked [FTC Bureau of Consumer Protection Deputy Director Daniel] Kaufman a series of questions related to published standards that the Bureau sought to enforce against LabMD; however, Complaint Counsel instructed the witness not to respond to any of these questions.") (citing Deposition of Daniel Kaufman, April 14, 2014).

16 C.F.R. § 3.24(a)(3), which can neither support nor defeat a Motion for Summary Decision.

Most significantly, even if these statements or arguments of Complaint Counsel could be construed as facts, and even if they were not genuinely in dispute, they still would not be material to this case. The statements and arguments of Complaint Counsel that LabMD lists in its Statement of Facts relate primarily to LabMD's legal arguments concerning due process, jurisdiction, and related matters, which we already rejected in our Order denying LabMD's Motion to Dismiss. *See infra*, part II. They appear to have little, if any, bearing on the open issues affecting our decision on whether LabMD's data security practices violated Section 5.

Finally, LabMD's contention that it "owns" the consumer information at issue also is immaterial. *See* Motion at 9-10. LabMD contends that "the PHI in LabMD's possession is information that patients voluntarily gave to their doctors, who in turn, voluntarily provided this information to LabMD," and thus, that the information at issue is LabMD's "own property." *Id.*[19] The central questions to be decided here are whether LabMD's data security practices were reasonable and whether they caused, or were likely to cause, significant injury to consumers that was unavoidable and unjustified by offsetting benefits. Those questions do not turn on the "ownership" of the data. It is quite possible that a company could use (or misuse) its "own property" in a manner that causes, or is likely to cause, significant harm to others. If such misuse satisfies the criteria of Section 5, it may constitute an "unfair act or practice."

[19] In support of this assertion, LabMD contends that, as a matter of law, "consumers who voluntarily provide personal information to third parties lose their privacy rights because the information in question once given, belongs to the receiver and not the consumer." Motion at 9. LabMD therefore rejects what it characterizes as "FTC's foundational premise"—that "consumers who voluntarily give PHI to medical providers have some protectable privacy or other interest in that information beyond that which Congress authorized HHS to carve out under HIPAA." *Id.* at 10. *See also* CC Opp. at 8 & n.3 (opposing argument). For present purposes, we need not resolve the merits of this novel legal proposition.

II. LABMD'S RENEWED DUE PROCESS AND JURISDICTIONAL CHALLENGES

LabMD asserts that we wrongly denied its Motion to Dismiss, Motion at 8, and implicitly asks us to reconsider the issues raised in that Motion. We decline to do so. We have already carefully addressed and disposed of LabMD's arguments that (1) its due process rights were infringed and that it lacked adequate notice of what conduct is prohibited (*compare* Motion at 11-12, 15-16, and LabMD Reply at 4-6, *with* MTD Denial Order at 16-17); (2) the Commission cannot bring enforcement actions to address statutory violations unless it has adopted specific rules or announced detailed compliance standards in advance (*compare* Motion at 13-18 and LabMD Reply at 6-10, *with* MTD Denial Order at 14-17); and (3) HIPAA supersedes any FTC authority over unfair data security practices and that HIPAA and the FTC Act are in irreconcilable conflict (*compare* Motion at 18-20, and LabMD Reply at 13-15, *with* MTD Denial Order at 10-13).

We need not reiterate the legal analysis set forth in our earlier Order. LabMD identifies no "new questions raised by the decision . . . upon which [it] had no opportunity to argue," *see* 16 U.S.C. § 3.55; and even if it had done so, it failed to submit a Petition for Reconsideration within 14 days of the service of our Order. *Id.* To the extent LabMD continues to disagree with the legal conclusions set forth in that interlocutory decision, it may seek judicial review pursuant to 15 U.S.C. § 45(c)-(d)—but *only* if and when we issue a final order against LabMD at the conclusion of this adjudicatory proceeding. *See, e.g.*, *FTC v. Standard Oil Co. of Cal.*, 449 U.S. 232 (1980).[20] We express no view on the open legal questions at issue in this proceeding, or on the numerous, genuinely disputed issues of material fact that have not yet been resolved.

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[20] *See also LabMD, Inc. v. FTC*, No. 13-15267-F (11th Cir. Feb. 18, 2014) (*per curiam*) (dismissing challenge to adjudicatory proceeding for lack of jurisdiction, because no cease and desist order had been issued); *LabMD, Inc. v. FTC*, No. 1:14-cv-00810-WSD (N.D. Ga. May 12, 2014) (same), *appeal pending*.

Accordingly,

IT IS ORDERED THAT Respondent LabMD, Inc.'s Motion for Summary Decision **IS DENIED**.

By the Commission, Commissioner Brill not participating.

Interlocutory Orders, Etc.

IN THE MATTER OF

SERVICE CORPORATION INTERNATIONAL
AND
STEWART ENTERPRISES, INC.

Docket No. C-4423. Order, May 20, 2014

Letter approving application to divest certain assets to Signature Funeral and Cemetery Investments LLC and/or its affiliates d/b/a The Signature Group.

LETTER ORDER APPROVING DIVESTITURE OF CERTAIN ASSETS

Amanda Wait, Esq.
Hunton & Williams LLP

Dear Ms. Wait:

This is in reference to the Petition For Approval of Proposed Divestiture filed by Service Corporation International ("SCI") and received on March 14, 2014 ("Petition"). Pursuant to the Decision and Order in Docket No. C-4423, SCI requests prior Commission approval of its proposal to divest certain assets to Signature Funeral and Cemetery Investments LLC and/or its affiliates d/b/a The Signature Group (collectively, "Signature").

After consideration of SCI's Petition and other available information, the Commission has determined to approve the proposed divestiture as set forth in the Petition. In according its approval, the Commission has relied upon the information submitted and the representations made by SCI and Angeleno in connection with SCI's Petition and has assumed them to be accurate and complete.

By direction of the Commission.

Interlocutory Orders, Etc.

IN THE MATTER OF

HERTZ GLOBAL HOLDINGS, INC.

Docket No. C-4376. Order, May 29, 2014

Letter responding to the Petition for Approval for the sale and assignment of ten closed Advantage locations to Hertz Global Holdings, Inc. and twelve closed Advantage locations to Avis Budget Group.

LETTER ORDER APPROVING DIVESTITURE OF CERTAIN ASSETS

Craig M. Geno, Esquire
Law Offices of Craig M. Geno, PLLC

Dear Mr. Geno:

This letter responds to the Petition of Franchise Services Corporation, Inc. for Prior Approval of the Sale of the Non-Transferred Locations filed by Franchise Services of North America ("FSNA") on April 10, 2014 ("Petition"). The Petition requests that the Federal Trade Commission approve, pursuant to the Order in this matter, the sale and assignment of ten closed Advantage locations to Hertz Global Holdings, Inc. and twelve closed Advantage locations to Avis Budget Group. The Petition was placed on the public record for comments until May 19, 2014. No comments were received.

After consideration of the proposed divestiture as set forth in FSNA's Petition and supplemental documents, as well as other available information, the Commission has determined to approve both proposed sales. In according its approval, the Commission has relied upon the accuracy and completeness of information submitted and representations made in connection with FSNA's Petition.

By direction of the Commission, Commissioner Wright and Commissioner McSweeny not participating.

Interlocutory Orders, Etc.

IN THE MATTER OF

ARDAGH GROUP, S.A.; SAINT-GOBAIN CONTAINERS, INC.; AND COMPAGNIE DE DAINT-GOBAIN

Docket No. 9356. Order, June 17, 2014

Letter approving application to divest the Anchor Glass Business to Glass Container Acquisition LLC.

LETTER ORDER APPROVING DIVESTITURE OF CERTAIN ASSETS

Wayne Dale Collins, Esq.
Shearman & Sterling LLP

Dear Mr. Collins:

This letter responds to the Application for Approval of Divestiture of Anchor Glass Business to Glass Container Acquisition LLC ("Anchor Glass Application") filed by Ardagh Group S.A. ("Ardagh") on April 24, 2014. The Anchor Glass Application requests that the Federal Trade Commission approve, pursuant to the Order in this matter, Ardagh's proposed divestiture of the Anchor Glass Business to Glass Container Acquisition LLC, an affiliate of KPS Capital Partners L.P. The Application was placed on the public record for comments until May 28, 2014, and no comments were received.

After consideration of the proposed divestiture as set forth in Ardagh's Anchor Glass 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 Ardagh's Anchor Glass Application and has assumed them to be accurate and complete.

By direction of the Commission, Commissioner Wright dissenting and Commissioner McSweeny not participating.

AUTO DEALERS

FTC File No. 131 0206 – Decision, April 21, 2014

RESPONSE TO ZIEGLER SUPERSYSTEMS, INC.'S PETITION TO QUASH OR LIMIT CIVIL INVESTIGATIVE DEMAND DATED FEBRUARY 11, 2014

By WRIGHT, Commissioner:

Ziegler Supersystems, Inc. ("ZSS") has filed a petition to quash or limit the civil investigative demand ("CID") issued by the Federal Trade Commission on February 11, 2014. For the reasons stated below, the petition is denied.

I. BACKGROUND

TrueCar.com matches potential automobile purchasers and dealers and gives consumers pricing information about specific vehicles. Before February 2012, TrueCar matched buyers and sellers through online reverse auctions. A user would specify a desired car make and model, along with a zip code. In response, TrueCar provided "leads" that identified participating local dealers with the car in stock, together with a price bid by each dealer. The website then generated a coupon stating that the user was entitled to buy the desired car at the price quoted by the dealer. The website also purported to provide the dealer's cost for the car after rebates, the factory invoice price, the average market price, and the manufacturer's suggested retail price.

This business model came to an end in February 2012, after thousands of dealers ended their business relationships with TrueCar during the previous few months. At that point, the company announced that it would eliminate the reverse auctions and dealer cost disclosures. Commission staff is now investigating whether dealers, consultants, and other firms in the retail automotive industry violated Section 5 of the FTC Act, 15

U.S.C. § 45 (as amended), by agreeing that they would collectively refuse to participate in TrueCar's reverse auctions.

As part of this investigation, the Commission has sought information from James Ziegler, an industry consultant who is the owner and President of petitioner ZSS. Mr. Ziegler advises dealers nationwide, organizes management seminars, speaks at industry conventions, and writes opinion pieces for trade periodicals and blogs.[1] In the months preceding TrueCar's announcement that it was changing its business model, Mr. Ziegler appears to have contributed unfavorable blog posts and comments about TrueCar's reverse-auction business model to the industry blogs DealerElite and Automotive Digital Marketing. Mr. Ziegler himself states that he encouraged "thousands" of dealers and "industry influencers" to end their relationships with TrueCar,[2] and that he was recognized for "spear-heading the Anti-TrueCar movement."[3] Staff is now investigating whether he may have helped orchestrate an unlawfully collusive agreement among dealers to suppress price competition.

On February 11, 2014, pursuant to a Commission resolution authorizing the use of compulsory process,[4] the FTC issued a CID to ZSS seeking, *inter alia*, the communications of its employees (including Mr. Ziegler) with dealers, manufacturers, consultants, and trade associations concerning TrueCar's effects on the retail price of automobiles and any decisions by dealers to terminate TrueCar's services. The CID's initial return date (February 20,

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[1] Pet. 2. Although ZSS's Petition to Quash refers to itself as a "media publications company," the company's website (http://www.zieglersuper systems.com) promotes Mr. Ziegler's consulting services, seminars, and speaking engagements.

[2] James A. Ziegler, TRUE CAR and ZAG Cyber Bandits, Parasites or Good for the Car Business?, Dec. 3, 2011 comment, DealerElite (Nov. 27, 2011), *available at* http://www.dealerelite.net/profiles/blog/show?id=5283893%3ABlogPost%3A250154&commentId=5283893%3AComment%3A254205&xg_source=activity.

[3] *Id.* at Feb. 9, 2012 comment.

[4] *See* Resolution Authorizing Use of Compulsory Process in Nonpublic Investigation, File No. 1310206 (Jan. 17, 2014).

2014) was extended to March 20, 2014. During a phone call on March 18, 2014, counsel for ZSS first informed Commission staff that ZSS intended to withhold documents responsive to certain CID specifications on the ground that they were privileged under state and federal laws protecting journalists. ZSS's counsel did not voice any other specific issues with the CID at that time.

On March 20, 2014, ZSS produced 138 pages of documents and filed this petition to limit or quash.

II. ANALYSIS

A. The Applicable Legal Standards

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 defined by the Commission's investigatory resolution.[5] Agencies have wide latitude to determine what information is relevant to their law enforcement investigations and need not even have a belief that wrongdoing has actually occurred.[6] As the D.C. Circuit has explained, "[t]he 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, as it was in the Commission's resolution here."[7] Furthermore, if the recipient of compulsory process asserts an

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[5] *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).

[6] *See, e.g.*, *Morton Salt*, 338 U.S. at 642-43 ("[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.").

[7] *Invention Submission*, 965 F.2d at 1090 (emphasis in original, internal citations omitted) (citing *FTC v. Carter*, 636 F.2d 781, 787-88 (D.C. Cir. 1980), and *Texaco*, 555 F.3d at 874 & n.26).

evidentiary privilege, it has the burden to establish that the privilege applies.[8]

ZSS argues that the CID's demands for its TrueCar-related documents should be quashed on the grounds that they violate the journalist's privilege, the Privacy Protection Act of 1980, 42 U.S.C. § 2000aa(a)-(b), and the Georgia reporter's shield law. Additionally, ZSS asserts that the Commission resolution was overbroad; the CID seeks irrelevant material concerning ZSS's income sources, personnel, and document retention policies; and the CID's demands for ESI production are unduly burdensome. These contentions lack merit.

B. ZSS's Privilege Claims Are Without Merit

Most appellate courts recognize a qualified privilege that protects journalists from disclosing in civil proceedings information that they obtained while reporting the news.[9] A person who claims the privilege must bear the burden to show that he or she (1) gathered the material with the intent to disseminate information to the public, *and* (2) did so with journalistic independence from the subject matter.[10] Even when the privilege applies, it must give way if the party seeking the material demonstrates that the material is highly relevant, necessary to the

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[8] *CFTC v. McGraw-Hill Cos.*, 390 F. Supp. 2d 27, 32 (D.D.C. 2005) (*McGraw-Hill I*); *CFTC v. McGraw-Hill Cos.*, 507 F. Supp. 2d 45, 50 (D.D.C. 2007) (*McGraw-Hill II*).

[9] Although most courts of appeals have recognized the privilege in some form, they have taken conflicting positions about whether it is mandated by the First Amendment, *see Price v. Time, Inc.*, 416 F.3d 1327, 1342-43 (11th Cir. 2005), or is grounded in federal common law, *see Riley v. City of Chester*, 612 F.2d 708, 714-16 (3d Cir. 1979). The Seventh Circuit, by contrast, concludes that "rather than speaking of privilege, courts should simply make sure" that a subpoena directed to a journalist be "reasonable in the circumstances, which is the general criterion for judicial review of subpoenas." *McKevitt v. Pallasch*, 339 F.3d 530, 533 (7th Cir. 2003). *But see Branzburg v. Hayes*, 408 U.S. 665, 690-91 (1972) (journalists not immune from testifying about confidential sources before a criminal grand jury).

[10] *See, e.g.*, *Chevron Corp. v. Berlinger*, 629 F.3d 297, 307-08 (2d Cir. 2011); *von Bulow v. von Bulow*, 811 F.2d 136, 142-45 (2d Cir. 1987).

investigation, and unavailable from other sources.[11] When, as here, a federal agency is investigating possible law violations, the privilege is "more qualified" than it would be in private civil litigation, in light of the "public interest" in combating harms to consumers, such as "artificially inflated prices."[12]

Here, ZSS has failed to establish that the journalist's privilege shields its TrueCar-related documents from disclosure. Commission Rule 2.10(a)(1) requires that a Petition to Quash "set forth all assertions of protected status . . . including all appropriate arguments, affidavits, and other supporting documentation."[13] ZSS, however, did not submit credible evidence that Mr. Ziegler acted primarily for newsgathering purposes, nor did it provide any evidentiary support regarding the scope and nature of the documents it seeks to protect under the journalist's privilege. Accordingly, we conclude that Mr. Ziegler has not shown that he was engaged in newsgathering and, in any event, has not established that he exercised the requisite journalistic independence. Moreover, even if he had made both of those showings, any privilege claim would yield to FTC staff's *bona fide* need for these documents because they contain information that lies at the heart of the investigation and is not reasonably available from other sources.

1. Mr. Ziegler was not engaged in independent newsgathering

The journalist's privilege does not extend "to any person with a manuscript, a web page or a film."[14] It applies only if the person claiming the privilege "demonstrate[s], through competent evidence," that he or she intended to use the claimed protected material "to disseminate information to the public and that such

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[11] *See, e.g., United States v. Caporale*, 806 F.2d 1487, 1504 (11th Cir. 1986).

[12] *See, e.g., McGraw-Hill I*, 390 F. Supp. 2d at 33 ("The CFTC is a federal agency authorized by Congress to investigate violations of law, a posture quite distinct from that of a private litigant seeking personal redress.").

[13] 16 C.F.R. § 2.10(a)(1).

[14] *Madden*, 151 F.3d at 129.

intent existed at the inception of the newsgathering process."[15] The privilege does not protect those who collect information "for personal reasons, unrelated to dissemination of information to the public," even if such persons later decide to publish what they have learned.[16] Instead, the privilege is reserved for "persons whose purposes are those traditionally inherent to the press; persons gathering news for publication."[17]

ZSS asserts that the journalist's privilege protects Mr. Ziegler's "information and documents relating to TrueCar" because he intended to "prepar[e] articles" on this subject.[18] However, a general intention to publish articles is not enough; such intention must have existed at the inception of the newsgathering process and be proven through competent evidence. ZSS has not shown that Mr. Ziegler spoke with industry members about TrueCar for journalistic or investigatory purposes. For example, ZSS has not provided a sworn declaration from Mr. Ziegler affirming that his primary purpose was simply to inform the public about TrueCar's business relationships or its effects on the price of cars. Instead, Mr. Ziegler's blog posts state that his purpose was to encourage dealers to "Cancel your dealership's Affiliation with TrueCar" and "Bring This Monster to It's [sic] Knees" in order to prevent the price of automobiles from falling (11/27/11, DealerElite and Automotive Digital Marketing).[19] Statements such as this suggest that Mr. Ziegler, who describes himself as an "advis[or to] more than 500 [car] dealerships throughout the country,"[20] was functioning more like an industry facilitator than like a journalist. Although the purpose

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[15] *von Bulow*, 811 F.2d at 144.

[16] *Id.* at 143; *see also Chevron*, 629 F.3d at 307.

[17] *Madden*, 151 F.3d at 129-30; *see also Cusumano v. Microsoft Corp.*, 162 F.3d 708, 714 (1st Cir. 1998); *Shoen v. Shoen*, 5 F.3d 1289, 1293-94 (9th Cir. 1993); *Warnell v. Ford Motor Co.*, 183 F.R.D. 624, 625 (N.D. Ill. 1998); *Pinkard v. Johnson*, 118 F.R.D. 517, 521 (M.D. Ala. 1987).

[18] Pet. 8.

[19] Ziegler, supra note 2, at Nov. 27, 2011 comment.

[20] Pet. 2.

of our investigation is to learn all the relevant facts, the facts we have before us now tend to discredit any claim that Mr. Ziegler was engaged in genuine journalistic activities.

Even if ZSS had shown that Mr. Ziegler acted with a newsgathering purpose, it also failed to meet its additional burden to demonstrate his financial and editorial independence from the subject matter. "A person (or entity) that undertakes to publish commentary but fails to establish that its research or reporting [was] done with independence from the subject of the reporting either has no press privilege at all, or in any event, possesses a privilege that is weaker and more easily overcome."[21] Although ZSS has acknowledged that Mr. Ziegler served as an advisor to car dealerships, it has not disputed the natural inference that Mr. Ziegler was compensated for those business services. To the contrary, ZSS has not identified its income sources in response to the CID, and in fact seeks to quash the CID's request for such information.[22]

2. The FTC has an investigative need for Mr. Ziegler's TrueCar materials

Even if ZSS had met its burden of demonstrating that the journalist's privilege applies, any such privilege would nonetheless yield to the FTC's overriding need for ZSS's TrueCar-related materials.

When the government investigates potential federal law violations, it has greater entitlement to journalistic resources than a private civil litigant. In *Branzburg v. Hayes*, 408 U.S. 665, at 701 (1972), the Supreme Court ruled that journalists must disclose their confidential sources when subpoenaed before a grand jury, in light of that institution's "role . . . as an important instrument of effective law enforcement," and its far-reaching "investigatory

[21] *Chevron*, 629 F.3d at 309. "The privilege is designed to support the press in its valuable public service of seeking out and revealing truthful information. An undertaking to publish matter in order to promote the interests of another, regardless of justification, does not serve the same public interest, regardless of whether the resultant work may prove to be one of high quality." *Id.* at 308.

[22] See Part II.D.2, *infra.*

function." Although it is a civil enforcement agency, the FTC, like a grand jury, has a broad investigatory function that advances the public interest in effective law enforcement. As courts have held, the journalist's privilege is even more "qualified" than it is in private civil litigation if "the party seeking disclosure is the government pursuing an enforcement matter."[23]

Here, any First Amendment interests ZSS might claim in its TrueCar-related material must yield to staff's investigatory needs because that material is unquestionably (1) highly relevant, (2) necessary to a full investigation of the issues, and (3) not reasonably available from other sources. In particular, that material is critical to the pending investigation into whether dealers and consultants, including Mr. Ziegler, orchestrated a collusive refusal to deal with TrueCar, an innovative new industry entrant:

- Specification Three seeks ZSS's communications related to the TrueCar National Dealer Council, which was established after TrueCar announced it was changing its business model. These documents may help determine whether the Dealer Council developed, implemented, or benefited from a potential concerted refusal to deal, and may allow staff to evaluate any justifications that the dealers and consultants might offer to defend their conduct.

- Specification Four seeks ZSS's communications with TrueCar. These materials may clarify whether dealers and consultants entered into a concerted refusal to deal with TrueCar, whether any threats were issued to the company,

[23] *McGraw-Hill I*, 390 F. Supp. 2d at 33 (observing that the CFTC's interests in pursuing an energy price manipulation inquiry are "more akin to those in a criminal case than a purely civil matter"); *see also McGraw-Hill II*, 507 F. Supp. 2d at 51 (citing the CFTC's "significant public interest" in investigating law violations as a reason for limiting the scope of the journalist's privilege). *Accord, Univ. of Pa. v. EEOC*, 493 U.S. 182, 194 (1990) (rejecting university's claim that it had a First Amendment privilege to withhold academic tenure review files from the EEOC, since this "would place a substantial litigation-producing obstacle in the way of the Commission's efforts to investigate and remedy alleged discrimination").

and whether the actions of dealers and consultants influenced TrueCar's decision to change its business model.

- Specification Five seeks ZSS's internal and external communications regarding TrueCar's services, the effect or perceived effect of TrueCar's reverse auctions on automobile prices, and any decisions by dealers to terminate their TrueCar affiliations. Such information may help Commission staff assess whether competing dealers engaged in direct communications regarding TrueCar, any anticompetitive effects of such communications, and any anticompetitive motive for a refusal to deal that might contradict purported justifications offered by dealers and consultants.

In addition, much of the information the CID seeks is not reasonably available from other sources. Mr. Ziegler claimed that he spoke with "thousands" of auto dealers regarding TrueCar,[24] but he only identified a few by name. Although Commission staff is seeking relevant information from other sources, only Mr. Ziegler can identify all those with whom he communicated about TrueCar and what was said. Therefore, such material is unavailable from other sources. Although Specification Four seeks ZSS's communications with a known entity, TrueCar, we conclude that this specification will likely reveal information unavailable from another source, given the strong possibility that responsive communications have been lost or deleted with the passage of time. Additionally, even if certain information responsive to Specification Four were available from another source, we decline to limit or quash this specification because ZSS has not established that Mr. Ziegler is eligible to claim the journalist's privilege.

In sum, we reject ZSS's journalist's privilege claim because (1) Mr. Ziegler has not satisfied his burden to show that he acted as an independent journalist; and (2) the FTC's need for the material would outweigh any First Amendment interests at stake.

[24] Ziegler, supra note 2, at Dec. 3, 2011 comment.

Finally, ZSS's other privilege claims are likewise without merit. ZSS's Georgia shield law is not relevant because federal common law governs evidentiary privileges in investigations of potential violations of federal law.[25] The Privacy Protection Act is inapposite, too, because that statute "applies only when there is a criminal investigation or prosecution."[26]

C. ZSS's Remaining Arguments Lack Merit

ZSS also asserts that the CID should be quashed because (1) the resolution authorizing compulsory process was "overly expansive"; (2) the CID seeks irrelevant information; and (3) the CID's request for electronically stored information would cause undue burden.[27] As a preliminary matter, ZSS failed to raise these arguments with Commission staff in any of its four teleconferences with staff to date. Commission Rule 2.7(k) provides, "The Commission will not consider petitions to quash or limit absent a pre-filing meet and confer session with Commission staff and, absent extraordinary circumstances, will consider only issues raised during the meet and confer process."[28]

A CID recipient's obligation to meet and confer with Commission counsel is an essential component of the Commission's procedures. It requires the recipient to give Commission staff an opportunity to resolve disputes in an efficient manner and thus prevents the investigation from being

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[25] *See, e.g.*, *Linde Thomson Langworthy Kohn & Van Dyke, P.C. v. Resolution Trust Corp.*, 5 F.3d 1508, 1513 (D.C. Cir. 1993); *Gilbreath v. Guadalupe Hosp. Found. Inc.*, 5 F.3d 785, 791 (5th Cir. 1993).

[26] *S.H.A.R.K. v. Metro Parks Serving Summit Cnty.*, 499 F.3d 553, 567 (6th Cir. 2007). Under the PPA, "the government, in connection with the investigation or prosecution of a criminal offense, is prohibited from searching for or seizing any documentary. . . materials 'possessed by a person reasonably believed to have a purpose to disseminate to the public a newspaper, book, broadcast, or other similar form of public communication.'" *United States v. Any & All Radio Station Transmission Equip.*, 218 F.3d 543, 551 n.4 (6th Cir. 2000) (quoting 42 U.S.C. § 2000aa(b)).

[27] Pet. 9-10.

[28] 16 C.F.R. 2.7(k).

sidetracked by avoidable or inconsequential disagreements. ZSS's failure to satisfy the meet and confer requirements is an adequate and independent reason to deny ZSS's arguments concerning relevance, burden, and the breadth of the authorizing resolution.

In any event, even if ZSS had satisfied the meet and confer requirement in Commission Rule 2.7(k), ZSS's petition should be denied because it provides no basis for ZSS to refuse to produce the documents required by the CID.

1. The Commission resolution was sufficiently specific

ZSS asserts, but without explanation, that the Commission resolution authorizing compulsory process in this investigation was "over-broad" and "outside the FTC's authority."[29] Under the FTC Act, a CID is proper when it "state[s] the nature of the conduct constituting the alleged violation which is under investigation and the provision of law applicable to such violation." 15 U.S.C. § 57b-1(c)(2). It is well-established that the resolution authorizing process provides the requisite statement of the purpose and scope of the investigation.[30] The resolution may define the investigation generally, need not state the purpose with specificity, and need not tie it to any particular theory of violation.[31]

Resolution File No. 1310206 authorizes the use of compulsory process:

> [t]o determine whether firms in the retail automobile industry, including automobile dealers

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[29] Pet. 10.

[30] *Invention Submission*, 965 F.2d at 1088, 1090; *accord Texaco*, 555 F.2d at 874; *FTC v. Carter*, 636 F.2d 781, 789 (D.C. Cir. 1980); *FTC v. Anderson*, 631 F.2d 741, 746 (D.C. Cir. 1979).

[31] *Invention Submission*, 965 F.2d at 1090; *Texaco*, 555 F.2d at 874 & n.26; *FTC v. Nat'l Claims Serv., Inc.*, No. S 98-283 FCD DAD, 1999 WL 819640, at *2 (E.D. Cal. Feb. 9, 1999) (citing *EPA v. Alyeska Pipeline Serv. Co.*, 836 F.2d 443, 446 (9th Cir. 1988)).

> and industry consultants, may be engaging in, or may have engaged in, conduct violating Section 5 of the Federal Trade Commission Act, 15 U.S.C. § 45, as amended, by agreeing to restrain competition, including by agreeing to refuse to deal with TrueCar, Inc.[32]

This resolution is plainly sufficient under the legal standards outlined above. It gives ample notice of the general purpose, scope, and legal authority for the investigation.

2. The CID seeks relevant information

ZSS challenges the relevance of CID Specification One, which directs ZSS to identify its personnel; Specification Two, which requests ZSS's income received from dealerships and trade associations; and Specification Seven, which seeks ZSS's document retention policies.[33] In the context of an administrative CID, "relevance" is defined broadly and with deference to an administrative agency's determination.[34] An administrative agency is accorded "extreme breadth" in conducting an investigation.[35] As the D.C. Circuit has stated, the standard for judging relevance in an administrative investigation is "more relaxed" than in an adjudicatory proceeding.[36] As a result, a CID recipient must demonstrate that the agency's determination is "obviously wrong," or the documents are "plainly irrelevant" to the investigation's purpose.[37]

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[32] Pet. Exh. 1.

[33] Pet. 10.

[34] *FTC v. Church & Dwight Co.*, 665 F.3d 1312, 1315-16 (D.C. Cir. 2011); *FTC v. Ken Roberts Co.*, 276 F.3d 583, 586 (D.C. Cir. 2001).

[35] *Linde Thomson*, 5 F.3d at 1517.

[36] *Invention Submission*, 965 F.2d at 1090.

[37] *Id.* at 1089; *Carter*, 636 F.2d at 788.

Here, the material sought by the CID is plainly relevant. ZSS has already provided information about its employees and document retention policies in the partial CID response it submitted on March 20, 2014. To the extent ZSS still objects to providing such material, we note that FTC staff routinely ask for this material because it helps to ensure the investigation is accurate, thorough, and comprehensive. Additionally, the request for ZSS's income sources is relevant to the core issue in the investigation: whether consultants and dealers may have orchestrated a concerted refusal to deal.

3. The request for electronically stored information is not unduly burdensome

ZSS also asserts that the CID would impose an undue burden by requiring ZSS to "conduct sophisticated searches for electronically stored information," which would require "assistance from an information technology specialist from outside the company," resulting in "substantial costs that are not justified . . . ."[38] When an agency inquiry pursues a lawful purpose and the requested documents are relevant to that purpose, the reasonableness of its request is presumed absent a showing that compliance threatens undue disruption to the normal operations of the business.[39] Some burden on the recipient of process is "to be expected and is necessary in furtherance of the agency's legitimate inquiry and the public interest."[40] Thus a recipient of process must produce the materials unless the request is unduly burdensome or unreasonably broad.[41] In other words, the recipient must make a record to show the "measure of their grievance rather than [asking the court] to assume it."[42]

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[38] Pet. 10.

[39] *In re Line of Business Report Litig.*, 595 F.2d 685, 703 (D.C. Cir. 1978) (citing *Texaco*, 555 F.2d at 882).

[40] *Texaco*, 555 F.2d at 882.

[41] *Texaco*, 555 F.2d at 882 & n.49 (citing *United States v. Powell*, 379 U.S. 48, 58 (1964)).

[42] *FTC v. Standard American, Inc.*, 306 F.2d 231, 235 (3d Cir. 1962) (citing *Morton Salt*, 338 U.S. at 654).

It is not enough for ZSS to assert that the Commission CID is unduly burdensome because it requires "sophisticated searches." ZSS has provided no evidence that the costs imposed by the CID exceed costs typically incurred in an investigation, that these costs are unduly burdensome in light of the company's normal operating costs, or that these costs would hinder or threaten its normal operations. We note, moreover, that ZSS never presented FTC staff with detailed information about the company and the manner in which it stores its information. ZSS also did not make any suggestions about how the CID might be modified so as to reduce any burden yet also satisfy staff's investigative needs.[43] Indeed, as noted, ZSS failed to raise these concerns at all in the four teleconferences with FTC staff.

III. CONCLUSION

For the foregoing reasons, **IT IS HEREBY ORDERED THAT** the Petition of Ziegler Supersystems, Inc. to quash the Civil Investigative Demand be, and it hereby is, DENIED.

IT IS FURTHER ORDERED THAT Petitioner Ziegler Supersystems, Inc. shall comply with the Commission's CID by May 6, 2014.

By the Commission.

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[43] *See* 16 C.F.R. § 2.7(k) (anticipating that in a meet and confer session parties may discuss "ESI systems and methods of retrieval").

Responses to Petitions to Quash

THE COLLEGE NETWORK, INC.

FTC File No. 132 3236 – Decision, April 21. 2014

RESPONSE TO THE COLLEGE NETWORK, INC.'S PETITION TO QUASH OR LIMIT CIVIL INVESTIGATIVE DEMAND DATED JANUARY 16, 2014

By WRIGHT, Commissioner:

The College Network, Inc. ("TCN" or "Petitioner") has filed a petition to strike or limit the civil investigative demand ("CID") issued by the Federal Trade Commission on January 16, 2014. Petition to Strike or Limit of The College Network, Inc., F.T.C. File No. 1323236 (Mar. 20, 2014) [hereinafter Pet.]. For the reasons stated below, the petition is denied.

I. INTRODUCTION

TCN is an educational services and publishing company that creates and markets self-guided educational materials and exams to adults seeking to complete college course equivalency examinations. TCN sells study guides called Comprehensive Learning Modules ("CLMs"). After a consumer completes a CLM, the consumer can register to take a college course equivalency exam offered by TCN or a third party. If the consumer passes the exam and later enrolls at a "university partner," that university may accept the passing exam as course credit towards a degree or certificate awarded by that school. As TCN states in its petition, TCN itself is not a school and does not award college degrees.

After receiving hundreds of complaints, FTC staff opened an investigation of TCN and its practices. As authorized by a Commission-approved resolution,[1] the FTC issued a CID to TCN

[1] The Commission's Resolution Directing Use of Compulsory Process in a Non-public Investigation of Secondary or Postsecondary Educational Products or Services or Educational Accreditation Products or Services describes the nature and scope of the investigation as follows:

seeking information concerning TCN's advertising, marketing, and sales of educational products and services. Pet. Exh. A, CID attached as Exh. 1. The CID seeks, among other things, information regarding TCN's products and services, and the marketing claims regarding those products and services, including claims regarding the content of its CLMs, TCN's affiliations with universities, cancellation and refund policies, and the nature and terms of loans TCN offers or facilitates to consumers. Counsel for TCN and FTC staff agreed to some limitations of the CID, but could not reach agreement on all issues before the deadline to file this Petition. Since TCN filed its petition, staff has further limited the CID.[2]

As described below, TCN challenges the CID on the ground that it is overbroad and vague, and that it could lead to undue burden of compliance. TCN also opposes production of certain information because it claims the information is proprietary. Finally, TCN challenges various requests for information as an improper "fishing expedition."

To determine whether unnamed persons, partnerships, corporations, or others have engaged or are engaging in deceptive or unfair acts or practices in or affecting commerce in the advertising, marketing, or sale of secondary or postsecondary educational products or services, or educational accreditation products or services, in violation of Section 5 of the Federal Trade Commission Act, 15 U.S.C. § 45, as amended. 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 File No. P138402 (Nov. 14, 2013).

[2] Pet. at 1-3. On March 19, 2014, FTC staff modified the CID by limiting the scope of particular definitions and extending the date for compliance. *See* Pet. at 3; Pet. Exh. G (March 19, 2014 Letter from Thomas N. Dahdouh to Jeanne M. Cors). FTC staff further modified the CID after the Petition was filed. Because these modifications mooted some of Petitioner's objections, we do not address them in detail in this order. Specifically, staff struck Interrogatory 40; modified Document Specification 15(c) to accept TCN's proposal to produce customer files for certain listed customers; and modified Interrogatories 37a and 39 to clarify that they apply only to natural persons, businesses, or organizations.

II. ANALYSIS

A. The Definitions and Specifications in the CID Clearly Identify Responsive Materials and Do Not Impose Undue Burden

TCN challenges numerous definitions and specifications in the CID, claiming variously that they are overly broad, oppressive, unreasonable, vague and ambiguous, and unduly burdensome. These challenges lack merit.

The standards for evaluating TCN's claims are well established. A CID is impermissibly vague where it lacks reasonable specificity or is too indefinite to enable a responding party to comply.[3] A CID is overbroad where it is "out of proportion to the ends sought," and "of such a sweeping nature and so unrelated to the matter properly under inquiry as to exceed the investigatory power."[4]

A CID imposes an undue burden only if compliance threatens to seriously impair or unduly disrupt the normal operations of the recipient's business.[5] The recipient bears the responsibility of establishing that the burden of compliance is undue.[6] It must show the "measure of their grievance rather than [asking the court] to assume it."[7] Of course, balanced against this required

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[3] *See, e.g., United States v. Fitch Oil Co.*, 676 F.2d 673, 679 (Temp. Emer. Ct. App. 1982); *United States v. Wyatt*, 637 F.2d 293, 302 n.16 (5th Cir. 1981); *United States v. Cox*, 73 F. Supp. 2d 751, 766 (S.D. Tex. 1999); *United States v. Medic House, Inc.*, 736 F. Supp. 1531 (W.D. Mo. 1989).

[4] *Wyatt*, 637 F.2d at 302 (quoting, among others, *United States v. Morton Salt Co.*, 338, U.S. 632, 652 (1950)).

[5] *See FTC v. Texaco, Inc.*, 555 F.2d 862, 882 (D.C. Cir. 1977); *In re Nat'l Claims Serv., Inc.*, 125 F.T.C. 1325, 1328-29 (1998).

[6] *See EEOC v. Maryland Cup Corp.*, 785 F.2d 471, 475-76 (4th Cir. 1986); *FTC v. Shaffner*, 626 F.2d 32, 38 (7th Cir. 1980); *Texaco*, 555 F.2d at 882.

[7] *FTC v. Standard American, Inc.*, 306 F.2d 231, 235 (3d Cir. 1962).

showing is the understanding that "any subpoena places a burden on the person to whom it is directed."[8]

We address each challenge of particular specifications against these standards. We also consider the cumulative effect of Petitioner's challenges and conclude that compliance with the CID does not impose undue burden.

The Defined Word "Company." The CID, as issued, defined the term "Company" to mean "The College Network, Inc. and its wholly or partially owned subsidiaries, unincorporated divisions, joint ventures, operations under assumed names, and affiliates, including College Network Inc. and The College Network Inc., and all directors, officers, employees, agents, consultants, and other persons working for or on behalf of the foregoing." The phrase "and affiliates" was later deleted after discussions between TCN and staff.[9] TCN seeks to limit that definition further.[10] It argues that the description of "other persons working for or on behalf of" TCN is vague, overly broad, and could include unrelated entities like lead vendors or independent contractors over whose documents TCN lacks custody or control. Pet. at 4-5.

We find that the definition of "Company," including the challenged phrase, is sufficiently definite. That definition is used routinely in similar FTC CIDs. Nothing about the phrase lacks reasonable specificity or is too indefinite to enable TCN to identify responsive materials. In fact, TCN's argument recognizes that lead vendors and independent contractors who sell or market to prospective customers fall within the definition.

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[8] *Shaffner*, 626 F.2d at 38.

[9] *See* Pet. Exh. F (March 17, 2014 Letter from Yan Fang to Jeanne M. Cors), at 1-2, 6-7. The definition of "Company" that strikes "and affiliates" is a "provisional" definition.

[10] Petitioner also objects to the particular Interrogatories and Document Specifications that use or reference the word "Company." Petitioner objects to Interrogatories 1-8, 10-24, 26-37, and 39, and Document Specifications 1-2, 4, 7, 18-31, and 35-36. Pet. at 3-4.

TCN's real claim seems to be not that it cannot understand what information is called for, but that it cannot produce that information because it is in the hands of third parties – vendors and independent contractors who sell or market to prospective customers (and therefore fall within the definition of "Company"). That contention is without merit. The CID imposes no obligation on TCN to produce materials over which it lacks possession, custody or control – which in this context means the legal or practical ability to obtain the responsive documents.[11] A party can be said to control documents if, for example, they are available through a contractual right of access,[12] or are in the possession of a party's agents.[13] Thus, under the Instructions of the CID, if TCN does not control the documents of its vendors and contractors, the definition of "Company" imposes no obligation on TCN to produce them. We now address TCN's factual claims.

To support its contention that TCN lacks possession, custody or control over the documents of lead vendors and independent contractors, TCN relies on the Affidavit of Cory Eyler, who states that he is "unaware of any ability of TCN to demand production of those types of documents from independent contractors or lead vendors." Pet. Exh. H (Eyler Affidavit) ¶ 5. However, Mr. Eyler's affidavit does not indicate whether TCN has in its possession any documents from the contractors or whether it has

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[11] *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 NY 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. Secs. 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.").

[12] *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)).

[13] *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)).

ready access to such documents. If it does, it must produce that material. Nor does the affidavit provide any other detail regarding Mr. Eyler's review of any relevant contract terms, or other facts that might clarify whether TCN has a right to access the requested materials. The tentative and conclusory statement in the affidavit does not allow us to determine whether relevant documents and material fall beyond TCN's possession, custody, or control.

Petitioner also has failed to establish that producing the requested materials would be unduly burdensome (assuming it has them, or has a right to retrieve them). As explained above, a CID recipient bears the responsibility of establishing that the burden of compliance is undue. "At a minimum, a petitioner alleging burden must (i) identify the particular requests that impose an undue burden; (ii) describe the records that would need to be searched to meet that burden; and (iii) provide evidence in the form of testimony or documents establishing the burden (*e.g.*, the person-hours and cost of meeting the particular specifications at issue)."[14] But TCN's affidavit provides no details regarding the burden associated with searching and retrieving documents and materials from its lead vendors and independent contractors. Pet. at 4-5. The affidavit states that TCN has more than 125 lead vendors and 140 independent contractors, Pet. Exh. H (Eyler Affidavit) ¶ 5, but it includes no additional facts to support the conclusion that "[e]ven attempting to obtain information orally [from the independent contractors] would be an expensive, time consuming, and overly burdensome undertaking." Pet. at 5.

Instead of addressing the burden of searching and retrieving all documents and materials from its lead vendors and independent contractors, Petitioner provides only an example of the number of links or advertisements that are generated by lead vendors and independent contractors demanded by Document Specification 20. Pet. Exh. H (Eyler Affidavit) ¶ 5. Petitioner does not identify or provide factual support regarding other types of documents that lead vendors and independent contractors are likely to have, estimate their volume, or provide estimates of the burden of production. Thus, except for Document Specification

[14] *Nat'l Claims Serv., Inc.*, 125 F.T.C. 1325, 1328-29 (1998).

20, which is discussed below, TCN has not made a sufficient showing that compliance is unduly burdensome.

The Defined Word "Identify." TCN asks the Commission to strike Interrogatories 6, 7, 10, 12, 23, 25, 34, and 37c because the word "identify" requires TCN to name the officers, directors, managers, and contact persons of third party businesses or organizations. Pet. at 6-8. TCN also objects that a telephone number must be provided in addition to the name and business address for these parties. Pet. at 7-8. TCN argues that such demands are oppressive, unreasonable, overbroad and unduly burdensome. As an alternative to its motion to strike the interrogatories, TCN proposes to limit the definition so that TCN would provide only names and job titles or business affiliations for natural persons, and names and addresses for third party businesses or entities.

After TCN filed its petition, FTC staff narrowed the definition of "Identify" to reduce some of TCN's burden.[15] Although the modified definition is still somewhat broader than the definition TCN proposes in its Petition, we find that it is reasonable. As modified, it asks for business affiliations, business addresses and telephone numbers for natural persons, and the names and telephone numbers of TCN's contacts at businesses and organizations. Such information is relevant to the investigation and should be readily available to TCN; in any event, the CID requests it for only a limited number of persons or organizations. Consequently, we decline Petitioner's proposal to limit the definition further.

Interrogatory 3. Interrogatory 3 asks TCN to identify current and former officers, employees, independent contractors,

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[15] Letter from Thomas N. Dahdouh to Jeanne M. Cors (Apr. 1, 2014). The modified definition states: "'Identify' or 'the Identity of' shall be construed to require identification of (a) natural persons, by stating the person's name, title, present business affiliation, present business address and telephone number, or if a present business affiliation or present business address is not known, the last known business and home address; and (b) businesses or other organizations, by stating the business's or organization's name and address, and the name and contact telephone number of TCN's contacts at the organization, where applicable."

affiliates, and agents with responsibility or knowledge about four topics. TCN argues that this Interrogatory is overbroad and oppressive because "virtually all TCN personnel have some knowledge" about the particular issues. Pet. at 10. That is not a valid objection. Indeed, the phrasing of the interrogatory is no broader than Federal Rule of Civil Procedure 26(a)(1)(A)(i), which mandates disclosure in litigation of "each individual likely to have discoverable information."

Even if the Interrogatory asked TCN to identify all its employees, it is not unduly burdensome because TCN has approximately 150 employees,[16] 125 lead vendors, and 140 independent contractors. Listing those persons and entities imposes no great burden. Under the modified definition of "Identify" discussed above, TCN must provide a "person's name, title, and department" for current employees of The College Network, Inc. For businesses such as the 125 lead vendors, TCN must provide the business or organization name and address, and the name and telephone number of TCN's contact(s). For individuals such as TCN's 140 independent contractors, TCN must provide a person's name, title, business affiliation, business address and telephone number. To the extent that former employees, lead vendors, or independent contractors must be identified, the CID covers a limited time period that begins in 2011, so the number of persons or entities should be limited. This information should be readily available and easily assembled by TCN, and is relevant for the investigation.

Interrogatories 19 and 32. TCN asks the Commission to strike Interrogatories 19 and 32 on the grounds that they are so overbroad, unduly burdensome, unreasonable, and oppressive that TCN would not be able to certify that its responses are complete. Interrogatory 19 seeks TCN's customer information, including name, contact information, products purchased, payments, complaints and cancellations, exam passage, and college enrollment. TCN objects to Interrogatory 19 because it "demands that TCN identify all of its customers during the responsive period." Pet. at 10. In addition, Petitioner objects to

[16] In discussions with FTC staff, TCN estimated that it has 100 to 150 employees.

Interrogatory 19 because the demand to identify complaints "would require a manual review of over 200,000 customer files, which would likely consist of millions of pages of documents." Pet. Exh. I (Fair Affidavit) ¶ 5.

Interrogatory 32 seeks information about the number of customers who, among other things, enrolled at degree-granting institutions, obtained degrees, or withdrew before earning a degree. TCN claims that this specification would also require a manual review of customer records, which "would be impossible for the company to undertake without ceasing normal operations, or would require . . . months or years to complete, depending on the manpower devoted to the project." Pet. Exh. A (Ivory Affidavit) ¶ 8.

These Interrogatories are not overly burdensome because, by their own terms, they can be satisfied either by "a narrative response" *or* by production of materials "in an electronic database format." TCN thus need not compile a new list of all of its customers or conduct the manual review of which it complains. Its electronic customer database likely contains all the responsive information and materials. Indeed, the petition indicates that it contains the 200,000 customer files. *See* Pet. Exh. J (Sallee Affidavit) ¶ 7. If TCN produces the databases, it need not manually review the files in the databases to address the interrogatories. We now address TCN's objection to producing the databases.

Document Specifications 10, 11, 12, 13, 22, and 27. TCN seeks to strike the word "databases" from Document Specifications 10, 11, 12, 13, 22 and 27 on the grounds that the word renders the specifications overbroad, unreasonable, oppressive, vague, ambiguous, unduly burdensome, and that TCN would be unable to certify that its response was complete. *See* Pet. at 15. Document Specifications 10, 11, and 12 seek accounting data; Document Specification 22 seeks documents that summarize advertising dissemination schedules; and Document Specifications 13 and 27 call for databases (such as the customer database) used to respond to Interrogatories 19 and 32.

There is nothing vague or ambiguous about those specifications. They are not rendered vague or ambiguous merely because the CID does not provide a definition of the term "database." That term is commonly used and has a generally accepted meaning. TCN should easily be able to identify responsive materials. In fact, in objecting to the burden of producing them, TCN appears already to have identified that material.

To support its claim of unreasonable burden, TCN estimates that producing a copy of TCN's accounting database would cost $10,000-$15,000 to purchase a server, software and licenses and that it would need a vendor to install and configure the database and provide access at an addition $2,000-$5,000 cost. *See* Pet. Exhibit J (Sallee Affidavit) ¶ 9. Additionally, TCN asserts that production of the customer database would cost approximately $30,000 and take weeks to complete because TCN would need new servers to house the database and a vendor to create a mirror image of the database and application. *See id.* ¶ 7.

Petitioner's claimed burden of responding to the document specifications for accounting data is overstated. The CID provides TCN with a number of options for providing the requested accounting data. A database is one of several types of responsive documents that TCN may provide to satisfy the specifications. Document Specifications 10, 11, and 12 also allow TCN to respond by providing "spreadsheets, statements, memoranda, reports, or any summarizing document." *See* Pet. Exh. A, CID attached as Exh. 1.

Even if the Commission were to accept TCN's claims regarding the process for and cost of producing the accounting and customer databases,[17] Petitioner has not established that this

[17] FTC experience in other investigations suggests reason to question TCN's estimated cost and burden. First, accounting databases are typically located in programs specifically designed for accounting, and prior investigations have shown that extracting files from Peach Tree Accounting, the common accounting program that TCN uses, is neither difficult nor costly. Second, businesses typically store data within an industry standard database system and most businesses create regular backups of their databases to ensure there is another copy in case the original is corrupted or accidentally deleted. In discussions with FTC staff, TCN indicated that it uses an Onyx SQL database,

production threatens to seriously impair or unduly disrupt the normal operations of TCN's business.[18] Some cost of complying with an investigation is expected; the burden of that cost must be evaluated in relation to the size and complexity of a recipient's business operations. Here, TCN's estimated $50,000 cost for equipment and vendor services to provide the two databases is evaluated in light of gross sales revenue that exceeded $73 million in 2012 and $48 million in 2013. In similar circumstances, courts have found that far greater compliance costs – ranging from $392,000 to $4,000,000 – did not impose unreasonable burden.[19] In sum, Petitioner has not shown that its costs are excessive.

Document Specification 7. Document Specification 7 seeks documents sufficient to show TCN's policies, practices, and procedures for creating and revising substantive CLM content. Petitioner contends that this document specification (which relates to Interrogatory Specification 8) requires TCN to produce or review documents it does not control because the underlying interrogatory specification asks for the number of independent contractors, affiliates, and others involved in developing CLMs. Pet. at 17. This argument is untenable. Document Specification 7 seeks information that plainly belongs to TCN. If it put that responsibility for developing CLMs information in the hands of its vendors, it can get that information back in order to respond to the CID.

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with a third-party cloud service. If TCN has a recent backup copy of its database, it could easily make a copy of this backup to an external hard drive, which the FTC could provide. If TCN has not recently run a backup, it could create a backup manually using the database's backup function, which is normally not costly and might be completed in one day, depending on the quantity of data. Finally, in other investigations, FTC technical support personnel have copied materials themselves if they are provided access to a petitioner's facilities. This alternative is also available to Petitioner to copy the database at FTC expense.

[18] *See Texaco*, 555 F.2d at 882.

[19] *See FTC v. Jim Walter Corp.*, 651 F.2d 251, 258 (5th Cir. 1981) (citing *California Bankers Ass'n v. Schultz*, 416 U.S. 21 (1974) ($392,000 cost for a bank with net income of $178 million); *Texaco*, 555 F.2d at 922 ($4,000,000)).

In any event, TCN has offered no factual support for its assertion that it would be unduly burdensome to obtain documents in the hands of its independent contractors and lead vendors. TCN does not provide a reason to believe that its contractors and lead vendors, who solicit customers or buy advertising space, would have responsive documents related to the creation or revision of substantive CLM content. In addition, to the extent there is any burden, it is minor, because TCN is required to produce only documents "sufficient to show" TCN's policies, practices and procedures for creating and revising substantive content for CLMs (rather than all documents relating to the creation or revision of CLMs). Thus, TCN has some flexibility in assembling its response. We conclude that Petitioner has not demonstrated that Document Specification 7 is unduly burdensome.

Document Specification 16. TCN objects to Document Specification 16, which seeks communications, including internal email and responses to customers, that refer or relate to issues raised in customer complaints. TCN contends that the specification is "overbroad, oppressive, unreasonable, unduly burdensome, and not subject to certification." Pet. at 16. TCN argues that the specification is overbroad because TCN receives at least five categories of complaints that do not have "anything to do with the company."[20] *See* Pet. Exh. I (Fair Affidavit) ¶ 3. We disagree with TCN's conclusion about the relevance of some complaints. The affidavit discounts some categories of complaints – such as subject matter that is "too hard" – which may be relevant to the Commission's need to determine whether TCN is providing consumers with the types of test preparation materials that it advertises. While there may be instances where a complaint relates to a customer's personal circumstances, Petitioner does not show these complaints are so prevalent that they present an obstacle to complying with the CID.

[20] The affidavit explains that TCN has received complaints that "(a) the location where a particular end-of-course equivalency examination is being offered by a third party testing agency is too far away from the customer's home; (b) the subject matter of a particular CLM is 'too hard'; (c) the customer's spouse has left them and therefore they cannot afford the materials they have purchased; (d) the customer has moved to another state; [and] (e) the customer has taken ill[.]" Pet. Exh. I (Fair Affidavit) ¶ 3.

Regarding the burden of Document Specification 16, the Fair affidavit states that compliance would require a manual review of customer files. *Id.* at ¶ 5. As noted above, however, in lieu of manual review, TCN may produce the customer database. As for the objection to providing email or other documents that discuss complaints and responses to complaints, a wide-ranging search throughout the company for responsive documents is unnecessary because Mr. Fair's affidavit states that he oversees the "department within the company which receives, responds to, and if possible, resolves various customer complaints or issues." *Id.* at ¶ 2. A search for responsive documents can reasonably be focused on one department.

Document Specifications 20, 21, 22, and 28. TCN objects to the burden created by Document Specification 20, which seeks "all disseminated advertisements" relating to products and services offered by TCN to individual consumers. TCN also objects to the burden created by other document specifications that seek information about the ads demanded by Document Specification 20.[21] As support for its claimed burden of review and production, Petitioner states that approximately 3,000 to 6,000 links[22] or advertisements are generated daily when TCN's lead vendors and independent contractors are included and the ads "appear on an unknowable number of websites and webpages." *See* Pet. Exh. H (Eyler Affidavit) ¶ 5. In his affidavit, Mr. Eyler states that the production of all websites and webpages, including screenshots, archived versions, source code programs, log files, scripts, and dissemination schedules that include dates and times for the 3,000 to 6,000 daily links "is simply impossible." *Id.*

It appears that TCN has misconstrued the specifications. Document Specification 20 directs TCN to produce copies of all ads. An ad is the "written or verbal statement, illustration, or

[21] Document Specification 21 seeks all documents relating to the creation and development of the advertising. Document Specification 22 seeks documents about dissemination schedules and visitor volume for each ad. Document Specification 28 seeks documents relating to consumers' interpretations and perceptions of the ads.

[22] Website links are often distributed via Internet search, keyword, sponsored, pop-up, and banner ads.

depiction . . . that is designed to effect a sale or create interest in the purchasing of goods or service." *See* Pet. Exh. A, CID attached as Exh. 1, at Definition B (Advertisement). The definition includes ads that are "displayed or accessible as Web pages." *Id.* Each link that is generated is not a separate advertisement that must be produced. If two consumers who click on links that they found at two different places (*e.g.*, two different third-party websites) arrive at the same webpage or otherwise see the same ad copy, TCN need only to produce one ad.[23] The same requirement applies to Document Specifications 21, 22, and 28.

In addition, we note that, after TCN filed its Petition, FTC staff modified Document Specifications 20 and 22.[24]

Document Specification 17. The specification seeks all documents relating to TCN's marketing policies, practices, and procedures for consumer phone calls, Internet chats with consumers, email communications with consumers, and in-person communications with consumers. Petitioner contends that Specification 17 imposes undue burden, Pet. at 16-17, but the only facts it provides to support its objection appear to relate to Document Specification 20, which we have already addressed.[25] Given the absence of facts to support its claim, it is not possible for us to fully assess Petitioner's proposed limitation to the specification. We note, however, that limiting the production to "any TCN marketing policies and procedures" likely would omit documents relating to the implementation of the policies and procedures, as well as formal and informal "practices" for

[23] The analysis is similar to other advertising; TCN needs to produce print advertising only once even if it has been distributed to 1000 households.

[24] An April 1, 2014 letter from Thomas N. Dahdouh to Jeanne M. Cors modified the specifications. The modification to Specification 20 eliminates the need for TCN to produce source code, programs, log files, scripts, and past or archived versions of websites and webpages for websites and webpages not operated by TCN. Document Specification 22 was modified to reduce the burden regarding dissemination schedules for Internet advertising; Specification 22, as modified, seeks only summarizing documents sufficient to show dates and numbers of dissemination, visitor volume, and click-through rates for Internet ads. *Id.* at 2-3.

[25] *See* Pet. Exh. H (Eyler Affidavit) ¶¶ 5-6.

marketing TCN products and services to consumers. Pet. at 17. Such materials are highly relevant to the purpose of the investigation, and TCN, therefore, must produce them.

Document Specification 29. TCN objects to Document Specification 29, which seeks documents referring or relating to the target audience of TCN's advertising. TCN argues that a demand for "all documents" "referring or relating to the target audience" would require producing all TCN documents. Pet. at 14-15.

FTC staff modified this specification after the Petition was filed.[26] The modified text provides TCN with flexibility to determine how it can best produce the requested materials and ameliorate any burden by reducing the number of responsive documents.

Document Specification 35. TCN petitions to strike this specification, which seeks complaints, inquiries, and communications from third-party organizations such as the Better Business Bureau, state attorneys general, universities, and nursing organizations. Although it contends that this request imposes undue burden, TCN provides no factual support for this claims. For example, it has not provided the Commission with an estimate of the number of organizations that have complained, the number of third-party complaints received, or the number of document custodians. In addition, contradicting Petitioner's claimed burden, TCN's Vice President of Call Center Operations has stated that producing certain third-party complaints is "more manageable" because TCN's customer database "contain[s] a field to capture certain types of 'complaints' including those received from a state attorney general, the Better Business Bureau, or even an attorney." Pet. Exh. I (Fair Affidavit) ¶¶ 5, 7. Thus, it appears that Petitioner can comply with the specification by producing its customer database and, as we previously explained, production of the customer database is not an

[26] As modified by an April 1, 2014 letter from Thomas N. Dahdouh to Jeanne M. Cors, Document Specification 29 requires the production of all documents, including consumer research, media research analysis, and relevant portions of media plans "sufficient to show" the target audience for each TCN ad produced pursuant to Document Specification 20.

unreasonable burden. We therefore deny Petitioner's request that we strike this specification.

Email and Document Specifications 2-4, 15-18, 20-23, 29-31, and 35. Petitioner seeks leave to file a future petition to quash regarding email if it encounters additional objections after it reviews its emails. TCN explains that it "was working with FTC investigators to reach consensus regarding a universe of custodian accounts to retrieve and search and a listing of search terms to apply. That process was necessarily halted by the deadline for the filing of this Petition[.]" Pet. at 12.

As Petitioner has acknowledged, Commission Rule 2.10(a)(1) provides one opportunity for a CID recipient to file a petition to quash. 16 C.F.R. §2.10(a)(1) ("petition shall set forth *all* assertions of protected status or other factual and legal objections to the Commission's compulsory process") (emphasis added). As we have explained, "[t]he rule is clear on its face that all grounds for challenging a CID shall be joined in the initial application, absent some extraordinary circumstances. To construe the rule in any other fashion would serve no purpose other than inviting piecemeal challenges to CIDs and a parade of dilatory motions seeking seriatim deconstruction of each CID."[27]

Petitioner has not sufficiently availed itself of the meet-and-confer process required by the FTC's Rules of Practice and the CID itself.[28] The meet-and-confer requirement "provides a mechanism for discussing adjustment and scheduling issues and resolving disputes in an efficient manner."[29] Here, Petitioner did not engage in an exchange with staff to resolve the issues surrounding email and limits on custodians whose files would be retrieved and searched. Petitioner received the CID on January 21, 2014, Pet. Exh. A (Ivory Affidavit) ¶ 3, but as late as March 17, Petitioner had not yet provided FTC staff with a list of

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[27] *Wellness Support Network*, File No. 072-3179 at 2 (FTC Apr. 24, 2008) (letter ruling dismissing appeal from denial of petition to quash CID).

[28] 16 C.F.R. § 2.7(k); Pet. Exh. A, CID attached as Exh. 1, at Instruction B.

[29] *Firefighters Charitable Found., Inc.*, FTC File No. 102-3023, at 3 (Sept. 23, 2010).

relevant custodians.[30] Given that Petitioner did not provide the very information that staff needed to properly consider and resolve any lingering issues regarding TCN's obligations to search for emails, we disagree that a refusal to allow another petition to quash is an "arbitrary action" that would "raise[] a question of due process."

B. TCN's Claim that Particular Information is Proprietary is Not a Reason to Limit the CID or Avoid Production

Petitioner objects to Interrogatory 12 to the extent that it seeks the number and percentage of TCN customers in default, because "the identity of TCN's present and past customers is proprietary . . . [and] contact [with these customers could] adversely affect TCN's business." Pet. at 7. With respect to Interrogatory 12, Petitioner's concern is misplaced because the modified definition of "identify," does not require personal or contact information to the extent that the specification seeks numerical information. *See* discussion at note 2, *supra*.

Because Petitioner's argument that disclosure of TCN's customers also arises with respect to the production of TCN's customer database and materials demanded by other specifications,[31] we address the substance of Petitioner's claim. Concerns about customer reactions to a Commission investigation do not excuse an obligation to comply with investigative process unless "compliance threatens to unduly disrupt or seriously hinder normal operations of a business."[32] The same allegations were

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[30] *See* Pet Exh. F (March 17, 2014 letter from Yan Fang to Jeanne M. Cors) at 8 ("TCN proposes to forward a list of relevant custodians this week."); Pet. Exh. D (March 13, 2014 letter from Yan Fang to Jeanne M. Cors) at 2 ("We are generally amenable to custodian limits and search terms [to retrieve and search e-mail], but before we can agree to any limits, TCN would first need to provide us sufficient information to identify those custodians likely to possess responsive documents.").

[31] *See* Interrogatories 3, 19, and 32 and Document Specifications 13, 16, 27, and 29.

[32] *Texaco*, 555 F.2d at 882.

made in *Invention Submission Corp.*, 965 F.2d 1086 (D.C. Cir. 1992), but were not accepted by the D.C. Circuit as a basis for excusing noncompliance with a CID. The D.C. Circuit did not lighten or change the standard just because disclosing the identity of clients might place the respondent under a "cloud of suspicion and speculation" if the potential witnesses were contacted.[33] If the mere creation of a cloud of suspicion were sufficient to quash a CID or excuse a failure to comply, then, as the D.C. Circuit recognized, "it could be made with respect to almost any investigation."[34]

C. The CID Specifications Seek Information that is Reasonably Related to the Investigation

Finally, TCN objects to Interrogatories 12 and 19 and Document Specification 29 on the ground that the requests constitute improper "fishing expeditions." Pet. at 7, 11, 14. Interrogatory 19 seeks TCN's customer information, including names, contact information, products purchased, payments, refunds, and complaints. Interrogatory 12 seeks information about customers in default. TCN argues that Document Specification 15 already identifies 29 individuals who are customers of TCN so the "only reason for the FTC requiring the names of other TCN's customers can be for the FTC to contact those customers as the FTC sees fit." Pet. at 11. The Petition also objects to Document Specification 29, which demands documents relating to the targeted audience of TCN's ads.

The information responsive to these specifications is highly relevant to the investigation.[35] Indeed, Petitioner does not argue

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[33] *See FTC v. Invention Submission Corp.*, 965 F.2d 1086, 1090 (D.C. Cir. 1992).

[34] *Id.*

[35] *See, e.g.*, *id.* at 1089 (D.C. Cir. 1992) ("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"); *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

that the information is irrelevant, but instead objects to the Commission using that information to contact those customers. As we discussed above, this concern does not provide a basis to excuse Petitioner's obligation to comply with the CID. The challenged specifications seek information that is relevant to the purpose of the investigation and we deny Petitioner's request that we strike the specifications.

III. CONCLUSION

For the foregoing reasons, **IT IS HEREBY ORDERED THAT** the Petition of The College Network, Inc. to Strike or Limit the Civil Investigative Demand be, and it hereby is, DENIED; and

IT IS FURTHER ORDERED THAT all responses to the specifications in the Civil Investigative Demand to The College Network, Inc. must now be produced on or before May 19, 2014.

By the Commission.

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the nature of the FTC's investigative authority) (citing *Morton Salt*, 338 U.S. at 642, and *Texaco*, 555 F.2d at 874).

Responses to Petitions to Quash

POLICE PROTECTIVE FUND, INC.

FTC File No. 132 3239 – Decision, May 22, 2014

RESPONSE TO POLICE PROTECTIVE FUND, INC.'S PETITION TO QUASH CIVIL INVESTIGATIVE DEMAND DATED MARCH 19, 2014

By WRIGHT, Commissioner:

Police Protective Fund ("PPF") has filed a petition to quash a Civil Investigative Demand ("CID") issued by the Commission on March 19, 2014.[1] For the reasons stated below, the petition is denied.

I. INTRODUCTION

PPF is organized as a not-for-profit corporation under state law and is exempt from federal taxation under Section 501(c)(3) of the Internal Revenue Code.[2] In its 2012 IRS Form 990, PPF states that its mission is to "promote the safety and well being of law enforcement officers through educational programs and public awareness campaigns."[3] In recent years, PPF has been the subject of various state and federal investigations and, in 2007, received a letter from the IRS pointing out deficiencies in its operations that, if not corrected, could threaten its status as a 501(c)(3) organization.[4] Additionally, the Commission has received numerous consumer complaints relating primarily to PPF's telephone solicitations.

The Commission is conducting an investigation to determine whether PPF is engaged in "unfair or deceptive acts or practices"

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[1] "Pet." refers to PPF's Petition to Quash; "Pet. Ex." refers to the exhibit attached to PPF's petition; "Int." refers to specific interrogatories from the CID; "Doc. Req." refers to specific document requests from the CID.

[2] *See* Pet. Ex. G, I-K.

[3] *See* Pet. Ex. B.

[4] *See* Pet. Ex. L.

in violation of Section 5 of the FTC Act, 15 U.S.C. § 45. Among other matters, the Commission is investigating whether PPF is misrepresenting the level of financial support it provides for its programs and whether it is making false statements to potential donors concerning any financial support it may provide to the families of fallen officers in the donors' home states. The Commission is also inquiring whether PPF is violating the Do Not Call provisions of the Commission's Telemarketing Sales Rule, 16 C.F.R. Part 310. In addition, the Commission is examining whether PPF, notwithstanding its representations to potential donors, has used the funds they contribute to confer pecuniary benefits on private persons who are not the claimed beneficiaries of its campaigns.

On March 19, 2014, under the authority of a Commission resolution authorizing the use of compulsory process,[5] the Commission issued a CID to PPF seeking, *inter alia*, information and materials relating to PPF's finances, oversight, and employee compensation; its fundraising and telemarketing practices; and the level of support PPF provides to programs and individuals. The Commission issued this CID pursuant to Section 20 of the FTC Act, which authorizes the Commission to issue compulsory process to any "person," and "person" is defined broadly as "any natural person, partnership, corporation, association or other legal entity."[6]

The return date for the CID was April 21, 2014. On April 10, 2014, PPF's counsel offered to make a limited production of documents in exchange for an extension to May 12 of the

[5] The purpose of the investigation is:
"To determine whether unnamed persons, partnerships, corporations, or others, in connection with soliciting charitable contributions, donations, or gifts of money or any other thing of value, have engaged in or are engaging in (1) deceptive or unfair acts or practices in or affecting commerce in violation of Section 5 of the Federal Trade Commission Act, 15 U.S.C. § 45, and/or (2) deceptive or abusive telemarketing acts or practices in violation of the Commission's Telemarketing Sales Rule, 16 C.F.R. Part 310."
Pet. Ex. P.

[6] 15 U.S.C. § 57b-1 (a)(6).

deadline for filing a petition to quash.[7] In response, FTC staff offered to defer certain specifications, to accept a rolling response as to certain non-deferred items, and to grant the extension until May 12.[8] On April 21, however, PPF filed a petition asking the Commission to quash the CID in its entirety.

PPF's principal objection is that the Commission "lacks personal and subject matter jurisdiction . . . because [PPF] is a tax-exempt, nonprofit corporation."[9] According to PPF, that status means that it is not a "corporation" within the Commission's jurisdiction because, it claims, it is not "organized to carry on business for its own profit or that of its members." 15 U.S.C. § 44. Additionally, PPF asserts that the CID violates the First, Fourth, and Fourteenth Amendments.[10] As discussed below, all of these contentions are unfounded.

II. ANALYSIS

A. The Commission is Authorized to Use Compulsory Process to Conduct The Present Inquiry

PPF principally asserts that its tax-exempt status and form of organization relieve it of any obligation to comply with FTC compulsory process. PPF's objections confuse the Commission's investigatory authority (under Section 20 of the FTC Act) with its enforcement authority (under Section 5). The Commission's authority to enforce the prohibitions of Section 5 applies to corporations that are "organized to carry on business for [their] own profit or that of [their] members," 15 U.S.C. § 44. Moreover, PPF's status does not preclude an alternative finding that PPF constitutes a "person" subject to the prohibitions of Section 5 of the FTC Act.[11] In any case, Section 20 authorizes the FTC to

[7] *See* Pet. Ex. M.

[8] *See* Pet. Ex. O.

[9] Pet. at 1.

[10] Pet. at 8-16.

[11] The Commission has previously maintained that its jurisdiction over "persons" under Section 5 of the FTC Act extends to state-chartered nonprofit

issue a CID "[w]henever the Commission has reason to believe that any person may be in possession, custody, or control of any documentary material or tangible things, or may have any information, relevant to unfair or deceptive acts or practices in or affecting commerce."[12]

Courts have consistently held that "an individual may not normally resist [investigative process] on the ground that the agency lacks regulatory jurisdiction …."[13] As the Ninth Circuit has explained,

> [E]ach independent regulatory administrative agency has the power to obtain the facts requisite to determining whether it has jurisdiction over the matter sought to be investigated. After the agency has determined its jurisdiction, that determination may be reviewed by the appropriate court.[14]

Thus, the Commission is not required to take at face value an organization's claim that it is a charitable organization, and can require it to produce documents and other information to enable the Commission to make that determination itself. As we have

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municipal corporations such as the City of New Orleans and the City of Minneapolis. *See* Federal Trade Commission, *Prohibitions on Market Manipulation and False Information in Subtitle B of Title VIII of The Energy Independence and Security Act of 2007: Notice of Proposed Rulemaking and Request for Public Comment*, 73 Fed. Reg. 48317, 48324 & n.86 (Aug. 19, 2008) (*citing In re City of New Orleans*, 105 F.T.C. 1, 1-2 (1985); *In re City of Minneapolis*, 105 F.T.C 304, 305 (1985)).

[12] 15 U.S.C. § 57b-1(c)(1).

[13] *FTC v. Ken Roberts Co.*, 276 F.3d 583, 586 (D.C. Cir. 2001) ("… courts of appeals have consistently deferred to agency determinations of their own investigative authority, and have generally refused to entertain challenges to agency authority in proceedings to enforce compulsory process." (citing *United States v. Sturm, Roger & Co*, 84 F.3d 1, 5 (lst Cir. 1996))); *United States v. Construction Prods. Research, Inc.*, 73 F.3d 464, 468-73 (2d Cir. 1996); *EEOC v. Peat, Marwick, Mitchell & Co*., 775 F.2d 928, 930 (8th Cir. 1985); *Donovan v. Shaw*, 668 F.2d 985, 989 (8th Cir. 1982); *FTC v. Ernstthal*, 607 F.2d 488, 490 (D.C. Cir. 1979).

[14] *FMC v. Port of Seattle*, 521 F.2d 431, 434 (9th Cir. 1975).

previously observed, "[j]ust as a court has the power to determine whether it possesses jurisdiction to address and resolve any given case, the FTC has the power to determine whether it possesses jurisdiction over a given matter or entity."[15] PPF may not foreclose that inquiry simply by asserting that, *if* conducted, the inquiry would yield facts favorable to PPF.

As part of the present inquiry, the Commission will conduct a careful examination to determine whether PPF "is organized to carry on business for its own profit or that of its members."[16] While the Commission may take into account PPF's form of organization and its tax exemption in making an initial determination of regulatory coverage, these factors are not dispositive.[17] Rather, the Commission will conduct a fact-intensive inquiry into how the corporation actually operates. Such an inquiry encompasses a broad array of factors, including the

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[15] Commission Letter Denying Petition to Limit and/or Quash Civil Investigative Demand Directed to Firefighters Charitable Foundation, Inc., FTC File No. 102 3023 (citing *Weinberger v. Hynson, Westcott & Dunning, Inc.*, 412 U.S. 609, 627 (1973)); s*ee Endicott Johnson Corp. v. Perkins*, 317 U.S. 501, 508-09 (1942); *Ken Roberts Co.*, 276 F.3d at 583 ("[A]s a general proposition, agencies should remain free to determine, in the first instance, the scope of their own jurisdiction when issuing investigative subpoenas.").

[16] 15 U.S.C. § 44.

[17] *See, e.g.*, *Community Blood Bank of the Kansas City Area, Inc. v. FTC*, 405 F.2d 1011, 1019 (8th Cir. 1969) ("mere form of incorporation does not put them outside the jurisdiction of the Commission"); *FTC v. Ameridebt, Inc.*, 343 F. Supp. 2d 451, 460 (D. Md. 2004) ("Although Ameridebt is incorporated as a non-stock corporation with tax-exempt status, the Court finds this insufficient to insulate it from the regulatory coverage of the FTC Act."); *In re Daniel Chapter One*, 2009 WL 5160000 at *12 (F.T.C. 2009) ("As recognized by the ALJ, however, 'courts and the Commission look to the substance, rather than the form, of incorporation in determining jurisdiction under the FTC Act.'"), *aff'd*, 405 Fed. Appx. 505 (D.C. Cir. 2010) (unpublished opinion); *In re College Football Association*, 117 F.T.C. 971, 1004 (1994) (IRS determinations are not binding on the Commission); *In re Am. Medical Ass'n*, 94 F.T.C. 701, 990 (1979) ("status as . . . tax-exempt organization does not obviate the relevance of further inquiry"), *enforced as modified*, 638 F.2d 443 (2d Cir. 1980), *aff'd by an equally divided court*, 455 U.S. 676 (1982); *In re Ohio Christian College*, 80 F.T.C. 815, 949-50 (1972) ("Notwithstanding the fact the [defendant] had been afforded an exemption certificate . . . it was not in fact an exempt corporation.").

primary purpose of the organization, the extent to which funds or other benefits may have been conferred on related for-profit companies or individuals, and the extent to which the organization may have been used by individuals or for-profit entities as a device to seek monetary gain.[18] The extent to which an entity confers benefits on private interests is relevant even if those benefits are not in the form of "profits," as that term is traditionally understood.[19]

The specifications of the CID are designed to elicit precisely that information. PPF contends "that everything the FTC needs [to determine its jurisdiction] is readily available to it in the public domain."[20] That is plainly incorrect. Most of the CID requests ask for nonpublic materials and information that are highly relevant to the question whether charitable donations are being diverted to insiders or affiliated entities.[21] Other such requests will elicit detailed information on PPF's financial affairs and the degree of oversight it receives from an independent board.[22]

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[18] *See Community Blood Bank*, 405 F.2d at 1019-20; *Ameridebt*, 343 F.Supp. 2d at 460 (factors include "the manner in which it uses and distributes realized profit; its provision of charitable purposes as a primary or secondary goal; and its use of non-profit status as an instrumentality of individuals or others seeking monetary gain." (citing *Community Blood Bank*, 405 F.2d at 1019-20 and *In re Ohio Christian College*, 80 F.T.C. 815, at 849-850)).

[19] *See, e.g., FTC v. Gill*, 183 F.Supp. 2d 1171, 1184-85 (C.D. Cal 2001) (FTC had jurisdiction where individual defendant lived in corporate office, paid personal expenses from corporate accounts, and otherwise comingled business and personal items); *In re Ohio Christian College*, 80 F.T.C. at 23-24 ("profit" for purposes of FTC Act is not limited to dividends; corporation provided individual defendants "much of their subsistence and shelter" and expensive automobiles).

[20] Pet. at 17.

[21] *See, e.g.*, Int. 47, 50, 53, 60-61; Doc. Req. 9, 16-28, 41.

[22] *See, e.g.*, Int. 3-9, 13-30; Doc. Req. 6-9, 12-28.

B. PPF's First Amendment Challenge to the Commission's Jurisdiction Is Meritless

PPF also challenges the CID on First Amendment grounds. In particular, PPF assumes that the Commission will merely compare PPF's fundraising costs to its program expenditures, as reported unfavorably by the media.[23] Based on that assumption, PPF then contends that the solicitation of charitable donations is fully-protected speech under the First Amendment, that "using percentages to decide the legality of the fundraiser's fee or the minimum amount that must reach the charity is constitutionally invalid," and that "the FTC [therefore] cannot rely on high percentages of fundraising fees alone to satisfy the definition of profits necessary to trigger jurisdiction."[24] PPF concludes that the Commission must undertake some additional (though unspecified) "threshold inquiry" before it can obtain the information requested by the CID. We find no merit in these contentions.

First, the First Amendment's protection extends only to truthful solicitations.[25] Thus, in *Madigan v. Telemarketing Associates, Inc.*, 538 U.S. 600 (2003), the Supreme Court held that states may maintain fraud actions where fundraisers make false or misleading representations designed to deceive donors. The Court reiterated that the First Amendment protects the right to engage in charitable solicitations, but that, like other forms of deception, fraudulent charitable solicitations do not enjoy any such protection.[26]

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[23] Pet. at 10-11.

[24] Pet. at 9-10.

[25] *See* Pet. at 8-12. Those cases—*Schaumberg v. Citizens for a Better Environment*, 444 U.S. 620 (1980), *Secretary of State of Maryland v. Munson Co., Inc.*, 467 U.S. 947 (1984), and *Riley v. Federation of the Blind*, 487 U.S. 781 (1988), involved statutes and regulations that prohibited or limited certain kinds of truthful speech. They do not support the proposition that there are First Amendment constraints on Commission actions seeking to prohibit deceptive speech.

[26] *Madigan*, 538 U.S. at 611-27.

In any event, PPF's concern about a possible infringement of its First Amendment rights is also premature. The Commission has not found that PPF has engaged in unlawful conduct, nor has the Commission ordered it to do, or refrain from doing, anything. The Commission is merely conducting an investigation, the very purpose of which is to determine whether PPF may have engaged in conduct that lacks any protection under the First Amendment. Thus, PPF's reliance on cases involving prior restraints on protected speech is misplaced.[27]

Moreover, as the D.C. Circuit has made clear, "in the pre-complaint stage, an investigating agency is under no obligation to propound a narrowly focused theory of a possible future case."[28] We emphasize, again, that the investigation is at an early stage. Much of PPF's petition is devoted to anticipating and addressing possible theories it believes the Commission may wish to pursue. Such arguments are at best premature. At this stage, the Commission is clearly entitled to all the materials that it has requested in the CID so that it may make its initial determination of jurisdiction on a complete record.

C. PPF's Objections to the Scope of the CID are Also Unfounded

Finally, PPF objects to the CID as being "overbroad, overreaching and overly burdensome."[29] In particular, PPF points to a "sheer volume of requests issued for an alleged determination of jurisdiction," asserts that Commission staff declined PPF's offer to provide a more limited production as to its non-profit status, and complains that a "significant amount of time and resources" would be required to comply with the CID.[30] According to PPF, "everything the FTC needs to affirm its lack of jurisdiction . . . is readily available to it in the public domain,"[31]

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[27] *Id.* at 623-24.

[28] *FTC v. Texaco, Inc.*, 555 F.2d 862, 874 (D.C. Cir. 1977).

[29] Pet. at 16.

[30] Pet. at 16-17.

[31] Pet. at 17.

"[the CID] constitutes nothing more than a fishing expedition,"[32] and "such searches are constitutionally repugnant under the Fourth and Fourteenth Amendments to the United States Constitution."[33] We disagree.

The recipient of a CID bears the burden of showing that the request is highly disruptive and, therefore, unduly burdensome or unreasonably broad. That burden is not easily satisfied,[34] and the recipient must make a specific showing of disruption.[35] It is not enough merely to assert, as PPF does here, that the request is overbroad and burdensome and that "gathering, copying and scanning all documents and responses [to the CID] would take a significant amount of time and resources that the organization simply does not have."[36] PPF has made no effort to identify the information requests it considers overly broad or burdensome, nor has PPF made any showing of business disruption. Instead, it has made a blanket objection to all the requests. That does not satisfy PPF's burden.

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[32] Pet. at 15.

[33] Pet. at 16.

[34] *See, e.g., Texaco*, 555 F.2d at 882 (if the agency inquiry is pursuant to a lawful purpose, and the requested documents are relevant to that purpose, the burden of proof is on the subpoenaed party and "is not easily met"); *Genuine Parts Co. v. FTC*, 445 F.2d 1382, 1391 (5th Cir. 1971) (FTC should be accorded "extreme breadth" in conducting its investigations).

[35] *FTC v. Jim Walter Corp.*, 651 F.2d 251, 258 (5th Cir. 1981), citing *FTC v. Rockefeller*, 591 F.2d 182, 190 (2d Cir. 1979) (quoting *Texaco*, 555 F.2d at 882).

[36] Pet. at 17; *see, e.g., FDIC v. Garner*, 126 F.3d 1138, 1145-46 (9th Cir. 1997) (mere allegation that subpoena called for thousands of financial documents and one million other documents was not sufficient to establish burden; a party claiming a "fishing expedition" must establish how); *FTC v. Standard American, Inc*., 306 F.2d 231, 235 (3d Cir. 1962) (recipient must demonstrate the unreasonableness of the Commission's demand and make a record to show the measure of its grievance instead of just assuming it).

Furthermore, a "sheer volume of requests"[37] does not itself establish that the CID is overbroad or imposes undue burden. In particular, the *number* of requests, by itself, says little or nothing about the burden of compliance because complying with many of the specifications would require little time, effort, or money. Furthermore, many of the requests relate both to the subject matter of the investigation and PPF's status as a charitable organization.

We likewise find no merit in PPF's assertion that the CID constitutes an unconstitutional search and seizure.[38] As courts have recognized, "[a]n administrative subpoena is not self-executing and is therefore technically not a 'search.' It is at most a constructive search, amounting to no more than a simple direction to produce documents, subject to judicial review and enforcement."[39]

III. CONCLUSION

For all the foregoing reasons, **IT IS HEREBY ORDERED THAT** the Petition of Police Protective Fund to quash the Civil Investigative Demand be, and it hereby is, **DENIED**.

IT IS FURTHER ORDERED THAT Police Protective Fund comply in full with the Commission's Civil Investigative Demand on or before June 12, 2014.

By the Commission.

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[37] Pet. at 16.

[38] *See* Pet. at 16-17.

[39] *Sturm*, 84 F.3d at 3.

Responses to Petitions to Quash

STAR PIPE PRODUCTS LTD

FTC File No. 131 0214 – Decision, May 27, 2014

RESPONSE TO STAR PIPE PRODUCTS LTD.'S PETITION TO LIMIT SUBPOENA *DUCES TECUM* DATED APRIL 4, 2014

By WRIGHT, Commissioner:

Star Pipe Products Ltd. ("Star Pipe") has filed a Petition to limit the subpoena *duces tecum* ("Subpoena") issued by the Commission on April 4, 2014. For the reasons stated below, the Petition is denied as moot.

On July 17, 2013, the Commission commenced an investigation to determine whether Star Pipe is violating or has violated the terms of a Consent Order approved by the Commission on May 8, 2012 ("the May 8, 2012 Order"). The May 8, 2012 Order resolved the Commission's allegations that Star Pipe had engaged in collusive conduct in the market for ductile iron pipe fittings, brought through an Administrative Complaint under Part 3 of the Commission's Rules of Practice.[1] The Complaint alleged that beginning in January 2008, Star Pipe and its two main competitors, McWane, Inc. and Sigma Corporation, conspired to raise and stabilize prices for ductile iron pipe fittings by exchanging information regarding pricing and output for these products.[2]

The May 8, 2012 Order settled the Commission's allegations against Star Pipe and provided for various types of injunctive relief. Among them, Star Pipe agreed to cease and desist from

[1] *See* Complaint, *In re McWane, Inc. and Star Pipe Products Ltd.*, Docket No. 9351 (Jan. 4, 2012) [hereinafter "Complaint"]. Ductile iron pipe fittings are a component of systems for transporting drinking and waste water under pressurized conditions in municipal distribution systems and treatment plants. These fittings are typically used by municipal and regional water authorities to join pipes, valves and hydrants in straight lines, and to change, divide, or direct the flow of water. *See* Complaint, ¶14.

[2] Complaint, ¶¶ 28-38.

entering into "any combination, conspiracy, agreement, or understanding between or among" the competitors in the ductile iron pipe fittings market.[3] Star Pipe further agreed to cease and desist from communicating with competitors regarding cost, pricing, output, and customers for these products.[4]

Subsequently, FTC staff received information to suggest that Star Pipe might be violating the terms of the May 8, 2012 Order by communicating with representatives of its competitors about competitively sensitive topics. Accordingly, on September 20, 2013, the Commission issued a compulsory process resolution "[t]o determine whether Star Pipe Products Ltd. is violating or has violated the May 8, 2012, Decision and Order[,]" and, on April 4, 2014, the Commission issued the Subpoena to Star Pipe pursuant to Section 9 of the Federal Trade Commission Act, 15 U.S.C. § 49. The Subpoena contains nine specifications that request documents and information on various topics including: (1) Star Pipe's compliance with the requirement that it distribute the May 8, 2012 Order to relevant personnel; (2) Star Pipe's communications with its competitors, including Sigma; (3) Star Pipe's pricing; and (4) Star Pipe's document retention policies. The Subpoena provides a return date of May 5, 2014. The deadline for Star Pipe to file a petition to limit or quash the Subpoena was April 29, 2014.

FTC staff and counsel for Star Pipe engaged in a meet-and-confer process, but because they were unable to resolve the company's objections sufficiently in advance of the April 29 deadline to file a petition to limit or quash the Subpoena, Star Pipe filed the instant Petition on April 24, 2014.

Following Star Pipe's filing of its Petition, however, FTC staff and counsel for Star Pipe continued to confer and, on May 14, 2014, FTC staff formally modified the Subpoena to respond to Star Pipe's objections, based on information proffered by Star Pipe. FTC staff informed the Commission of the agreed-upon modification and a comparison of the modified Subpoena to Star

[3] May 8, 2012 Order, ¶¶ II.A., II.C.

[4] May 8, 2012 Order, ¶¶ I.D., II.B., II.D.

Pipe's Petition shows that the claims raised by the Petition have been resolved. As a result, Star Pipe's Petition is now moot.

We note that Star Pipe did not avail itself of the opportunity to withdraw its Petition despite FTC staff's modification of the Subpoena. In fact, rather than withdraw its Petition, Star Pipe filed an untimely supplement to its Petition on May 22.[5] We are under no obligation to consider untimely motions and merely observe that the issues raised in Star Pipe's supplemental petition have been resolved. We urge Star Pipe to comply with relevant Commission deadlines and to avoid unnecessary Commission review and action when disagreements with FTC staff have been resolved.

For all the foregoing reasons, **IT IS HEREBY ORDERED THAT** the Petition of Star Pipe Products Ltd. to Limit the Subpoena Duces Tecum be, and it hereby is, **DENIED** as moot;

IT IS FURTHER ORDERED THAT the Supplement to Petition of Star Pipe Products Ltd. to Limit the Subpoena Duces Tecum be, and it hereby is, **DENIED** as untimely and moot; and

IT IS FURTHER ORDERED THAT Star Pipe Products Ltd. comply in full with the Commission's Subpoena consistent with FTC staff's May 14, 2014, modification, or as otherwise amended pursuant to Rule 2.7(l) of the Commission's Rules of Practice, 16 C.F.R. § 2.7(l).

By the Commission.

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[5] *See* Supplement to Petition of Star Pipe Products Ltd. to Limit Subpoena Duces Tecum (May 22, 2014). The Commission's Rules of Practice require that, with respect to a Subpoena such as this one, a petition setting forth "*all* assertions of protected status or other factual or legal objections" shall be filed within 20 days after service of process, which in this case was April 29, 2014. 16 C.F.R. § 2.10(a) (emphasis added).

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