FEDERAL TRADE COMMISSION DECISIONS

FINDINGS, OPINIONS, AND ORDERS JANUARY 1, 2020, TO JUNE 30, 2020

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DURING THE PERIOD
JANUARY 1, 2020 TO JUNE 30, 2020

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FEDERAL TRADE COMMISSION DECISIONS

FINDINGS, OPINIONS, AND ORDERS
JANUARY 1, 2020, TO JUNE 30, 2020

IN THE MATTER OF

MEDABLE, INC.

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

Docket No. C-4697; File No. 182 3192
Complaint, January 6, 2020 – Decision, January 6, 2020

This consent order addresses Medable, Inc.'s alleged false or misleading representations made concerning its participation in the Privacy Shield framework agreed upon by the U.S. and the European Union. The complaint alleges that Respondent violated Section 5 of the Federal Trade Commission Act by falsely representing that it was a certified participant in the EU-U.S. Privacy Shield Framework. The consent order prohibits the company 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 EU-U.S. Privacy Shield framework and the Swiss-U.S. Privacy Shield framework.

Participants

For the *Commission*: *Robin Wetherill.*

For the *Respondents*: *Emily Tabatabai, Orrick.*

COMPLAINT

The Federal Trade Commission ("FTC"), having reason to believe that Medable, Inc., a corporation 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 Medable, Inc. is a Delaware corporation with its principal office or place of business at 525 University Ave., Suite A70 Palo Alto, CA 94301.

2. Respondent provides technology solutions to business customers operating in pharmaceutical, biotechnology, and research industries.

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 in its privacy policy, https://www.medable.com/privacy/, statements related to its participation in the EU-U.S. Privacy Shield framework agreed upon by the U.S. government and the European Commission.

5. In fact, Respondent has not been certified to participate in the EU-U.S. Privacy Shield framework.

Privacy Shield

6. The EU-U.S. Privacy Shield framework ("Privacy Shield") was designed by the U.S. Department of Commerce ("Commerce") and the European Commission to provide a mechanism for U.S. companies to transfer personal data outside of the EU that is consistent with the requirements of the European Union Directive on Data Protection. Enacted in 1995, the Directive sets forth EU requirements for privacy and the protection of personal data. Among other things, it requires EU Member States to implement legislation that prohibits the transfer of personal data outside the EU, with exceptions, unless the European Commission 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.

7. To satisfy the EU adequacy standard for certain commercial transfers, Commerce and the European Commission negotiated the EU-U.S. Privacy Shield framework, which went into effect in July 2016. The EU-U.S. Privacy Shield framework allows companies to transfer personal data lawfully from the EU to the United States. To join the EU-U.S. Privacy Shield framework, a company must self-certify to Commerce that it complies with the Privacy Shield Principles and related requirements that have been deemed to meet the EU's adequacy standard.

8. Companies under the jurisdiction of the FTC, as well as the U.S. Department of Transportation, are eligible to join the EU-U.S. Privacy Shield framework. A company under the FTC's jurisdiction that claims it has self-certified to the Privacy Shield 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.

9. Commerce maintains a public website, https://www.privacyshield.gov/welcome, where it posts the names of companies that have self-certified to the EU-U.S. Privacy Shield framework. The listing of companies, https://www.privacyshield.gov/list, indicates whether the company's self-certification is current.

10. Respondent has disseminated or caused to be disseminated privacy policies and statements on the https://www.medable.com/privacy/ website, including, but not limited to, the following statements:

> **Information for Persons Outside of the United States**
>
> As we are a US headquartered company, your personal information will be transferred to the US for further processing in accordance with the purposes set out above. Accordingly, Medable is EU/US Privacy Shield certified which means that

> we treat your personal information received from the European Economic Area (EEA) in accordance with EU data privacy principles. Please see our Privacy Shield Privacy Policy below for more details. . . .
>
> **Privacy Shield Privacy Policy**
>
> Medable has certified to the Department of Commerce that it adheres to the Privacy Shield Principles. If there is any conflict between the terms in this privacy policy and the Privacy Shield Principles, the Privacy Shield Principles shall govern. To learn more about the Privacy Shield program, and to view our certification, please visit https://www.privacyshield.gov/

11. Although Respondent initiated an application to Commerce for Privacy Shield certification in December 2017, it did not complete the steps necessary to participate in the EU-U.S. Privacy Shield framework and continued to make the statements described in Paragraph 10 in its privacy policy until October 2018.

Count 1-Privacy Misrepresentation

12. As described in Paragraph 10, from December 2017 to October 2018, Respondent represented, directly or indirectly, expressly or by implication, that it was a participant in the EU-U.S Privacy Shield framework.

13. In fact, as described in Paragraph 11, Respondent was never certified to participate in the EU-U.S. Privacy Shield framework. Therefore, the representation set forth in Paragraph 12 is false or misleading.

Violations of Section 5 of the FTC Act

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 sixth day of January 2020, has issued this complaint against Respondent.

By the Commission.

DECISION

The Federal Trade Commission ("Commission") initiated an investigation of certain acts and practices of the Respondent named above in the caption. The Commission's Bureau of Consumer Protection ("BCP") prepared and furnished to Respondent a draft Complaint. BCP proposed to present the draft Complaint to the Commission for its consideration. If issued by the Commission, the draft Complaint would charge Respondent with violation of the Federal Trade Commission Act.

Respondent and BCP thereafter executed an Agreement Containing Consent Order ("Consent Agreement"). The Consent Agreement includes: 1) statements by Respondent that it neither admits nor denies any of the allegations in the Complaint, except as specifically stated in this Decision and Order, and that only for purposes of this action, it admits the facts necessary to establish jurisdiction; and 2) waivers and other provisions as required by the Commission's Rules.

The Commission considered the matter and determined that it had reason to believe that Respondent has violated the Federal Trade Commission Act, and that a Complaint should issue stating its charges in that respect. The Commission accepted the executed Consent Agreement and placed it 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 Rule 2.34, the Commission issues its Complaint, makes the following Findings, and issues the following Order:

Findings

1. Respondent Medable, Inc. is a Delaware corporation with its principal office or place of business at 525 University Ave., Suite A70 Palo Alto, CA 94301.

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

ORDER

Definitions

For purposes of this Order, the following definition applies:

A. "Respondent" means Medable, Inc., a corporation, and its successors and assigns.

Provisions

I. Prohibition against Misrepresentations about Participation in or Compliance with Privacy Programs

IT IS ORDERED that Respondent and its officers, agents, 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 the advertising, marketing, promotion, offering for sale, or sale of any product or service must 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 a government or any self-regulatory or standard-setting organization, including but not limited to the EU-U.S. Privacy Shield framework and the Swiss-U.S. Privacy Shield framework.

II. Acknowledgments of the Order

IT IS FURTHER ORDERED that Respondent obtain acknowledgments of receipt of this Order:

A. Respondent, within ten (10) days after the effective date of this Order, must submit to the Commission an acknowledgment of receipt of this Order.

B. For five (5) years after the issuance date of this Order, Respondent must deliver a copy of this Order to: (1) all principals, officers, directors, and LLC managers and members; (2) all employees having managerial responsibilities for, and all agents and representatives who participate in, conduct related to representing 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 a government or any self-regulatory or standard-setting organization, including but not limited to the EU-U.S. Privacy Shield framework and the Swiss-U.S. Privacy Shield framework; and (3) any business entity resulting from any change in structure as set forth in the Provision titled Compliance Report and Notices. Delivery must occur within ten (10) days after the effective date of this Order for current personnel. For all others, delivery must occur before they assume their responsibilities.

C. From each individual or entity to which Respondent delivered a copy of this Order, Respondent must obtain, within sixty (60) days, a signed and dated acknowledgment of receipt of this Order.

III. Compliance Report and Notices

IT IS FURTHER ORDERED that Respondent make timely submissions to the Commission:

A. Sixty (60) days after the issuance date of this Order, Respondent must submit a compliance report, sworn under penalty of perjury, in which Respondent must: (a) identify the primary physical, postal, and email address and telephone number, as designated points of contact, which representatives of the Commission, may use to communicate with Respondent; (b) identify all of Respondent's businesses by all of their names, telephone numbers, and physical, postal, email, and Internet addresses; (c) describe the activities of each business; (d) describe in detail whether and how Respondent is in compliance with each Provision of this Order; and (e)

provide a copy of each Acknowledgment of the Order obtained pursuant to this Order, unless previously submitted to the Commission.

B. Respondent must submit a compliance notice, sworn under penalty of perjury, within fourteen (14) days of any change in the following: (1) any designated point of contact; or (2) the structure of Respondent or any entity that Respondent has any ownership interest in or controls directly or indirectly that may affect compliance obligations arising under this Order, including: creation, merger, sale, or dissolution of the entity or any subsidiary, parent, or affiliate that engages in any acts or practices subject to this Order.

C. Respondent must submit notice of the filing of any bankruptcy petition, insolvency proceeding, or similar proceeding by or against Respondent within fourteen (14) days of its filing.

D. Any submission to the Commission required by this Order to be sworn under penalty of perjury must be true and accurate and comply with 28 U.S.C. § 1746, such as by concluding: "I declare under penalty of perjury under the laws of the United States of America that the foregoing is true and correct. Executed on: _____" and supplying the date, signatory's full name, title (if applicable), and signature.

E. Unless otherwise directed by a Commission representative in writing, all submissions to the Commission pursuant to this Order must 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 *Medable, Inc*., FTC File No. 1823192.

IV. Recordkeeping

IT IS FURTHER ORDERED that Respondent must create certain records for ten (10) years after the issuance date of the Order, and retain each such record for five (5) years. Specifically, Respondent must create and retain the following records:

A. personnel records showing, for each person providing services in relation to any aspect of this Order, whether as an employee or otherwise, that person's: name; addresses; telephone numbers; job title or position; dates of service; and (if applicable) the reason for termination;

B. all records necessary to demonstrate full compliance with each provision of this Order, including all submissions to the Commission; and

C. a copy of each widely disseminated representation by Respondent making any representation subject to this Order, and all materials that were relied upon in making the representation.

V. Compliance Monitoring

IT IS FURTHER ORDERED that, for the purpose of monitoring Respondent's compliance with this Order:

A. Within ten (10) days of receipt of a written request from a representative of the Commission, Respondent must: submit additional compliance reports or other requested information, which must be sworn under penalty of perjury, and produce records for inspection and copying.

B. For matters concerning this Order, representatives of the Commission are authorized to communicate directly with Respondent. Respondent must permit representatives of the Commission to interview anyone affiliated with Respondent who has agreed to such an interview. The interviewee may have counsel present.

C. The Commission may use all other lawful means, including posing through its representatives as consumers, suppliers, or other individuals or entities, to Respondent or any individual or entity affiliated with Respondent, without the necessity of identification or prior notice. Nothing in this Order limits the Commission's lawful use of compulsory process, pursuant to Sections 9 and 20 of the FTC Act, 15 U.S.C. §§ 49, 57b-1.

VI. Order Effective Dates

IT IS FURTHER ORDERED that this Order is final and effective upon the date of its publication on the Commission's website (ftc.gov) as a final order. This Order will terminate twenty (20) years from the date of its issuance, (which date may be stated at the end of this Order, near the Commission's seal), or twenty (20) years from the most recent date that the United States or the Commission files a complaint (with or without an accompanying settlement) 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 Provision 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 Provision.

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 Provision as though the complaint had never been filed, except that the Order will not terminate between the date such complaint is filed and the later of the deadline for appealing such dismissal or ruling and the date such dismissal or ruling is upheld on appeal.

By the Commission.

ANALYSIS OF CONSENT ORDER TO AID PUBLIC COMMENT

The Federal Trade Commission ("Commission") has accepted, subject to final approval, an agreement containing a consent order from Medable, Inc. ("Medable" or "Respondent").

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

This matter concerns alleged false or misleading representations that Medable made concerning its participation in the Privacy Shield framework agreed upon by the

U.S. and the European Union ("EU"). The Privacy Shield framework allows for the lawful transfer of personal data from the EU to participating companies in the U.S. The framework consists of a set of principles and related requirements that have been deemed by the European Commission as providing "adequate" privacy protection. The principles include notice; choice; accountability for onward transfer; security; data integrity and purpose limitation; access; and recourse, enforcement, and liability. The related requirements include, for example, securing an independent recourse mechanism to handle any disputes about how the company handles information about EU citizens.

To participate in the framework, a company must comply with the Privacy Shield principles and self-certify that compliance to the U.S. Department of Commerce ("Commerce"). Commerce reviews companies' self-certification applications and maintains a public website, https://www.privacyshield.gov/list, where it posts the names of companies who have completed the requirements for certification. Companies are required to recertify every year in order to continue benefitting from Privacy Shield.

Medable is a technology development company. It primarily provides services that help pharmaceutical and biotechnology researchers collect and process data about research participants. According to the Commission's complaint, from approximately December 2017 until October

2018, Medable published on its website, http://www.medable.com, a privacy policy containing statements related to its participation in Privacy Shield.

The Commission's proposed one-count complaint alleges that Respondent violated Section 5(a) of the Federal Trade Commission Act. Specifically, the proposed complaint alleges that Respondent engaged in a deceptive act or practice by falsely representing that it was a certified participant in the EU-U.S. Privacy Shield Framework.Part I of the proposed order prohibits the company 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 EU-U.S. Privacy Shield framework and the Swiss-U.S. Privacy Shield framework.

Parts II through V of the proposed order are reporting and compliance provisions. Part II requires acknowledgement of the order and dissemination of the order now and in the future to persons with responsibilities relating to the subject matter of the order. Part III ensures notification to the FTC of changes in corporate status and mandates that the company submit an initial compliance report to the FTC. Part IV requires the company to create certain documents relating to its compliance with the order for ten years and to retain those documents for a five-year period. Part V mandates that the company make available to the FTC information or subsequent compliance reports, as requested.

Part VI is a provision "sun-setting" 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

ILLUMINA, INCORPORATED
AND
PACIFIC BIOSCIENCES OF CALIFORNIA, INCORPORATED (PACBIO)

CONSENT ORDER, ETC. IN REGARD TO ALLEGED VIOLATIONS OF SECTION 5 OF THE FEDERAL TRADE COMMISSION ACT, SECTION 2 OF THE SHERMAN ACT, AND SECTION 7 OF THE CLAYTON ACT

Docket No. 9387; File No. 191 0035
Complaint, December 17, 2019 – Decision, January 6, 2020

This case addresses the $1.2 billion acquisition by Illumina, Incorporated of certain assets of Pacific Biosciences of California, Incorporated (PacBio). The complaint alleges that the acquisition, if consummated, would violate Section 2 of the Sherman Act, Section 7 of the Clayton Act, and Section 5 of the FTC Act by substantially lessening competition in the market for "next-generation sequencing" technology that allows researchers and clinicians quickly, accurately, and efficiently to identify the order of the component blocks—called nucleotides—in a DNA sample. On January 3, 2020, Complaint Counsel and Respondents Illumina, Inc. ("Illumina") and Pacific Biosciences of California, Inc. ("Pacific Biosciences") jointly move to dismiss the complaint because Respondents terminated their Agreement and Plan of Merger and Respondent Illumina withdrew its Hart-Scott-Rodino Notification and Report Forms filed for the proposed acquisition. The Commission dismissed the Complaint without prejudice.

Participants

For the *Commission*: *Jordan S. Andrew, Michael Barnett, Stephanie C. Bovee, Peter Colwell, Yan Gao, David J. Gonen, Wade Lippard, Jean McNeil, Joseph R. Neely, Brian A. O'Dea,* and *Stephen W. Rodger.*

For the *Respondents*: *James J. O'Connell, Covington & Burling LLP; Scott Andrew Sher, Wilson Sonsini Goodrich & Rosati PC.*

COMPLAINT

Pursuant to the provisions of the Federal Trade Commission Act ("FTC Act"), and by virtue of the authority vested in it by said Act, the Federal Trade Commission ("FTC" or "Commission"), having reason to believe that Respondents Illumina, Inc. ("Illumina") and Pacific Biosciences of California, Inc. ("Pacific Biosciences" or "PacBio"), have executed an agreement for the acquisition of PacBio by Illumina (the "Acquisition"), which, if consummated, would violate Section 2 of the Sherman Act, 15 U.S.C. § 2, 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 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. Illumina is a monopolist. It is the self-proclaimed leader in DNA sequencing and dominates DNA sequencing markets in the United States and worldwide. Its name is often considered synonymous with "next-generation sequencing" ("NGS"), the technology that allows researchers and clinicians quickly, accurately, and efficiently to identify the order of the component blocks—called nucleotides—in a DNA sample. In the United States, Illumina has complete dominance over the market for these products, with a share of over 90%. Historically, Illumina has faced little competition for its NGS instruments and consumables (collectively, "systems").

2. PacBio is one of the few firms that has managed to gain a foothold in the NGS market. PacBio sells a DNA sequencing system that offers substantial benefits over Illumina's systems, including longer individual sequence read lengths, but is a lower throughput and more expensive alternative.

3. Due to the benefits provided by PacBio's technology, some Illumina customers have shifted certain sequencing projects (or parts of projects) from Illumina to PacBio despite the differences in cost and throughput.

4. Respondents' internal documents show that PacBio and Illumina consistently and routinely refer to each other as competitors. These include many internal strategy documents, technical assessments, and sales support documents prepared over a period of years.

5. In the past two years, PacBio has made significant technological advancements, including the release of its "Sequel II" instrument in 2019. These advancements have brought down the cost of sequencing using PacBio systems and increased the accuracy and throughput of PacBio's instruments. Collectively, these improvements have made PacBio a closer alternative to Illumina than ever before.

6. In advance of the Sequel II's release, PacBio positioned its improved technology as an ever closer competitor to Illumina. By 2018, PacBio executives instructed its marketing department to [redacted]
In October 2018, one PacBio marketing executive explained, [redacted]

7. Illumina has monitored PacBio as [redacted] and [redacted] from its inception. But as it learned details about PacBio's recent product improvements and the PacBio system's trajectory, Illumina recognized PacBio as [redacted].

8. Illumina now proposes to acquire PacBio and extinguish it as a competitive threat. Per an agreement executed November 1, 2018, Illumina will pay $1.2 billion for PacBio, a 71% premium over PacBio's share price at the time.

9. This Acquisition will eliminate competition between the two companies now and in the future. Accordingly, it will substantially lessen competition and further insulate Illumina's monopoly from PacBio's increasing competitive threat.

II. BACKGROUND

A. Jurisdiction

10. Respondents 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.

11. The Acquisition constitutes an acquisition subject to Section 7 of the Clayton Act, 15 U.S.C. § 18.

B. Respondents

12. Respondent Illumina is a publicly traded Delaware corporation, headquartered in San Diego, California. Illumina develops, manufactures, and markets life sciences tools. Illumina's main product offerings are instruments used for DNA sequencing and associated consumable chemistry kits. Illumina offers seven DNA sequencing systems at a range of different price points and throughput levels. Its primary customers are leading genomic research centers, academic institutions, government laboratories, and hospitals, as well as companies in the pharmaceutical, biotechnology, agrigenomic, commercial diagnostics, and consumable genomics industries. Illumina was founded in 1998 and has 7,300 employees worldwide, with commercial offices located in Europe, Asia, Australia, and the Americas. In 2018, Illumina's worldwide revenue was $3.33 billion, approximately 55% of which was from U.S. sales.

13. Respondent PacBio is a publicly traded Delaware corporation, headquartered in Menlo Park, California. PacBio sells DNA sequencing instruments and consumable chemistry kits. It targets these products toward scientists striving to resolve complex and novel issues in genetics. PacBio's customer base is broadly similar to that of Illumina and includes research institutions, commercial laboratories, genome centers, pharmaceutical companies, and agricultural companies. PacBio was founded in 2004 and has about 400 full-time employees, almost all of whom are located in the United States. In 2018, PacBio's worldwide revenue was $78.6 million, approximately 45% of which was North American sales.

C. The Proposed Acquisition

14. Illumina agreed to acquire PacBio on November 1, 2018, for approximately $1.2 billion. The price per share represents a 71% premium to PacBio's share price as of market close on October 31, 2018. This agreement (the "Agreement") was set to expire on December 31, 2019. On September 25, 2019, Illumina and PacBio executed an amendment to this agreement to allow Illumina the unilateral right to extend the end date to March 31, 2020.

D. Background on Sequencing Technologies

15. DNA sequencing is the process of determining the order of nucleotides in DNA molecules from a biological sample. Scientists use DNA sequencing to ascertain the sequence of individual genes, larger genetic regions, full chromosomes, or the entire genome of any organism. DNA sequencing is foundational to research spanning the fields of molecular biology, evolutionary biology, genomics, medicine, pharmacology, ecology, and epidemiology. Other uses for DNA sequencing include clinical medical diagnostics, forensics, biometrics, and consumer genetics. Additionally, scientists can use DNA sequencing systems to sequence RNA, which has unique scientific utility for research and clinical use.

16. From the 1970s until the mid-2000s, the Sanger method was the predominant method of sequencing. It was, however, time consuming, costly, and labor intensive.

17. In the mid-2000s, new technologies—dubbed next-generation sequencing ("NGS")— began to appear. NGS systems offered much lower cost and higher throughput, with the ability to generate a large number of sequences at once. This technology rapidly eclipsed Sanger as the primary tool for genetic sequencing.

18. Illumina's technology is known as "short-read" sequencing. Short-read technology has been the predominant NGS technology for the last decade.

19. NGS sequencing also includes "long-read" sequencers. Long-read sequencing became commercially available in 2011. PacBio has been the leading system of this type since this technology emerged.

20. Short-read and long-read sequencing systems—and Illumina and PacBio in particular— currently differ on several metrics that drive the ways in which customers use them. Illumina's short-read systems currently have an advantage over PacBio's long-read systems on cost, number of sequence reads, and throughput. PacBio's system far surpasses Illumina's in terms of the length of DNA that it can cover in each individual sequence read. Both systems are capable of delivering highly accurate sequence reads.

21. The characteristics of PacBio's systems have been converging with those offered by Illumina. As PacBio has improved the individual sequence read length, cost, and throughput of its products over the years, it has become a closer substitute for Illumina's short-read technology for some customers in some projects. PacBio expects to continue to improve the cost and throughput of its system in the future. Historically, Illumina's short-read sequencing has been cheaper than long read on a cost per genome basis. However, because of the inherent benefits of long-read sequencing over short-read sequencing for certain applications, use cases, and projects, customers have been willing to pay a price premium to use PacBio for some sequencing projects. And, as PacBio's cost per genome decreases, customers expect to sequence more samples on PacBio and fewer samples on Illumina.

22. Sequencing is used for a number of different applications, use cases, projects, and sample sets within projects. Today, certain applications are best served by short-read systems,

other applications are adequately served only by long-read systems, and some applications may be served by either short-read or long-read technology depending upon the objectives, budget, and time for a particular use case or project. As the cost of PacBio's long-read sequencing has decreased and its accuracy and throughput have increased, sequencing volume has shifted from short read to long read, as long read is able to fit the needs of more use cases and projects within several applications. Market participants expect this trend to continue for a broader set of projects and use cases.

III.

THE NGS PRODUCT MARKET

23. A relevant product market in which to assess the competitive impact of the proposed Acquisition is no broader than all next-generation sequencing systems (the "NGS Market").

24. The NGS Market comprises highly differentiated systems, including those of Illumina, PacBio, and a few other small participants.

25. In internal documents, both Illumina and PacBio routinely recognize the existence of an NGS market, consistently refer to each other as competitors in that market, and refer to competition across NGS systems. These documents include investor presentations, SEC filings, strategic planning documents, sales plans, and technical assessments.

26. Other market participants also recognize the existence of an NGS market, and other sequencing companies consider themselves to be competing in the NGS Market. Industry analysts also assess and monitor the NGS Market.

27. PacBio's long-read systems have characteristics and uses similar to those of Illumina's short-read systems for certain projects and use cases. As PacBio continues to improve the cost, accuracy, and throughput of its long-read systems, their characteristics and uses will become even more similar to those of Illumina's short-read systems.

28. In some instances, customers have switched sequencing volume from Illumina to PacBio as a result of past improvements in the cost, accuracy, and throughput of PacBio's systems. PacBio expects to continue improving its system's cost, accuracy, and throughput in the future, and customers expect to switch additional volume from Illumina to PacBio as a result of those improvements.

29. Sanger sequencing systems, the only other technology capable of sequencing DNA, are properly excluded from the NGS Market. It costs much less to sequence DNA with NGS than Sanger sequencing, and the legacy Sanger approach is so much slower that it is impractical for almost all purposes for which scientists employ NGS.

30. Non-sequencing products, such as microarrays, are properly excluded from the NGS Market. Microarrays do not sequence DNA. They merely identify known single nucleotide

variants in a genome. These products lack the throughput and technical capabilities of NGS products, qualities that customers require for their sequencing work.

IV.

THE RELEVANT GEOGRAPHIC MARKET

31. The United States is the relevant geographic market in which to assess the competitive effects of the proposed Acquisition.

32. U.S. NGS customers cannot practically turn to suppliers that do not have a U.S. presence to purchase an NGS system. NGS customers require local service and support networks. Reflecting the reality of regional competitive differences, Illumina [redacted]

33. Intellectual property is a significant barrier to entry in the NGS Market. The strength of incumbent NGS companies' patent portfolios differs depending on the region. Using intellectual property, incumbent U.S. NGS suppliers (namely, Illumina) exclude other firms from selling NGS products in the United States, including some companies that supply NGS products elsewhere in the world. Accordingly, intellectual property creates a unique set of entry conditions in the United States.

V.

MARKET STRUCTURE

34. Illumina is the dominant manufacturer of NGS systems in the United States, where it enjoys a market share of more than 90%. PacBio is one of three other companies manufacturing and selling NGS systems in the United States. All of the companies that could, theoretically, enter the U.S. NGS Market at some point in the future [redacted].

A. Illumina

35. Illumina describes itself as the "global leader in DNA sequencing" and has enjoyed an enduring dominance in the sale of sequencers. Market participants describe Illumina as "synonymous with sequencing" because its technology generates more than 90% of the world's sequencing data. Illumina has sustained its dominance for years.

36. Illumina has possessed since at least 2009, and continues to possess today, monopoly power in the markets in which it sells its DNA sequencing systems, including in the NGS Market.

37. Substantial direct evidence demonstrates Illumina's durable monopoly power. For many projects and use cases, customers have few, if any, commercially reasonable alternatives to Illumina.

38. Customers recognize that they have few commercially reasonable alternatives and lack bargaining leverage to obtain lower prices or better contract terms from Illumina. When Illumina has implemented price increases, those increases have been profitable and have not driven sales toward other DNA sequencing systems.

39. Illumina's own documents provide evidence of its monopoly power. An internal 2016 document answers the question [redacted]. It also states that [redacted].

40. Illumina is so dominant that it sees limited sales left to compete for. Illumina's Vice President of Regional Sales and Marketing for the Americas explained in an email [redacted]

41. Illumina's monopoly power may also be established through indirect evidence. Illumina possesses an extremely high share of the NGS Market. It has had a share of over 80% since at least 2013, and over 90% since 2015.

42. Substantial barriers to entry prevent other firms from competing with Illumina in the sale of DNA sequencing systems. DNA sequencing is complex, and any new entrant would need to overcome significant scientific, commercial, and intellectual property barriers to develop and commercialize a new NGS system successfully. Since 2013, only one new firm, Oxford Nanopore, has entered and remained in the U.S. NGS Market, and three years later it holds only a [redacted] market share.

B. PacBio

43. PacBio systems use an innovative "Single-Molecule, Real-Time" ("SMRT") sequencing approach. With its ability to generate accurate long reads, PacBio can provide more comprehensive and higher quality information than short-read sequencing systems like Illumina's. While PacBio's system offers advantages over short read, it currently has substantially lower throughput and higher costs than Illumina.

44. PacBio has continually improved its system with the goal of converting ever more sequencing volume from short-read systems to its long-read technology. Some Illumina customers have switched samples, projects, or entire applications from Illumina to PacBio already.

45. PacBio's innovations and sequencing advances over the past two years have enabled the company to deliver significantly higher quality sequencing at dramatically lower prices, bringing its offerings closer to those of Illumina in terms of both capability and price.

46. PacBio's share of the NGS Market is 2-3% today. Both PacBio and Illumina project [redacted]. Some of that [redacted].

C. Other Market Participants

47. Oxford Nanopore Technologies ("Oxford Nanopore") is a U.K.-based NGS company that markets native long-read sequencing systems based on a nanopore technology. This technology, which functions differently than PacBio's, generates longer—but significantly less accurate—reads than other systems. Oxford Nanopore [redacted] a unique device that is portable and serves only niche use cases. The low accuracy of Oxford Nanopore's technology has limited its acceptance among customers.

48. Thermo Fisher Scientific ("Thermo Fisher") markets short-read, benchtop sequencing systems. Thermo Fisher is the second-leading provider of NGS systems, albeit well behind Illumina. Thermo Fisher's systems have significant technological limitations that constrain the company's ability to compete for business outside the application of targeted sequencing for clinical use. Thermo Fisher's technology is not an option for most customers of NGS products and services.

49. No other firm attempting to develop a sequencing system [redacted]. One firm, Beijing Genomics Institute ("BGI"), currently provides sequencing instruments outside of the United States, but it is deterred from participating in the U.S. NGS Market due to Illumina's claims that BGI's instruments infringe Illumina's patents.

D. Market Shares

50. Illumina makes the dominant NGS system and earns revenues [redacted] greater than those of the next-largest firm.

51. Illumina, which has held its dominant position for years, currently maintains a share of more than 90% of the U.S. NGS Market. PacBio holds a share approximately 2-3% of the NGS Market in the United States.

VI.

CONDITIONS OF ENTRY OR EXPANSION

52. Entry into the U.S. NGS Market is time consuming and extremely difficult. A new entrant into the NGS Market would need to overcome significant scientific, legal, and commercial barriers.

53. DNA sequencing systems are highly complex systems comprising advanced chemistry, sensitive optics, and powerful semiconductors. Integrating these components into a

system that delivers value and performance sufficient to compete with existing systems, is scalable, and is cost effective to manufacture and operate is an immense challenge that requires considerable investment of capital and time.

54. The intellectual property landscape surrounding existing sequencing technologies is broad, dense, and difficult to invent around. Illumina has an extensive patent portfolio— with hundreds of U.S. patent registrations—that it devotes considerable resources to enforcing. Illumina's patent enforcement efforts have prevented, and likely will continue to prevent, new competitors from emerging in the United States. PacBio, which also owns a substantial patent portfolio, uses a different sequencing technology than Illumina. Accordingly, PacBio is not vulnerable to a patent infringement suit from Illumina, but both Illumina and PacBio have a long history of asserting their patents to exclude competitive technologies from the U.S. NGS Market, and the combined firm will have a strong incentive to exclude any firm seeking to enter the United States with a new long- read or short-read product.

55. Gaining acceptance in the marketplace after launching a product takes significant time and effort. A new system must prove itself reliable and robust before it can expect significant sales to customers in the research and clinical communities. New entrants typically must convince key opinion leaders to use their technology and publish papers to support the use of their products by other researchers, which takes a significant amount of time and creates uncertainty about whether new products, even after they are launched, would be able to compete effectively with existing, proven products.

VII.

HARM TO COMPETITION

A. The Acquisition Removes PacBio as a Competitive Threat to Illumina

56. By late 2018, improvements to PacBio's sequencing system had positioned PacBio as a significant threat to Illumina's longstanding monopoly.

57. As early as 2014, Illumina identified PacBio in internal documents as [redacted] and recognized that [redacted]

58. As PacBio's continued innovation produced incrementally better sequencing offerings, Illumina became increasingly concerned. In 2016, Illumina characterized PacBio as a [redacted] and one executive commented that, [redacted]

59. Internally, Illumina refers to PacBio specifically as a [redacted], with the frequency of references to PacBio as [redacted].

60. Illumina identified two companies as [redacted]. Of those two companies, only PacBio sells sequencing systems in the United States.

61. Respondents' internal documents demonstrate intensifying head-to-head competition and a mutual recognition of the threat that an independent PacBio posed to Illumina going forward. As PacBio's CEO told investors in August 2018, PacBio was getting close to "demonstrat[ing] that a high-quality PacBio analysis of the human genome can be performed at a comparable cost [to short-read technologies]," a "milestone" where it "anticipate[s] seeing larger cohorts of population sequencing samples shift over [from short read] to PacBio."

62. In early 2018, PacBio senior executives contacted Illumina's top executives to explore potential partnership opportunities, which afforded Illumina the ability to evaluate the sequencing data generated by PacBio's new chemistry. An Illumina Principal Scientist [redacted]—describing it internally as [redacted]

63. In light of PacBio's improving technology and the increasing threat to its monopoly, Illumina in 2018 contemplated specific competitive responses, including discounting its NGS products to protect its market position and developing new products that could compete with PacBio, which Illumina recognized was [redacted]

64. Instead of discounting or accelerating its internal innovation projects to maintain its market share in the face of PacBio's significant advancements, Illumina began evaluating PacBio as an acquisition target, as it had done before with [redacted] In 2017, Illumina determined that [redacted].

65. By August 2018, Illumina recognized [redacted] because of recent PacBio product improvements.

66. Illumina and PacBio agreed to merge on November 1, 2018, and shortly after, Illumina executives explained in the company's [redacted] that PacBio was [redacted]

B. The Proposed Acquisition Extinguishes All Current and Future Competition Between Illumina and PacBio

67. The proposed Acquisition will eliminate significant current and future competition between Illumina and PacBio, substantially harming consumers. As PacBio has improved its technology, customers have benefitted from these cost and quality improvements and moved sequencing volume from Illumina to PacBio systems in certain projects, use cases, and applications.

68. Respondents, customers, and other market participants recognize that, as an independent company, PacBio is poised to take increasing sequencing volume from Illumina in the future. In the absence of the merger, Illumina's response to that competition would likely include discounting the prices of its systems, improving their quality, and developing innovative new products.

69. When the parties entered into the Acquisition agreement, PacBio expected its Sequel II instrument and related chemistry improvements to be an inflection point for the company. The Sequel II will expand the projects and use cases for which customers could use PacBio, and will position PacBio as a much closer alternative to Illumina.

70. PacBio expected the Sequel II would [redacted] the NGS space. In 2018, as PacBio was planning to introduce a significant chemistry improvement, its executives directed the company's marketing department to [redacted] As a marketing executive described PacBio's focus in October 2018, [redacted]

71. The merger would harm consumers, in part, by hampering competition, particularly innovation competition. Both PacBio and Illumina have engaged in innovation efforts to compete with each other for years, they were engaged in such efforts at the time of the merger announcement, and both expected to compete against each other with new products in the future.

72. PacBio is continually improving its system to reduce costs, increase throughput, and take market share from Illumina. Illumina, in turn, is [redacted], motivated in large part by the competitive threat posed by PacBio.

73. The merger reduces the combined firm's incentives to innovate and develop new products relative to the incentives PacBio and Illumina faced as independent competitors. Post-acquisition, Illumina will have reduced incentives to develop new long-read systems that would cannibalize its existing short-read business, and Illumina will have little or no incentive to continue its efforts to launch new long-read products after acquiring PacBio's long-read business. As a result, consumers will have fewer innovative products to choose from, and they will lose the price and quality benefits that competition between Illumina's and PacBio's new products would have created absent the merger.

C. The Acquisition Presumptively Harms Competition in the NGS Market

74. The 2010 Department of Justice and Federal Trade Commission Horizontal Merger Guidelines ("Horizontal Merger Guidelines") and courts measure concentration using the Herfindahl-Hirschman Index ("HHI"). HHI levels are calculated by totaling the squares of the market shares of each firm in the relevant market. A relevant market is "highly concentrated" if it has an HHI level of 2,500 or more. A merger or acquisition 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.

75. Post-Acquisition U.S. NGS market concentration, and the change in concentration caused by the Acquisition, will exceed the thresholds established in the Horizontal Merger Guidelines. Pre-Acquisition, the U.S. NGS Market is highly concentrated, with an HHI of 8,290, which far exceeds the threshold level in the Horizontal Merger Guidelines. The Acquisition will increase the HHI of the U.S. NGS market by 443 points. Post- Acquisition, the HHI of the U.S. NGS Market will be 8,733.

76. The Acquisition is presumptively unlawful under the Horizontal Merger Guidelines and relevant case law.

VIII.

EFFICIENCIES AND PROCOMPETITIVE JUSTIFICATIONS

77. Respondents cannot verify or substantiate any merger-specific efficiencies. Even if Respondents could identify some efficiencies that would result from the Acquisition, they could not show that such savings would likely be passed on to customers. In any event, any cognizable efficiencies are far outweighed by the Acquisition's harm and do not justify the Acquisition.

78. Respondents' procompetitive justifications for the Acquisition are pretextual. To the extent that there are any procompetitive effects flowing from the Acquisition at all, those effects could be accomplished through other means, without eliminating all competition between Illumina and PacBio.

IX. VIOLATIONS

COUNT I—MONOPOLIZATION

79. The allegations of Paragraphs 1 through 78 above are incorporated by reference.

80. Respondent Illumina has, and at all relevant times had, monopoly power in the U.S. NGS Market, as well as in any other market in which it sells DNA sequencing systems.

81. The Acquisition, if consummated, would eliminate the nascent competitive threat that an independently owned PacBio poses to Illumina's monopoly power. The Acquisition is anticompetitive conduct because it eliminates competition between Illumina and PacBio. The Acquisition is anticompetitive conduct reasonably capable of contributing significantly to Illumina's maintenance of monopoly power.

82. Illumina's claimed procompetitive justifications are pretextual and, in any event, do not outweigh the anticompetitive effect of the Acquisition.

83. The Acquisition constitutes monopolization in violation of Section 2 of the Sherman Act, 15 U.S.C. § 2, and thus constitutes an unfair method of competition in violation of Section 5(a) of the FTC Act, as amended, 15 U.S.C. § 45(a).

COUNT II—ILLEGAL ACQUISITION

84. The allegations of Paragraphs 1 through 78 above are incorporated by reference.

85. Respondents currently compete with each other in the highly concentrated NGS Market. Competition between Respondents has been increasing over time and will increase substantially in the future. Respondents cannot show that any cognizable efficiencies are of a character and magnitude such that the Acquisition is not likely to be anticompetitive.

86. The Acquisition, if consummated, may substantially lessen current and future competition in violation of Section 7 of the Clayton Act, as amended, 15 U.S.C. § 18, and thus constitutes an unfair method of competition in violation of Section 5(a) of the FTC Act, as amended, 15 U.S.C. § 45(a).

NOTICE

Notice is hereby given to the Respondents that the eighteenth day of August 2020, 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 2 of the Sherman Act, Section 7 of the Clayton Act, as amended, and/or Section 5 of the Federal Trade Commission Act, as amended, the Commission may order such relief against the 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 market, with the ability to offer such products and services as Illumina and PacBio were offering and planning to offer prior to the Acquisition.

2. A prohibition against any transaction between Illumina and PacBio that combines their businesses in the relevant market, except as may be approved by the Commission.

3. A requirement that, for a period of time, Illumina and PacBio provide notice to the Commission of acquisitions, merger, consolidations, or any other combinations of their businesses in the relevant market with any other company operating in the relevant market.

4. A requirement to file periodic compliance reports with the Commission.

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 December, 2019.

ORDER DISMISSING COMPLAINT

This matter comes before the Commission on Complaint Counsel and Respondents' Joint Motion to Dismiss the Complaint. Having considered the motion, it is hereby

ORDERED that the Joint Motion to Dismiss the Complaint, dated January 3, 2020, is **GRANTED**, and the complaint is **DISMISSED** without prejudice.

By the Commission.

Complaint

IN THE MATTER OF

BRISTOL-MYERS SQUIBB COMPANY
AND
CELGENE CORPORATION

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-4690; File No. 191 0061
Complaint, November 15, 2019 – Decision, January 9, 2020

This consent order addresses the $74 billion acquisition by Respondent Bristol-Myers Squibb ("BMS") Company of certain assets of Respondent Celgene that constitutes a violation of Section 5 of the Federal Trade Commission Act and Section 7 of the Clayton Act. The complaint alleges that the effects of the Acquisition, if consummated, may be to substantially lessen competition and tend to create a monopoly by eliminating future competition between BMS and Celgene in the development and sale of oral products to treat moderate-to-severe psoriasis. Under the order respondent must divest the Otezla Assets to Amgen pursuant to the Otezla Divesture Agreements, which will be incorporated by reference into the order, and provide transition services sufficient to enable the Acquirer to operate the Otezla business.

Participants

For the *Commission*: *Kari A. Wallace.*

For the *Respondents*: *Debbie Feinstein, Arnold & Porter Kay Scholer LLP; Jacob (Chuck) Boyers* and *Matthew Reilly, Kirkland & Ellis LLP; Stephen Weissman, Baker Botts L.L.P.; Franco Castelli* and *Nelson Fitts, Wachtell, Lipton, Rosen & Katz.*

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 Bristol-Myers Squibb Company ("BMS"), a corporation subject to the jurisdiction of the Commission, has agreed to acquire the equity interests of Respondent Celgene Corporation ("Celgene"), 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, 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 Bristol-Myers Squibb Company is a corporation organized, existing, and doing business under and by virtue of the laws of the State of Delaware with its principal executive offices located at 430 East 29th Street, 14th Floor, New York, New York 10016.

2. Respondent Celgene Corporation is a corporation organized, existing, and doing business under and by virtue of the laws of the State of Delaware with its principal executive offices located at 86 Morris Avenue, Summit, New Jersey 07901.

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 engages in business that 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 January 2, 2019, Respondent BMS proposes to acquire the equity interests of Respondent Celgene in a series of transactions valued at approximately $74 billion (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. The relevant line of commerce in which to analyze the effects of the Acquisition is the research, development, manufacture, and sale of oral products to treat moderate-to-severe psoriasis.

6. The United States is the relevant geographic area in which to assess the competitive effects of the Acquisition in the relevant line of commerce.

IV. THE STRUCTURE OF THE MARKET

7. Celgene's Otezla is the most significant oral product to approved to treat moderate-to-severe psoriasis in the United States. Several older oral generic products, including methotrexate and acitretin, are approved by the U.S. Food and Drug Administration ("FDA") to treat psoriasis that does not respond to topical medication and light therapy. While these drugs are still used occasionally to treat psoriasis, most doctors now prescribe agents that have better efficacy, better safety, or a more favorable side effect profile for patients with moderate-to-severe psoriasis who desire an oral treatment. BMS is developing BMS 986165, a selective tyrosine kinase 2 inhibitor, which is the most advanced oral treatment for moderate-to-severe psoriasis in development.

V. ENTRY CONDITIONS

8. 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 be timely because the combination of drug development times and FDA approval requirements is 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

9. The effects of the Acquisition, if consummated, may be to substantially lessen competition and tend to create a monopoly in the relevant lines of commerce, in violation of Section 7 of the Clayton Act, as amended, 15 U.S.C. § 18, and Section 5 of the FTC Act, as amended, 15 U.S.C. § 45, in the following ways, among others by eliminating future competition between BMS and Celgene in the development and sale of oral products to treat moderate-to-severe psoriasis.

VII. VIOLATIONS CHARGED

10. The Acquisition described in Paragraph 4 constitutes a violation of Section 5 of the FTC Act, as amended, 15 U.S.C. § 45.

11. The Acquisition described in Paragraph 4, if consummated, would constitute a violation of Section 7 of the Clayton Act, as amended, 15 U.S.C. § 18, and Section 5 of the FTC Act, as amended, 15 U.S.C. § 45.

WHEREFORE, THE PREMISES CONSIDERED, the Federal Trade Commission on this fifteenth day of November, 2019 issues its Complaint against said Respondents.

By the Commission.

ORDER TO MAINTAIN ASSETS

The Federal Trade Commission ("Commission") initiated an investigation of the proposed acquisition by Respondent Bristol-Myers Squibb Company ("BMS") of all of the voting securities of Respondent Celgene Corporation ("Celgene") collectively "Respondents." The Commission's Bureau of Competition prepared and furnished to Respondents the Draft Complaint, which it proposed to present to the Commission for its consideration. If issued by the Commission, the Draft Complaint 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.

Respondents and the Bureau of Competition executed an agreement ("Agreement Containing Consent Orders" or "Consent Agreement"), containing (1) an admission by Respondents of all the jurisdictional facts set forth in the Draft Complaint; (2) a statement that the signing of said agreement is for settlement purposes only and does not constitute an admission by Respondents that the law has been violated as alleged in the Draft Complaint; or that the facts as alleged in the Draft Complaint, other than jurisdictional facts, are true, (3) waivers and other

provisions as required by the Commission's Rules; and (4) a proposed Decision and Order and this Order to Maintain Assets.

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 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 Bristol-Myers Squibb Company is a corporation organized, existing, and doing business under and by virtue of the laws of the State of Delaware with its principal executive offices located at 430 East 29th Street, 14th Floor, New York, New York 10016.

2. Respondent Celgene Corporation is a corporation organized, existing, and doing business under and by virtue of the laws of the State of Delaware with its principal executive offices located at 86 Morris Avenue, Summit, New Jersey 07901.

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

ORDER

I.
Definitions

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

A. "BMS" means Bristol-Myers Squibb Company, its directors, officers, employees, agents, representatives, successors, and assigns; and the joint ventures, subsidiaries, partnerships, divisions, groups, and affiliates, controlled by Bristol-Myers Squibb Company (including, but not limited to, Burgundy Merger Sub, Inc.), and the respective directors, officers, general partners, employees, agents, representatives, successors, and assigns of each.

B. "Celgene" means Celgene Corporation, its directors, officers, employees, agents, representatives, successors, and assigns; and the joint ventures, subsidiaries, partnerships, divisions, groups, and affiliates, in each case controlled by Celgene Corporation, and the respective directors, officers, general partners, employees, agents, representatives, successors, and assigns of each.

C. "Respondents" means BMS and Celgene.

D. "Monitor" means any monitor appointed pursuant to Paragraph IV of this Order to Maintain Assets or Paragraph IX of the Decision and Order.

E. "Orders" means the Decision and Order and this Order to Maintain Assets.

II.
Asset Maintenance

IT IS FURTHER ORDERED that:

A. Respondents shall take such actions as are necessary to maintain the full economic viability, marketability, and competitiveness of the Otezla Business, to minimize any risk of loss of competitive potential for such Otezla Business, and to prevent the destruction, removal, wasting, deterioration, or impairment of the Otezla Assets except for ordinary wear and tear. Respondents shall not sell, transfer, encumber, or otherwise impair the Otezla 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 Otezla Business.

B. Respondents shall maintain the operations of the Otezla Business 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 as consistent with standard operating procedures to ensure professionalism, safety, and quality of any product or service offered by the business, to maintain all related information technology infrastructure and data contained therein, to maintain compliance with all applicable healthcare laws, and to maintain any licenses or approvals with any Government Entity) and/or as may be necessary to preserve the full economic viability, marketability, and competitiveness of such Otezla Business and shall use their best efforts to preserve the existing relationships with the following: clients; patients; suppliers; licensors; licensees; advertisers; vendors and distributors; Customers; physicians and other health care providers; insurers; Government Entities; employees; and others having business relations with the Otezla Business. Respondents' responsibilities shall include, but are not limited to, the following:

1. providing the Otezla Business with sufficient working capital to operate at least at current rates of operation, to meet all capital calls with respect to such business and to carry on, at least at their scheduled pace, all capital projects, business plans, and promotional activities for the Otezla Business;

2. continuing, at least at their scheduled pace, any expenditures for the Otezla Business authorized prior to the date the Consent Agreement was signed by the Respondents;

3. providing such resources as may be necessary to respond to competition prior to the complete transfer and delivery of the Otezla Assets to an Acquirer;

4. providing such resources as may be necessary to maintain the competitive strength and positioning of the Otezla Business;

5. making available for use by the Otezla Business funds sufficient to perform all routine maintenance and all other maintenance as may be necessary to, and all replacements of, the Otezla Assets; and

6. providing such support services to the Otezla Business as were being provided to such Otezla Business by Respondents as of the date the Consent Agreement was signed by Respondents.

C. Respondents shall maintain a work force that is (i) materially equivalent in size (as measured in full time equivalents) and (ii) comparable in training, professionalism, and expertise to what has been associated with the Otezla Business for the Otezla Business's last fiscal year.

III.
Confidential Business Information

IT IS FURTHER ORDERED that:

A. Respondents shall not use, directly or indirectly, any Otezla Confidential Business Information other than as necessary to comply with the following:

1. the requirements of the Orders;

2. Respondents' obligations to the Acquirer under the terms of the Otezla Divestiture Agreements; or

3. applicable law.

B. Respondents shall not disclose or convey any Otezla Confidential Business Information, directly or indirectly, to any Person *except* (i) the Acquirer, (ii) other Persons specifically authorized by the Acquirer or staff of the Commission to receive such information (*e.g.*, employees of a Respondent providing transition services or Transition Manufacturing for Acquirer), (iii) the Commission, or (iv) the Monitor (if any has been appointed) and *except* to the extent necessary to comply with applicable law;

C. Respondents shall not provide, disclose or otherwise make available, directly or indirectly, any Otezla Confidential Business Information to the employees associated with the business that is being retained, owned, or controlled by the

Respondents, other than those employees providing transition services or Transition Manufacturing to the Acquirer or who are engaged in the transfer and delivery of the Product Manufacturing Technology related to the Otezla Products or the ongoing Clinical Trials related to the Otezla Products to the Acquirer;

D. Respondents shall institute procedures and requirements to ensure that those employees of the Respondents that are authorized by the Acquirer to have access to the Otezla Confidential Business Information:

1. do not provide, disclose, or otherwise make available, directly or indirectly, any Otezla Confidential Business Information in contravention of the Orders; and

2. do not solicit, access, or use any Otezla Confidential Business Information that they are prohibited from receiving for any reason or purpose.

E. Respondents shall take all actions necessary and appropriate to prevent access to, and the disclosure or use of, the Otezla Confidential Business Information by or to any Person(s) not authorized to access, receive, and/or use such information pursuant to the terms of the Orders or the Otezla Divestiture Agreements, including:

1. Establishing and maintaining appropriate firewalls, confidentiality protections, internal practices, training, communications, protocols, and system and network controls and restrictions;

2. To the extent practicable, maintaining Otezla Confidential Business Information separate from other data or information of the Respondents; and

3. Ensuring by other reasonable and appropriate means that Otezla Confidential Business Information is not shared with Respondents' personnel engaged in the business related to the same or substantially the same type of business as the Otezla Business (*e.g.,* commercialization of Products Developed or in Development for the same or similar indications as the Otezla Products).

IV.
Monitor

IT IS FURTHER ORDERED that:

A. Quantic Regulatory Services, LLC shall serve as the Monitor pursuant to the agreement executed by the Monitor and Respondents, and attached as Appendix A ("Monitor Agreement") and Non-Public Appendix B ("Monitor Compensation"). The Monitor is appointed to monitor Respondents' compliance with the terms of

this Order to Maintain Assets, the Decision and Order, and the Otezla Divestiture Agreements.

B. Not later than one (1) day after the Acquisition Date, Respondents shall confer on the Monitor all rights, powers, and authorities necessary to monitor each Respondent's compliance with the terms of the Orders.

C. 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 each Respondent's compliance with the divestiture and asset maintenance obligations and related requirements of the Orders, and shall exercise such power and authority and carry out the duties and responsibilities of the Monitor in a manner consistent with the purposes of the Orders and in consultation with the Commission;

2. Respondents shall provide access to all information and facilities, and make such arrangements with third parties, as are necessary to allow the Monitor to monitor compliance with the obligations to Transition Manufacture;

3. The Monitor shall act in consultation with the Commission or its staff, and shall serve as an independent third party and not as an employee or agent of the Respondents or of the Commission; and

4. The Monitor shall serve until Respondents complete the Transition Manufacturing for the Acquirer;

provided, however, that the Monitor's service shall not extend more than four (4) years after 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.

D. Subject to any demonstrated legally recognized privilege, the Monitor shall have full and complete access to each Respondent'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 that Respondent's compliance with its obligations under the Orders.

E. Each 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 that Respondent's compliance with the Orders.

F. 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 (including information technology experts), accountants, attorneys, and other representatives and assistants as are reasonably necessary to carry out the Monitor's duties and responsibilities.

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

H. Respondents shall report to the Monitor in accordance with the requirements of the Orders and as otherwise provided in any agreement approved by the Commission. The Monitor shall evaluate the reports submitted to the Monitor by a Respondent, and any reports submitted by the Acquirer with respect to the performance of a Respondent's obligations under the Orders. Within thirty (30) days after the date this Order to Maintain Assets is issued and every ninety (90) days thereafter, and at such other times as may be requested by staff of the Commission, the Monitor shall report in writing to the Commission concerning performance by the Respondents of the Respondents' obligations under the Orders. Among other things, the Monitor shall report in writing to the Commission concerning progress by the Acquirer or the Acquirer's Manufacturing Designee toward obtaining FDA approval to manufacture each Otezla Product and obtaining the ability to manufacture each Otezla Product in commercial quantities, in a manner consistent with cGMP, independently of Respondents. After the Decision and Order becomes final, the Monitor shall report to the Commission as described in the Decision and Order.

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

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 in the following manner:

1. the Commission shall select the substitute Monitor, subject to the consent of Respondent BMS, which consent shall not be unreasonably withheld. If Respondent BMS has not opposed, in writing, including the reasons for opposing, the selection of a substitute Monitor within ten (10) days after notice by the staff of the Commission to Respondents of the identity of any substitute Monitor, Respondents shall be deemed to have consented to the selection of the substitute Monitor; and

2. not later than ten (10) days after the Commission's appointment of the substitute Monitor, Respondents shall execute an agreement that, subject to the prior approval of the Commission, confers on that Monitor all the rights, powers, and authorities necessary to permit that Monitor to monitor each Respondent's compliance with the Orders in a manner consistent with the purposes of the Orders.

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 Orders.

M. The Monitor appointed pursuant to this Order to Maintain Assets may be the same Person appointed as the Monitor pursuant to the Decision and Order.

N. The 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.

V.
Compliance Reports

IT IS FURTHER ORDERED that:

A. Within thirty (30) days after the date this Order to Maintain Assets is issued by the Commission, and every ninety (90) days thereafter until Respondents have fully complied with this Order to Maintain Assets, 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 ("Compliance Reports").

B. Each Compliance Report shall contain sufficient information and documentation to enable the Commission independently to determine whether Respondents are in compliance with the Orders. Conclusory statements that Respondents have complied with their obligations under the Orders are insufficient. 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 the Orders, including:

1. a detailed description of all substantive contacts, negotiations, or recommendations related to (i) the transfer and delivery of all of the Otezla Assets to the Acquirer, (ii) the transfer and delivery of all of the Product Manufacturing Technology related to the Otezla Products and the Clinical Trial(s) related to the Otezla Products to the Acquirer, (iii) the transfer and delivery of all Otezla Confidential Business Information to the Acquirer, and (iv) the provision of transition services to the Acquirer; and

2. a detailed description of the timing for the completion of such obligations.

C. Respondents shall verify each Compliance Report in the manner set forth in 28 U.S.C. § 1746 by the Chief Executive Officer or other officer or employee specifically authorized to perform this function. Respondents shall submit an original and two (2) copies of each Compliance Report as required by Commission Rule 2.41(a), 16 C.F.R. § 2.41(a), including a paper original submitted to the Secretary of the Commission and electronic copies to the Secretary at ElectronicFilings@ftc.gov and to the Compliance Division at bccompliance@ftc.gov. In addition, Respondents shall provide a copy of each Compliance Report to the Monitor.

D. After the Decision and Order in this matter becomes final, the reports due under this Order to Maintain Assets may be consolidated with, and submitted to the Commission on the same timing as, the Compliance Reports required to be submitted by Respondents pursuant to the Decision and Order.

VI.
Change in Respondents

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

A. any proposed dissolution of: Bristol-Myers Squibb Company or Celgene Corporation;

B. any proposed acquisition, merger, or consolidation of: Bristol-Myers Squibb Company or Celgene Corporation; or

C. any other change in a Respondent including assignment and the creation or dissolution of subsidiaries, if such change might affect compliance obligations arising out of the Orders.

VII.
Access

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

A. access, during business office hours of that Respondent and in the presence of counsel, to all facilities and access to inspect and copy all business and other records and all documentary material and electronically stored information as defined in Commission Rules 2.7(a)(1) and (2), 16 C.F.R. § 2.7(a)(1) and (2), in the possession or under the control of that Respondent related to compliance with this Order, which copying services shall be provided by that Respondent at the request of the authorized representative(s) of the Commission and at the expense of that Respondent; and

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

VIII.
Purpose

IT IS FURTHER ORDERED that the purpose of this Order to Maintain Assets is to maintain the full economic viability, marketability and competitiveness of the Otezla Business through its full transfer and delivery to an Acquirer; to minimize any risk of loss of competitive potential for the Otezla Business; and to prevent the destruction, removal, wasting, deterioration, or impairment of any of the Otezla Assets except for ordinary wear and tear.

IX.
Term

IT IS FURTHER ORDERED that, unless the Commission directs otherwise, this Order to Maintain Assets shall terminate on the earlier of:

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

B. the day after all of the Otezla Assets, the Product Manufacturing Technology related to the Otezla Products, and the Clinical Trials related to the Otezla Products have been transferred to and are in the physical possession of the Acquirer, as required by and described in the Decision and Order.

By the Commission, Commissioners Chopra and Slaughter dissenting.

Appendix A

MONITOR AGREEMENT

This Monitor Agreement (this ''Agreement") entered into this 12th day of October, 2019 by and among Quantic Regulatory Services, LLC (the "Monitor"), Bristol-Myers Squibb Company ("BMS") and Celgene Corporation ("Celgene") (BMS and Celgene are referred to in this Agreement collectively as the "Respondents", and individually as a "Respondent") (the Monitor and the Respondents, each a "Party" and collectively the ''Parties") provides as follows:

WHEREAS, the United States Federal Trade Commission (the "Commission") is expected to accept for public comment an Agreement Containing Consent Order, including a proposed Decision and Order and Order to Maintain Assets (the "Orders"), which, among other things, contemplates the appointment of a Monitor to monitor the Respondents' compliance with its obligations under the Orders;

WHEREAS, the staff will recommend that the Commission appoint William Hitchings of Quantic Regulatory Services, LLC as Monitor pursuant to the Orders, and William Hitchings of Quantic Regulatory Services, LLC has consented to such appointment;

WHEREAS, the Orders will further provide that the Respondents shall execute an agreement, subject to the prior approval of the Commission, that confers all the rights and powers necessary to permit the Monitor to monitor the Respondents' compliance with the terms of the Orders; and

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

NOW, THEREFORE, the Parties agree as follows:

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

ARTICLE I

1.1 Monitor's Responsibilities. The Monitor shall be responsible for monitoring the Respondents' compliance with its obligations as set forth in the Orders and the Otezla Divestiture Agreement, as defined in the Orders ("Monitor Responsibilities").

1.2 Access to Relevant Information and Facilities. Subject to any legally recognized privilege and applicable law of which the Respondents shall notify the Monitor as the reason for not providing the access requested by the Monitor, the Monitor shall have full and complete access to the personnel, facilities, books, and records of Respondents related to the Respondents' obligations under the Orders and the Otezla Divestiture Agreement (as defined in the Orders), as the Monitor may reasonably request. Respondents shall cooperate with any reasonable request of the Monitor. The Monitor shall give the Respondents reasonable notice of any request for such access or such information and shall attempt to schedule any access or requests for information in such a manner as will not unreasonably interfere with any of either Respondent's business or operations. At the reasonable request and reasonable advanced notice of the Monitor to any Respondent, such Respondent shall promptly arrange meetings and discussion s, including tours of relevant facilities, at reasonable times and locations between the Monitor and employees of such Respondent who have knowledge relevant to the proper discharge of the Monitor's responsibilities under the Orders.

1.3 Compliance Reports. The Respondents shall report to the Monitor in accordance with the requirements of the Orders.

1.4 Monitor's Obligations. The Monitor shall:

a. carry out the Monitor's Responsibilities, including submission of periodic reports to the Commission staff, and such additional written reports as may be requested by the Commission staff, in each case regarding the Respondents' compliance with the Orders;

b. maintain the confidentiality of all confidential information, including Otezla Confidential Business Information, and any other non-public confidential information provided to the Monitor by or on behalf of any Respondent, any supplier or customer of any Respondent, or the Commission, and shall use such confidential information only for the purpose of discharging the Monitor's obligations pursuant to this Agreement and not for any other purpose, including, without limitation, any other business, scientific, technological, or personal purpose. The Monitor may disclose confidential infom1ation only to:

   i. persons working with the Monitor w1der this Agreement (and only to the extent such persons have executed a confidentiality agreement consistent with the provisions of this Agreement); and/or

   ii. persons employed at the Commission with involvement in this matter.

c. except to the extent professional obligations require confidentiality, require any consultants, accountants, attorneys, and any other representatives or assistants retained by the Monitor to assist in carrying out the Monitor's Responsibilities to execute a confidentiality agreement that requires such

third parties to treat confidential information with the same standards of care and obligations of confidentiality to which the Monitor must adhere under this Agreement;

d. maintain the confidentiality of all other aspects of the performance of the Monitor's Responsibilities and not disclose any confidential information, including Otezla Confidential Business Information, related thereto;

e. ensure that Dr. Hitchings or any individual monitor of the Monitor performing the services under this Agreement shall not be personally involved in any way in counseling related to, or the management, production, supply and trading, sales, marketing, and financial operations of, any products that contain apremilast as the active pharmaceutical ingredient that compete with the products sold by any of the Respondents except to the extent permitted by the Orders for a period of three (3) years after the termination of this Agreement or the cessation of such persons services under this Agreement. and

f. upon termination of the Monitor's duties under this Agreement, consult with the Commission's staff regarding disposition of any written and electronic materials (including materials that the Respondents provided to the Monitor) in the possession or control of the Monitor that relate to the Monitor's duties, and the Monitor shall dispose of such materials, which may include sending such materials to the Commission's staff, as directed by the staff. In response to a written request by any Respondent to return or destroy materials that such Respondent provided to the Monitor, the Monitor shall inform the Commission's staff of such request and, if the Commission' s staff do not object, shall comply with such Respondent's request. Notwithstanding the foregoing, the Monitor shall not be required to return or destroy confidential information contained in any archived computer, and the Monitor may retain a copy of confidential information, subject to the terms of this Agreement, in accordance with the Monitor's internal record retention procedures for legal or regulatory purposes. Nothing herein shall abrogate the Monitor's duty of confidentiality (which includes an obligation not to disclose or use any non-public information obtained while acting as a Monitor) for a period of ten (10) years after the termination of this Agreement except for trades secrets, for which the obligations of confidentiality shall not terminate or expire.

g. For the purpose of this Agreement, information shall not be considered confidential or proprietary to the extent that it is or becomes part of the public domain (other than as the result of any action by the Monitor or by any employee, agent, affiliate or consultant of the Monitor), or to the extent that the Monitor can demonstrate that such information was already known to the Monitor at the time of receipt or thereafter becomes known to the

Monitor from a source other than the Respondents, or any director, officer, employee, agent, consultant or affiliate of the Respondents, when such source was not known to recipient after due inquiry to be restricted from making such disclosure to such recipient.

h. In the event that confidential information must be disclosed by the Monitor under applicable law or pursuant to legal process, the Monitor shall, to the extent not otherwise prohibited, give prompt written notice to the Respondents that such disclosure is required so that any of the Respondents may, at its sole expense, seek an appropriate protective order or waive compliance with the terms hereof or both. absent the entry of a protective order or the receipt of a waiver of this Monitor Agreement, the Monitor is compelled by law or legal process to disclose any confidential information, the Monitor, as and to the extent advised by its legal counsel to do so, (x) may disclose such information solely to the extent required by law; (y) shall not disclose such information until such time as it is required by law; and (z) shall exercise commercially reasonable efforts, at the Respondents sole cost and expense, including without limitation, fees for time expended, to obtain reliable assurances that confidential treatment will be accorded to any confidential information so disclosed. Notwithstanding the foregoing, the Monitor or any person referenced in Section 1.4(b)(ii) herein may disclose confidential information to any regulatory or self-regulatory agency having jurisdiction over such party in the course of routine reviews or audits when such disclosure is required by law, which confidential information may be disclosed with written notice to Respondents and after compliance by the Monitor with the procedures set forth in this Section l.4(h).

1.5 Monitor Payment. The Respondents will pay the Monitor the hourly fee specified in the attached confidential fee schedule ("Hourly Fee") for all reasonable time spent in performance of the Monitor's duties under this Agreement. In addition, the Respondents will pay: (a) out-of-pocket expenses reasonably incurred by the Monitor in the performance of the Monitor's duties; and (b) fees and disbursements reasonably incurred by such independent third party consultants, accountants, attorneys, and other representatives and assistants as are reasonably necessa1y to carry out the Monitor's duties and responsibilities herew1der; however, all such fees and disbursements contemplated by clauses (a) and (b) of this Section 1.5 (other than consulting fees paid to Dr. Hitchings or any individual monitor whose employment arrangement with the Monitor is in the form of a consultancy similar to that of Dr. Hitchings and who performs services under this Agreement) in excess of the aggregate amount of $25,000.00 per annum must be pre-approved in writing by the Respondents. The Monitor shall provide the Respondents with an invoice on a bi-weekly basis that includes details and an explanation of all matters for which Monitor submits an invoice and the Respondents shall pay such invoices within sixty (60) days of receipt. Any consultants, accountants, attorneys, and other representatives and assistants retained by the Monitor .in accordance with this Section I.5 shall invoice their services to the Monitor who will review and approve such invoices and submit to Respondents for payment. At their own

expense, the Respondents may retain an independent auditor to verify such invoices. The Monitor and the Respondents shall submit any disputes about invoices to the Commission for assistance in resolving such disputes.

1.6 Monitor's Indemnification. The Respondents agree to indemnify the Monitor and the Respondents shall hold the Monitor harmless (regardless of any action, whether in contract, statutory law, tort or otherwise) against any losses, claims, damages, liabilities, or expenses arising out of or in connection with, the performance of the Monitor's duties and obligations hereunder, 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 gross negligence, willful misconduct, or bad faith by the Monitor, in each case, as proven by final non-appealable judgment in a court of law.

The Monitor's maximum liability to the Respondents relating to services rendered pursuant to this Agreement (regardless of the form of the action, whether in contract, statutory law, tort, or otherwise) shall be limited to the lesser of $50,000.00 and the total sum of the fees paid by the Respondents to the Interim Monitor, except in the case of gross negligence, willful misconduct, or bad faith by the Monitor, in each case, as proven by final non-appealable judgment in a court of law. IN NO CIRCUMSTANCES WHATSOEVER SHALL INTERIM MONITOR BE LIABLE FOR ANY SPECIAL, INCIDENTAL, CONSEQUENTIAL OR PUNITIVE DAMAGES.

The Respondents agree that the Respondents' obligations to indemnify the Monitor extend to any agreement that is entered between the Interim Monitor and any Commission-approved Acquirer and relates to the Interim Monitor's responsibilities under the Monitor Agreement and/or the Orders.

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

1.8 Conflicts of Interest. If the Monitor becomes aware during the term of this Agreement that he has or may have a conflict of interest that would reasonably likely have an effect on the performance by the Monitor of any of the Monitor's Responsibilities, the Monitor shall immediately inform the Respondents and the Commission of any such conflict.

ARTICLE II

2.1 Termination. This Agreement shall terminate upon *the earlier of* (a) the expiration or termination of the Orders; (b) the termination of the Monitor's term of service under the Orders; (c) the Respondents' receipt of written notice from the Commission that the Commission has determined that the Monitor has ceased to act or failed to act diligently, or is unwilling or unable to continue to serve as Monitor; or (d) with at least thirty (30) days advance written notice to be provided by the Monitor to the Respondents and to the Commission, upon resignation of the

Monitor. If this Agreement is terminated for any reason, the confidentiality obligations set forth in Section 1.4 above will remain in force.

2.2 Governing Law; Jurisdiction. This Agreement and the rights and obligations of the Parties hereunder shall in all respects be governed by the substantive laws of the state of New York, including all matters of construction, validity and performance. The Orders shall govern this Agreement and any provisions herein which conflict or are inconsistent with them may be declared null and void by the Commission and any provision not in conflict shall survive and remain a part of this Agreement. Each of the Parties also hereby irrevocably and unconditionally consent to submit to the jurisdiction of the courts of the State of New York and of the United States of America located in the City of New York for any actions, suits or proceedings arising out of or relating to this agreement and the transactions contemplated hereby (and you agree not to commence any action, suit or proceeding relating thereto except in such courts), and further agree that service of any process, summons, notice or document by U.S. registered mail to your address set forth above shall be effective service of process for any action, suit or proceeding brought against you in any such court. **Each of the Parties irrevocably waives any and all right to trial by jury in any legal proceeding arising out of or relating to this Non-Disclosure Agreement.** You hereby irrevocably and unconditionally waive any objection to the laying of venue of any action, suit or proceeding arising out of this agreement or the transactions contemplated hereby in the courts of the State of New York or of the United States of America located in the City of New York, and hereby further irrevocably and unconditionally waive .and agree not to plead or claim in any such court that any such action, suit or proceeding brought in any such court has been brought in an inconvenient forum.

2.3 Disclosure of Information. Nothing in this Agreement shall require any Respondent to disclose any material info1mation that is subject to a legally recognized privilege or that any Respondent is prohibited from disclosing by reason of law or an agreement with a third party.

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

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

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

2.7 Duplicate Originals. This Agreement may be executed in several counterparts, each of which shall be deemed an original, but all of which together shall constitute one and the same document.

2.8 Section Headings. Any heading of a section is for convenience only and is to be assigned no significance whatsoever as to its interpretation and intent.

ARTICLE III

3.1 In the performance of his functions and 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 its own business affairs.

3.2 It is understood that the Monitor will be serving under this Agreement as an independent contractor and that the relationship of employer and employee shall not exist between the Monitor and any Respondent. The Monitor shall not have a fiduciary responsibility to any Respondent, but shall have fiduciary duties to the Commission.

3.3 This Agreement is for the sole benefit of the Parties hereto and their permitted assigns and the Commission, and nothing herein express or implied shall give, or be construed to give, any other person any legal or equitable lights hereunder.

3.4 In the event that the Monitor wishes to terminate this Agreement, subject to Section 2.1, the Monitor shall provide prior written notice to the Respondents and the Commission. The Respondents and the Monitor shall work in good faith with the Commission to identify and propose to the Commission a successor Monitor, in accordance with the procedures in the Orders. The Monitor shall continue to serve as Monitor under the terms of this Agreement until such time as the Commission approves a successor Monitor, and the Monitor's termination of this Agreement shall be effective only upon the approval by the Commission of a successor Monitor.

[*The rest of the page has been intentionally left blank; signature page follows.]*

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

MONITOR

M Bonnell for O. Richards

R. Owen Richards
President
Quantic Regulatory Services, LLC

RESPONDENTS

P. Joseph Campisi, Jr.
Senior Vice President and Deputy General Counsel
Bristol-Myers Squibb Company

Mary Storella
Vice President, Senior Counsel
Celgene Corporation

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

MONITOR

R. Owen Richards
President
Quantic Regulatory Services, LLC

RESPONDENTS

~~P. Joseph Campbell, Jr.~~ Sandra Leung
~~Senior Vice President and Deputy General~~
~~Counsel~~ Executive Vice President + General Counsel
Bristol-Myers Squibb Company

Mary Storella
Vice President, Senior Counsel
Celgene Corporation

Non-Public Appendix B
(Monitor Compensation

DECISION

The Federal Trade Commission ("Commission") initiated an investigation of the proposed acquisition by Respondent Bristol-Myers Squibb Company ("BMS") of all of the voting securities of Respondent Celgene Corporation ("Celgene") collectively "Respondents." The Commission's Bureau of Competition prepared and furnished to Respondents the Draft Complaint, which it proposed to present to the Commission for its consideration. If issued by the Commission, the Draft Complaint 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.

Respondents and the Bureau of Competition executed an agreement ("Agreement Containing Consent Order" or "Consent Agreement") containing (1) an admission by Respondents of all the jurisdictional facts set forth in the Draft Complaint; (2) a statement that the signing of said agreement is for settlement purposes only and does not constitute an admission by Respondents that the law has been violated as alleged in the Draft Complaint, or that the facts as alleged in the Draft Complaint, other than jurisdictional facts, are true; (3) waivers and other provisions as required by the Commission's Rules; and (4) a proposed Decision and Order and Order to Maintain Assets.

The Commission considered the matter and 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. The Commission accepted the Consent Agreement and placed it on the public record for a period of 30 days for the receipt and consideration of public comments; at the same time, it issued and served its Complaint and Order to Maintain Assets. The Commission 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 Rule 2.34, the Commission makes the following jurisdictional findings, and issues the following Decision and Order ("Order"):

1. Respondent Bristol-Myers Squibb Company is a corporation organized, existing, and doing business under and by virtue of the laws of the State of Delaware with its principal executive offices located at 430 East 29th Street, 14th Floor, New York, New York 10016.

2. Respondent Celgene Corporation is a corporation organized, existing, and doing business under and by virtue of the laws of the State of Delaware with its principal executive offices located at 86 Morris Avenue, Summit, New Jersey 07901.

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

ORDER

I. Definitions

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

A. "BMS" means Bristol-Myers Squibb Company, its directors, officers, employees, agents, representatives, successors, and assigns; and the joint ventures, subsidiaries, partnerships, divisions, groups, and affiliates, controlled by Bristol-Myers Squibb Company (including, but not limited to, Burgundy Merger Sub, Inc.), and the respective directors, officers, general partners, employees, agents, representatives, successors, and assigns of each.

B. "Celgene" means Celgene Corporation, its directors, officers, employees, agents, representatives, successors, and assigns; and the joint ventures, subsidiaries, partnerships, divisions, groups, and affiliates, in each case controlled by Celgene Corporation, and the respective directors, officers, general partners, employees, agents, representatives, successors, and assigns of each.

C. "Commission" means the Federal Trade Commission.

D. "Respondents" means BMS and Celgene.

E. "Acquirer(s)" means the following:

1. Amgen; or

2. any other Person the Commission approves to acquire the Otezla Assets pursuant to this Decision and Order.

F. "Acquisition Date" means the date on which BMS acquires 50 percent or more of the voting securities of Celgene.

G. "Agency(ies)" means any government regulatory authority or authorities in the world responsible for granting approval(s), clearance(s), qualification(s), license(s), or permit(s) for any aspect of the research, Development, manufacture, marketing, distribution, or sale of a Product. The term "Agency" includes, but is not limited to, the FDA.

H. "Amgen" means Amgen Inc., a corporation organized, existing and doing business under and by virtue of the laws of Delaware with its principal executive offices located at One Amgen Center Drive, Thousand Oaks, California 91320-1799.

I. "Business Information" means all originals and all copies of any operating, financial, or other information, books, records, documents, data computer files (including files stored on a computer hard drive or other storage media), electronic files, ledgers, papers, instruments, and other materials, wherever located and however stored (*i.e.*, whether 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).

J. "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.

K. "Clinical Plan" means a written clinical plan setting forth the protocol for the conduct of a Clinical Trial, preparation and filing of each Regulatory Package related to such Clinical Trial, and the activities to be conducted by each Person that is a party to conducting such Clinical Trial in support of such Clinical Trial, including the timelines for such Clinical Trial.

L. "Clinical Research Organization Designee" means any Person other than the Respondents that has been designated by an Acquirer to conduct a Clinical Trial related to an Otezla Product for the Acquirer.

M. "Clinical Trial" means a controlled study in humans of the safety, efficacy, or bioequivalence of a Product, and includes 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.

N. "Customer" means any Person that is a direct purchaser of any Otezla Product from a Respondent or the Acquirer.

O. "Development" means all preclinical and clinical drug development activities, including test method development and stability testing; toxicology; formulation; process development; manufacturing scale-up; development-stage manufacturing; quality assurance/quality control development; statistical analysis and report writing; conducting 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.

P. "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 shall not exceed then-current average hourly wage rate for such employee.

Q. "Divestiture Date" means the date on which a Respondent (or a Divestiture Trustee) closes on the divestiture of the Otezla Assets to an Acquirer as required by Paragraph II of this Order.

R. "Divestiture Trustee" means the trustee appointed by the Commission pursuant to Paragraph X of this Order.

S. "Domain Name" means the domain name(s) and the related uniform resource locators(s) and registration(s) thereof, issued by any Person or authority that issues and maintains the domain name registration.

T. "Drug Master File" means the information submitted to the FDA as described in 21 C.F.R. Part 314.420 related to a Product.

U. "Excluded Assets" means the following:

1. any real estate and the buildings and other permanent structures located on such real estate;

2. corporate names or corporate trade dress of a Respondent or the related corporate logos thereof; or the corporate names or corporate trade dress of any other corporations or companies owned or controlled by a Respondent or the related corporate logos thereof; or general registered images or symbols by which a Respondent can be identified or defined;

3. the portion of any Business Information that contains information about any of a Respondent's business other than the Otezla Business;

4. any original document that a Respondent has a legal, contractual, or fiduciary obligation to retain the original; *provided, however,* that the Respondents shall provide copies of the document to the Acquirer and shall provide the Acquirer access to the original document if copies are insufficient for regulatory or evidentiary purposes; and

5. (i) any tax asset relating to (a) the Otezla Assets for pre-Divestiture Date tax periods or (b) any tax liability that Respondents are responsible for arising out of the divestiture of the Otezla Assets, (ii) all accounts receivable, notes receivable, rebates receivable and other miscellaneous receivables of Respondents that are related to the Otezla Business and arising out of the operation of the Otezla Business prior to the Divestiture Date, and (iii) all cash, cash equivalents, credit cards and bank accounts of the Respondents;

6. any records or documents reflecting attorney-client, work product or similar privilege of Respondents or otherwise relating to the Otezla Assets as a result of legal counsel representing the Respondents in connection with the divestiture of the Otezla Assets pursuant to this Order or the Otezla Divestiture Agreements; and

7. any assets owned by Respondent BMS as of the Acquisition Date that have not been incorporated into the Otezla Assets on or before the Divestiture Date.

provided, however, that if Amgen is the Acquirer, notwithstanding anything to the contrary, no asset, property or right that is a "Transferred Asset" as defined in Section 2.1 of the APA or to which Amgen or any of its affiliates is otherwise entitled pursuant to any Otezla Divestiture Agreement, shall be deemed to be an Excluded Asset.

V. "FDA" means the United States Food and Drug Administration.

W. "FDA Authorization(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 holder and the FDA related thereto. "FDA Authorization" 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 holder and the FDA related thereto.

X. "Good Clinical Practice" means the current standards and practices promulgated or endorsed by (i) International Conference on Harmonisation of Technical Requirements for the Registration of Pharmaceuticals for Human Use; (ii) the FDA; and (iii) any applicable laws for the country(ies) within which a Clinical Trial is being conducted.

Y. "Government Entity" means any Federal, state, local, or non-U.S. government; any court, legislature, government agency, or government commission; or any judicial or regulatory authority of any government.

Z. "Manufacturing Designee" means any Person other than a Respondent that has been designated by an Acquirer to manufacture an Otezla Product for that Acquirer.

AA. "Monitor" means any monitor appointed pursuant to Paragraph IX of this Order or Paragraph III of the related Order to Maintain Assets.

BB. "Order Date" means the date on which the final Decision and Order in this matter is issued by the Commission.

CC. "Order to Maintain Assets" means the Order to Maintain Assets incorporated into and made a part of the Consent Agreement.

DD. "Orders" means this Decision and Order and the related Order to Maintain Assets.

EE. "Otezla Assets" means all legal or equitable rights, title, and interest in and to all tangible and intangible assets, wherever located, relating to the Otezla Business, to the extent the transfer is permitted by law and as such assets and rights are in existence as of the date the Respondents sign the Consent Agreement, including the following:

1. all rights to all FDA Authorizations;

2. all rights to the Drug Master File filed with the FDA for the active pharmaceutical ingredient apremilast;

3. all rights to all Clinical Trials;

4. all Otezla Intellectual Property, including Shared Intellectual Property;

5. the Otezla™ trademarks and any other trademark used exclusively in the marketing, advertising, or sale of the Otezla Products;

6. all Product Approvals;

7. all Product Manufacturing Technology that is primarily related to the Otezla Products;

8. at the Acquirer's option, all Otezla Manufacturing Equipment;

9. all Otezla Marketing Materials;

10. all Product Scientific and Regulatory Material;

11. all website(s) and Domain Names related exclusively to the Otezla Products and the content thereon related exclusively to the Otezla Products, and the content related exclusively to the Otezla Products that is displayed on any website that is not dedicated exclusively to the Otezla Products;

12. all Product Development Reports;

13. at the option of the Acquirer, all Otezla Contracts;

14. all Business Information; *provided however*, that such Business Information may be redacted to exclude information that discusses with particularity the business of a Retained Product, where such redaction does not impair the usefulness of the information related to the Otezla Business;

15. a list of any finished Otezla Product batch or lot determined to be out-of-specification during the three (3) year period immediately preceding the Divestiture Date, and, for each such batch or lot: (i) a detailed description of the known deficiencies or defects (*e.g.*, impurity content, incorrect levels of the active pharmaceutical ingredient, stability failure); (ii) the corrective actions taken to remediate the cGMP deficiencies in the Otezla Product; and (iii) to the extent known by Respondent Celgene, the employees (whether current or former) responsible for taking such corrective actions;

16. for each Otezla Product:

a. to the extent known or available to the Respondents, a list of the inventory levels (weeks of supply) in the possession of each Customer as of the date prior to and closest to the Divestiture Date as is available; and

b. to the extent known by the Respondents, any pending reorder dates for a Customer as of the Divestiture Date;

17. at the option of the Acquirer, all inventory and all ingredients, materials, or components used in the manufacture of the Otezla Products in existence as of the Divestiture Date including, the active pharmaceutical ingredient(s), excipient(s), raw materials, packaging materials, work-in-process, and finished goods related to the Otezla Products;

18. the quantity and delivery terms in all unfilled Customer purchase orders for the Otezla Products as of the Divestiture Date, to be provided to the Acquirer of the Otezla Products not later than five (5) days after the Divestiture Date; and

19. at the option of the Acquirer, the right to fill any or all unfilled Customer purchase orders for the Otezla Products as of the Divestiture Date;

provided, however, that "Otezla Assets" does not include the Excluded Assets.

FF. "Otezla Business" means the research, Development, manufacture, commercialization, distribution, marketing, importation, advertisement, and sale of the Otezla Products.

GG. "Otezla Confidential Business Information" means all Business Information relating to the Otezla Business that is not in the public domain.

HH. "Otezla Contracts" means all contracts, agreements, mutual understandings, arrangements, or commitments related to the Otezla Business, including any contracts or agreements:

1. pursuant to which any third party purchases, or has the option to purchase, an Otezla Product from a Respondent;

2. pursuant to which a Respondent had, or has as of the Divestiture 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 an Otezla Product;

3. relating to any Clinical Trials involving an Otezla Product;

4. with universities or other research institutions for the use of an Otezla Product in scientific research;

5. for the marketing of an Otezla Product or educational matters relating solely to the Otezla Products;

6. pursuant to which a third party manufactures or plans to manufacture an Otezla Product as a finished dosage form on behalf of a Respondent;

7. pursuant to which a third party provides or plans to provide any part of the manufacturing process, including, without limitation, the finish and/or packaging of an Otezla Product on behalf of a Respondent;

8. pursuant to which a third party licenses the Product Manufacturing Technology related to an Otezla Product to a Respondent;

9. pursuant to which a third party is licensed by a Respondent to use the Product Manufacturing Technology related to an Otezla Product;

10. constituting confidentiality agreements involving an Otezla Product;

11. involving any royalty, licensing, covenant not to sue, or similar arrangement related to an Otezla Product;

12. pursuant to which a third party provides any specialized services necessary to the research, Development, manufacture, or distribution of an Otezla Product to a Respondent including, consultation arrangements; and/or

13. pursuant to which any third party collaborates with a Respondent in the performance of research, Development, marketing, distribution, or selling of an Otezla Product or the Otezla Business;

provided, however, that where any such contract or agreement also relates to a Retained Product, a Respondent shall, at the Acquirer's option, assign or otherwise make available to the Acquirer all such rights under the contract or agreement as are related to the Otezla Product, but concurrently may retain similar rights for the purposes of the Retained Product.

II. "Otezla Copyrights" means rights to all original works of authorship of any kind directly related to an Otezla Product and any registrations and applications for registrations thereof throughout the world.

JJ. "Otezla Core Employees" means the Otezla Marketing Employees, Otezla Manufacturing Employees, Otezla Research and Development Employees and Otezla Sales Employees.

KK. "Otezla Divestiture Agreement(s)" means the following:

1. the Asset Purchase Agreement between Celgene Corporation and Amgen, Inc., dated as of August 25, 2019 (the "APA");

2. all amendments, exhibits, attachments, agreements, and schedules attached to and submitted to the Commission with the APA for the approval of the Commission; and

3. any other 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.

The Otezla Divestiture Agreements that have been submitted to the Commission by the Respondents on or before the Order Date and are attached to this Order and contained in Non-Public Appendix I.

LL. "Otezla Intellectual Property" means intellectual property of any kind, related to an Otezla Product that is owned, licensed, held, or controlled by a Respondent as of the Divestiture Date, including:

1. Otezla Patents;

2. Otezla Copyrights;

3. Otezla™ trademarks;

4. Otezla™ trade dress;

5. trade secrets, know-how, techniques, data, inventions, practices, methods, and other confidential or proprietary technical, business, research, Development, and other information; and

6. 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 violation of any of the foregoing.

MM. "Otezla Manufacturing Employees" means all employees of a Respondent who have participated (irrespective of the portion of working time involved, unless such participation consisted solely of oversight of legal, accounting, tax, or financial compliance) in any of the following related to the Otezla Business: (i) Developing and validating the commercial manufacturing process, (ii) formulating the manufacturing process performance qualification protocol, (iii) controlling the manufacturing process to assure performance Product quality, (iv) assuring that during routine manufacturing the process remains in a state of control, (v) collecting and evaluating data for the purposes of providing scientific evidence that the manufacturing process is capable of consistently delivering quality Products, (vi) managing the operation of the manufacturing process, or managing the technological transfer of the manufacturing process to a different facility, of the Product Manufacturing Technology related to the Otezla Products within the three (3) year period immediately prior to the termination of any contract to provide Transition Manufacturing.

NN. "Otezla Manufacturing Equipment" means equipment that is being used, or has been used at any time since Respondent BMS entered into the agreement to acquire Respondent Celgene, by Respondents to manufacture the Otezla Products.

OO. "Otezla Marketing Employee(s)" means all management-level employees of a Respondent who have participated (irrespective of the portion of working time involved, unless such participation consisted solely of oversight of legal, accounting, tax, or financial compliance) in any of the following related to the Otezla Business in the United States: sales management, brand management, sales training, market research, patient support programs, health insurer marketing and contracting, pharmacy benefit management marketing and contracting, managed care marketing and contracting, hospital marketing and contracting, or specialty pharmacy marketing and contracting, *excluding* administrative assistants within the eighteen (18) month period immediately prior to the Divestiture Date.

PP. "Otezla Marketing Materials" means all marketing materials used specifically in the marketing or sale of the Otezla Products in the United States as of the Divestiture Date that are owned or controlled by a Respondent, 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 dollars and/or units for each month, quarter or year), sales forecasting models, educational materials, advertising and display materials, speaker lists, promotional and marketing materials, website content, artwork for the production of packaging components, television masters, and other similar materials related to the Otezla Products.

QQ. "Otezla Patent(s)" means the following:

1. the Patents listed in Schedule 2.1(a)(i) to the APA defined in this Order under the Otezla Divestiture Agreements; and

2. any other Patent(s) related to the Otezla Business.

RR. "Otezla Product(s)" means:

1. the Products manufactured, in Development, marketed, or sold pursuant to the following FDA Authorizations: NDA No. 205437 and NDA No. 206088, and any supplements, amendments, or revisions to these NDAs; and,

2. any other Product manufactured by or for Respondent Celgene, or in Development, marketed, or sold by Respondent Celgene prior to the Divestiture Date that contains apremilast as the active pharmaceutical ingredient.

SS. "Otezla Releasee(s)" means any of the following Persons:

1. the Acquirer;

2. any Person controlled by or under common control with the Acquirer;

3. any Manufacturing Designee(s);

4. any Clinical Trial Research Organization Designee(s); and

5. any licensees, sublicensees, manufacturers, suppliers, distributors, and Customers of the Acquirer, or of such Acquirer-affiliated entities, in each such case, as related to the Otezla Product(s).

TT. "Otezla Research and Development Employees" means all employees of a Respondent who have participated (irrespective of the portion of working time involved, unless such participation consisted solely of oversight of legal, accounting, tax, or financial compliance) in any of the following related to the Otezla Business: research, Development, regulatory approval process, or Clinical Trials of the Otezla Products, within the eighteen (18) month period immediately prior to the Divestiture Date.

UU. "Otezla Sales Employee(s)" means all employees of a Respondent who have participated (irrespective of the portion of working time involved, unless such participation consisted solely of oversight of legal, accounting, tax, or financial compliance) in any of the following related to the Otezla Business in the United States: the detailing, marketing, or promotion of the Otezla Products directly to physicians, pharmacists, professional distributors, managed care or other insurance

providers, hospitals, employers, or governmental entities within the eighteen (18) month period immediately prior to the Divestiture Date.

VV. "Patent(s)" means all patents and 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 Divestiture 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.

WW. "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.

XX. "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 FDA Authorization.

YY. "Product Approval(s)" means any approvals, registrations, permits, licenses, consents, authorizations, and other regulatory 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, and includes, without limitation, all approvals, registrations, licenses, or authorizations granted in connection with any FDA Authorization related to that Product.

ZZ. "Product Development Report(s)" means:

1. pharmacokinetic study reports related to any Otezla Product;

2. bioavailability study reports (including Reference Listed Drug information) related to any Otezla Product;

3. bioequivalence study reports (including Reference Listed Drug information) related to any Otezla Product;

4. all correspondence, submissions, notifications, communications, registrations, or other filings made to, received from, or otherwise conducted with the FDA relating to the FDA Authorization(s) related to any Otezla Product;

5. annual and periodic reports related to the above-described FDA Authorization(s), including any safety update reports;

6. FDA approved Product labeling related to any Otezla Product;

7. currently used or planned product package inserts (including historical change of controls summaries) related to any Otezla Product;

8. FDA approved patient circulars and information related to any Otezla Product;

9. adverse event reports, adverse experience information, and descriptions of material events and matters concerning safety or lack of efficacy related to any Otezla Product;

10. summaries of complaints from physicians or clinicians related to any Otezla Product;

11. summaries of complaints from Customers related to any Otezla Product;

12. Product recall reports filed with the FDA related to any Otezla 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 or defects found in any Otezla Product;

14. reports related to any Otezla Product from any Person (e.g., any consultant or outside contractor) engaged to investigate or perform testing for the purposes of resolving any Otezla Product or process issues, including, without limitation, identification and sources of impurities or defects;

15. reports from vendors of the component(s), active pharmaceutical ingredient(s), excipient(s), packaging component(s), and detergent(s) used to produce any Otezla Product that relate to the specifications, degradation, chemical interactions, testing, and historical trends of the production of any Otezla Product;

16. analytical methods development records related to any Otezla Product;

17. manufacturing batch or lot records related to any Otezla Product;

18. stability testing records related to any Otezla Product;

19. change in control history related to any Otezla Product; and

20. executed validation and qualification protocols and reports related to any Otezla Product.

AAA. "Product Employee Information" means the following, for each Otezla Core Employee, as and to the extent permitted by law:

1. a complete and accurate list containing the name of each Otezla Core Employee (including former employees who were employed by a Respondent within ninety (90) days of the execution date of any Otezla Divestiture Agreement); and

2. with respect to each such employee, the following information:

   a. direct contact information for the employee, including telephone number;

   b. the date of hire and effective service date;

   c. job title or position held;

   d. a specific description of the employee's responsibilities related to the Otezla Products; *provided, however*, in lieu of this description, a Respondent may provide the employee's most recent performance appraisal;

   e. base salary or current wages;

   f. the most recent bonus paid, aggregate annual compensation for the relevant Respondent's last fiscal year, and current target or guaranteed bonus, if any;

   g. employment status (*i.e.,* active or on leave or disability; full-time or part- time); and

   h. all other material terms and conditions of employment in regard to such employee that are not otherwise generally available to similarly situated employees; and

3. at the Acquirer's option or the Proposed Acquirer's option (as applicable), copies of all employee benefit plans and summary plan descriptions (if any) applicable to the relevant Otezla Core Employees.

BBB. "Product Manufacturing Technology" means all of the following related to a Product: all technology, trade secrets, know-how, formulas, and proprietary information (whether patented, patentable, or otherwise) related to the manufacture of the Product, including the following: all product specifications, processes, analytical methods, product designs, plans, 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, FDA Authorization(s) conformance and cGMP compliance, labeling and all other information related to the manufacturing process, and supplier lists.

CCC. "Product Scientific and Regulatory Material" means all technological, scientific, chemical, biological, pharmacological, toxicological, regulatory, and Clinical Trial materials and information related to a Product.

DDD. "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.

EEE. "Regulatory Package" means, with respect to each Otezla Product, all INDs and other regulatory applications submitted to any Agency, Product Approvals, pre-clinical and clinical data and information, regulatory materials, drug dossiers, master files (including Drug Master Files, as defined in 21 C.F.R. 314.420 (or any non-United States equivalent thereof)), and any other reports, records, regulatory correspondence, and other materials relating to Product Approvals of such Otezla Product or required to Develop, manufacture, distribute, or otherwise commercialize such Otezla Product, including information that relates to pharmacology, toxicology, chemistry, manufacturing and controls data, batch records, safety and efficacy, and any safety database, in each case that is necessary or reasonably useful to the Clinical Trial(s).

FFF. "Retained Product(s)" means any Product(s) other than an Otezla Product that is manufactured, in Development, marketed, sold, owned, controlled, or licensed by a Respondent.

GGG. "Shared Intellectual Property" means all intellectual property of any kind (other than trademarks and Domains Names) that (i) is used in connection with, the Otezla Business as of the Divestiture Date, and (ii) Respondents can demonstrate has been used, and continues to be used, in connection with the manufacture of any Retained Product that is the subject of an active (not discontinued or withdrawn) NDA or ANDA as of the Acquisition Date.

HHH. "Supply Cost" means the actual cost of materials, ingredients, packaging, direct labor, and direct overhead *excluding* any allocation or absorption of costs for excess or idle capacity, and *excluding* any intracompany transfer profits *plus* the actual cost of shipping and transportation where those costs are incurred by the Respondents.

III. "Technology Transfer Standards" means requirements and standards sufficient to ensure that the information and assets required to be delivered to the 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 or other Persons working on behalf of a Respondent knowledgeable about the Product Manufacturing Technology related to the Otezla Products who will be responsible for communicating directly with the Acquirer or its Manufacturing Designee, and the 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 Otezla Products 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 related to the Otezla Products to the Acquirer or its Manufacturing Designee;

4. permitting employees of the Acquirer to visit the Respondents' facility where the Otezla Products are made for the purposes of evaluating and learning the manufacturing process of the Otezla Products and/or discussing the process with employees of Respondents involved in the manufacturing process (including, without limitation, use of equipment and components, manufacturing steps, time constraints for completion of steps, methods to ensure batch or lot consistency), pharmaceutical development, and validation of the manufacturing of the Otezla Products at the Respondent's facility; and

5. providing, in a timely manner, assistance and advice to enable the Acquirer or its Manufacturing Designee to:

    a. manufacture the Otezla Products in the quality and quantities achieved by a Respondent, or the manufacturer and/or developer of the Otezla Products;

    b. obtain any Product Approvals necessary for the Acquirer or its Manufacturing Designee to manufacture, distribute, market, and sell the Otezla Products in commercial quantities and to meet all Agency-approved specifications for the Otezla Products; and

c. receive, integrate, and use all Product Manufacturing Technology related to the Otezla Products used in, and all Otezla Intellectual Property that is related to, the manufacture of the Otezla Products.

JJJ. "Transition Manufacture" and "Transition Manufacturing" mean the following:

1. to manufacture, or to cause to be manufactured, a Transition Manufacture Product on behalf of an Acquirer (including, without limitation, for the purposes of Clinical Trials and/or commercial sales); or

2. to provide, or to cause to be provided, any part of the manufacturing process including, the finish and/or packaging of a Transition Manufacture Product on behalf of an Acquirer.

KKK. "Transition Manufacture Product(s)" means the Otezla Products, in finished dosage form, and any ingredient, material, or component used in the manufacture of the Otezla Products including the active pharmaceutical ingredient(s), excipient(s), or packaging materials.

LLL. "United States" means the United States of America, and its territories, districts, commonwealths and possessions.

II. Divestiture

IT IS FURTHER ORDERED that:

A. Not later than ten (10) days after the Acquisition Date, Respondents shall divest the Otezla Assets, absolutely and in good faith, to Amgen pursuant to, and in accordance with, the Otezla Divestiture Agreements.

B. Respondent BMS may receive a non-exclusive license from the Acquirer to use the Shared Intellectual Property in the research, Development, manufacture, commercialization, distribution, marketing, importation, advertisement, and sale of any Retained Product that is not indicated for either the treatment of psoriasis or psoriatic arthritis.

C. Respondents shall grant to the Acquirer a perpetual, non-exclusive, fully paid-up, irrevocable, and royalty-free license to all Product Manufacturing Technology related to the Otezla Products that is not otherwise assigned to the Acquirer pursuant to this Order for use to manufacture any Otezla Products.

D. If Respondents have divested the Otezla Assets to Amgen 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:

1. Amgen is not an acceptable purchaser of any of the Otezla Assets, then Respondents shall immediately rescind the transaction with Amgen as directed by the Commission, and shall divest the Otezla Assets within one hundred eighty (180) days after 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; or

2. 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 Otezla Assets to Amgen (including, entering into additional agreements or arrangements) as the Commission may determine are necessary to satisfy the requirements of this Order.

E. Prior to the Divestiture Date, Respondents shall provide the Acquirer with the opportunity to review all Otezla Contracts for the purposes of the Acquirer's determination of whether to assume the Otezla Contracts.

F. Prior to the Divestiture Date, Respondents shall secure all consents and waivers from all non-governmental third parties that are necessary to permit Respondents to divest the Otezla Assets to an Acquirer, and to permit the Acquirer to continue the Otezla Business in the United States without interruption or impairment;

provided, however, Respondents may satisfy this requirement by certifying that the Acquirer for the Otezla Assets has executed all such agreements directly with each of the relevant third parties.

G. Respondents shall provide, or cause to be provided, to the Acquirer in a manner consistent with the Technology Transfer Standards:

1. all Product Manufacturing Technology related to the Otezla Products; and

2. all rights to all Product Manufacturing Technology related to the Otezla Products that is owned by a third party and licensed to a Respondent.

Respondents shall obtain any consents from third parties required to comply with this provision. Respondents shall not enforce any agreement against a third party or an Acquirer to the extent that such agreement may limit or otherwise impair the ability of the Acquirer to use or to acquire from the third party a license or other right to the Product Manufacturing Technology related to the Otezla Products. Such agreements include agreements with respect to the disclosure of Otezla Confidential Business Information related to such Product Manufacturing Technology related to the Otezla Products. Not later than ten (10) days after the Divestiture Date, Respondents shall grant a release to each third party that is subject to such agreements that allows the third party to provide the Product Manufacturing

Technology related to the Otezla Products to the Acquirer. Within five (5) days of the execution of each such release, Respondents shall provide a copy of the release to the Acquirer.

H. Respondents shall designate employees of Respondents knowledgeable about the marketing, distribution, warehousing, and sale related to the Otezla Products to assist the Acquirer in the transfer and integration of the Otezla Business into the Acquirer's business.

I. Respondents shall not, in the United States:

1. use any of the Otezla™ trademarks or any mark confusingly similar to those trademarks as a trademark, tradename, or service mark, *except* as may be agreed upon with the Acquirer for the purposes of selling inventory, finished goods, packaging or similar materials bearing the Otezla™ trademarks for the benefit of the Acquirer during a transition period;

2. attempt to register the Otezla™ trademarks;

3. attempt to register any mark confusingly similar to the Otezla™ trademarks;

4. challenge or interfere with an Acquirer's use and registration of the Otezla™ trademarks; or

5. challenge or interfere with an Acquirer's efforts to enforce its trademark registrations for, and trademark rights in, the Otezla™ trademarks against third parties.

J. Respondents shall not join, file, prosecute, or maintain any suit, in law or equity, against the Otezla Releasees under any Patent that was pending or issued on or before the Acquisition Date if such suit would limit or impair the Acquirer's freedom to research, Develop, or manufacture an Otezla Product anywhere in the world, or to distribute, market, sell, or offer for sale within the United States any Otezla Product.

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 (*i.e.*, employees of Respondents that were involved in the Development of Otezla Products) to assist the Acquirer to defend against, respond to, or otherwise participate in any litigation brought by a third party related to the Otezla Intellectual Property.

L. For any patent infringement suit that is filed or to be filed within the United States that is (i) filed by, or brought against, a Respondent prior to the Divestiture Date related to the Otezla Products or the Otezla Patents issued by the United States or (ii) any potential patent infringement suit that a Respondent has prepared, or is

preparing, to bring or defend against as of the Divestiture Date that is related to the Otezla Products or the Otezla Patents issued by the United States, Respondents shall:

1. cooperate with the Acquirer and provide any and all necessary technical and legal assistance, documentation, and witnesses from that Respondent in connection with obtaining resolution of such patent infringement suit;

2. waive conflicts of interest, if any, to allow Respondents' outside legal counsel to represent the Acquirer in any such patent infringement suit; and

3. permit the transfer to the Acquirer of all of the litigation files and any related attorney work product in the possession of the Respondents' outside counsel related to such patent infringement suit.

III. Divestiture Agreement

IT IS FURTER ORDERED that:

A. The Otezla Divestiture Agreements shall be incorporated by reference into this Order and made a part hereof, and any failure by a Respondent to comply with any term of the Otezla Divestiture Agreements shall constitute a violation of this Order;

provided however, that the Otezla Divestiture Agreements shall not limit, or be construed to limit, the terms of this Order. To the extent any provision in the Otezla Divestiture Agreements varies from or conflicts with any provision in this Order such that the Respondents cannot fully comply with both, Respondents shall comply with this Order.

B. Respondents shall include in the Otezla Divestiture Agreements a specific reference to this Order, the remedial purposes thereof, and provisions to reflect the full scope and breadth of the Respondents' obligation to the Acquirer pursuant to this Order.

C. Respondents shall not modify or amend any of the terms of any Otezla Divestiture 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).

IV. Transition Manufacturing and Services by Respondents

IT IS FURTHER ORDERED that:

A. At the request of an Acquirer and in a manner that receives the prior approval of the Commission, Respondents shall provide transition services sufficient to enable the Acquirer to operate the Otezla Business in substantially the same manner that Respondents have operated the Otezla Business prior to the Acquisition Date.

provided, however, Respondents shall not require any Acquirer to pay compensation for transition services that exceeds the Direct Cost of providing such assistance and services.

B. Upon reasonable written notice and request from the Acquirer to Respondents, Respondents shall Transition Manufacture and deliver, or cause to be manufactured and delivered, to the Acquirer, in a timely manner and under reasonable terms and conditions, a supply of each of the Transition Manufacture Products at Supply Cost.

C. At the option of the Acquirer:

1. the term for any such contract to Transition Manufacture the Otezla Products in final dosage form shall be twenty-four (24) months with the option to extend such term for two additional 6-month terms; and

2. the term for any such contract to Transition Manufacture the active pharmaceutical ingredient (apremilast) shall be eighteen (18) months with the option to extend such term for two additional 6-month terms.

D. Respondents shall make representations and warranties to the Acquirer that the Transition Manufacture Product(s) supplied by Respondents meet the relevant Agency-approved specifications.

E. For the Transition Manufacture Product(s) to be marketed or sold in the United States, Respondents shall agree to indemnify, defend, and hold the Acquirer harmless from any and all suits, claims, actions, demands, liabilities, expenses, or losses alleged to result from the failure of the Transition Manufacture Product(s) supplied to the Acquirer pursuant to an Otezla Divestiture Agreement by that Respondent to meet cGMP, but the Respondents may make this obligation contingent upon the Acquirer giving Respondents prompt written notice of such claim and cooperating fully in the defense of such claim;

provided, however, that the supplying 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 the supplying Respondent's responsibilities to supply the Transition Manufacture Products in the manner required by this Order;

provided further, however, that this obligation shall not require such Respondent to be liable for any negligent act or omission of the Acquirer or for any representations and warranties, express or implied, made by the Acquirer that exceed the representations and warranties made by the supplying Respondent to the Acquirer in an agreement to Transition Manufacture.

F. Respondents shall give priority to supplying a Transition Manufacture Product to the Acquirer over manufacturing and supplying of Products for Respondents' own use or sale.

G. Respondents shall agree to hold harmless and indemnify the Acquirer for any liabilities, loss of profits, or consequential damages resulting from the failure of the Respondents to deliver the Transition Manufacture Product(s) in a timely manner *unless* (i) 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, and (ii) Respondents are able to cure the supply failure not later than thirty (30) days after the receipt of notice from the Acquirer of a supply failure;

provided, however, the Otezla Divestiture Agreement attached to this Order may contain limits on Respondents' aggregate liability for any penalty incurred by an Acquirer from a Customer directly related to the Acquirer's inability to supply the Otezla Product to that Customer that was the result of Respondents' failure to supply the Otezla Product to the Acquirer.

H. During the term of any agreement to Transition Manufacture, upon written request of the Acquirer or the Monitor, Respondents shall make available to the Acquirer and the Monitor all records that relate directly to the manufacture of the relevant Transition Manufacture Products that are generated or created after the Divestiture Date.

I. For each Transition Manufacture Product for which a Respondent purchases the active pharmaceutical ingredient(s), components(s), or excipient(s) from a third party, Respondents shall provide the Acquirer with the actual price paid by that Respondent for each active pharmaceutical ingredient(s), component(s), and excipient(s), respectively, used to manufacture that Transition Manufacture Product.

J. During the term of any agreement to Transition Manufacture, Respondents shall take all actions as are reasonably necessary to ensure an uninterrupted supply of the Transition Manufacture Product(s).

K. Respondents shall not be entitled to terminate any agreement to Transition Manufacture due to (i) a breach by the Acquirer of a Divestiture Agreement, or (ii) an Acquirer filing a petition in bankruptcy, or entering into an agreement with its creditors, or applying for or consenting to appointment of a receiver or trustee, or

making an assignment for the benefit of creditors, or becoming subject to involuntary proceedings under any bankruptcy or insolvency law.

provided, however, that this Paragraph shall not prohibit Respondents from seeking compensatory damages from the Acquirer for the Acquirer's breach of its payment obligations to the Respondents under the agreement.

L. Respondents shall permit the Acquirer to terminate any agreement to Transition Manufacture at any time upon commercially reasonable notice and without cost or penalty (other than costs or penalties due by Respondents to third parties pursuant to the termination of such agreement, which shall be the responsibility of the Acquirer).

M. During the term of any agreement to Transition Manufacture, Respondents shall provide consultation with knowledgeable employees of Respondents and training, at the written request of the Acquirer and at a facility chosen by the Acquirer, for the purposes of enabling the Acquirer (or the Manufacturing Designee of the Acquirer) to obtain all Product Approvals to manufacture the Otezla Products in final dosage form in the same quality achieved by, or on behalf of, a Respondent and in commercial quantities, and in a manner consistent with cGMP, independently of Respondents and sufficient to satisfy management of the Acquirer that its personnel (or its Manufacturing Designee's personnel) are adequately trained in the manufacture of the Otezla Products.

V. Employees

IT IS FURTHER ORDERED that:

A. Respondents shall:

1. for a period of:

a. six (6) months after the termination of any agreement to provide Transition Manufacturing, provide the Acquirer or its Manufacturing Designee with the opportunity to enter into employment contracts with the Otezla Manufacturing Employees; and,

b. one (1) year after the Divestiture Date, provide the Acquirer with the opportunity to enter into employment contracts with the other Otezla Core Employees.

Each of these periods is hereinafter referred to as the "Otezla Core Employee Access Period(s);"

2. provide the Acquirer or Proposed Acquirer(s) with the Product Employee Information related to the Otezla Core Employees not later than the earlier of the following dates: (i) ten (10) days after notice by staff of the Commission to the Respondents to provide the Product Employee Information; or (ii) ten (10) days after written request by an Acquirer. Failure by Respondents to provide the Product Employee Information for any Otezla Core Employee within the time provided herein shall extend the Otezla 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; (ii) use the information solely in connection with considering whether to provide, or providing, to Otezla Core Employees the opportunity to enter into employment contracts during an Otezla Core Employee Access Period; and (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;

3. during the Otezla Core Employee Access Period, (i) not interfere with the hiring or employing by the Acquirer or its Manufacturing Designee of the Otezla Core Employees, and remove any impediments within the control of a Respondent that may deter or prevent these employees from accepting employment with the Acquirer or its Manufacturing Designee, including any noncompete or nondisclosure provisions of employment; and (ii) not make any counteroffer to any Otezla Core Employee who has received a written offer of employment from the Acquirer or its Manufacturing Designee;

   provided, however, that this Paragraph shall not prohibit a Respondent from continuing to employ any Otezla Core Employee under the terms of that employee's employment with a Respondent prior to the date of the written offer of employment from the Acquirer or its Manufacturing Designee to that employee; and

4. until the Divestiture Date, provide all Otezla Core Employees with reasonable financial incentives to continue in their positions and to research, Develop, manufacture, and/or market the Otezla Product(s) consistent with past practices and/or as may be necessary to preserve the marketability, viability, and competitiveness of the Otezla Business and to ensure successful execution of the pre-Acquisition plans for that Otezla Product(s). Such incentives shall include a continuation of all employee compensation and benefits offered by a Respondent until the Divestiture Date(s) for the

divestiture of the Otezla Assets has occurred, including regularly scheduled raises, bonuses, and vesting of pension benefits (as permitted by law).

B. From the Divestiture Date until the date that is one (1) year after the Divestiture Date, Respondents shall not, directly or indirectly, solicit any employee of the Acquirer or its Manufacturing Designee with any amount of responsibility related to an Otezla Product ("Otezla Product Employee") to leave the service or employment of the Acquirer or its Manufacturing Designee;

provided, *however*, that such prohibitions do not apply to: (i) general solicitations for employment through advertisements or similarly directed efforts; (ii) general solicitations by third parties (such as recruiters); (iii) any such employee that has been terminated by the Acquirer or its Manufacturing Designee; or (iv) any Otezla Product Employee who contacts a Respondent on his or her own initiative without any direct or indirect solicitation or encouragement from that Respondent.

VI. Confidential Business Information

IT IS FURTHER ORDERED that:

A. Respondents shall:

1. transfer and deliver to the Acquirer, at Respondents' expense, all Otezla Confidential Business Information;

   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 Otezla Confidential Business Information to the Acquirer, provide the Acquirer with access to all such Otezla Confidential Business Information and employees who possess or are able to locate such information for the purposes of identifying the Business Information that contain such Otezla Confidential Business Information and facilitating the delivery in a manner consistent with this Order;

3. not use, directly or indirectly, any such Otezla Confidential Business Information other than as necessary to comply with the following:

   a. the requirements of the Orders;

b. Respondents' obligations to the Acquirer under the terms of the Otezla Divestiture Agreements; or

c. applicable law;

4. not disclose or convey any Otezla Confidential Business Information, directly or indirectly, to any Person *except* (i) the Acquirer, (ii) other Persons specifically authorized by the Acquirer or staff of the Commission to receive such information (*e.g.*, employees of a Respondent providing transition services or Transition Manufacturing for Acquirer), (iii) the Commission, or (iv) the Monitor (if any has been appointed) and *except* to the extent necessary to comply with applicable law;

5. not provide, disclose, or otherwise make available, directly or indirectly, any Otezla Confidential Business Information to the employees associated with the business that is being retained, owned, or controlled by the Respondents, other than those employees providing transition services or Transition Manufacturing to the Acquirer or who are engaged in the transfer and delivery of the Product Manufacturing Technology related to the Otezla Products or the ongoing Clinical Trials related to the Otezla Products to the Acquirer;

6. institute procedures and requirements to ensure that those employees of the Respondents that are authorized by the Acquirer to have access to Otezla Confidential Business information:

   a. do not provide, disclose, or otherwise make available, directly or indirectly, any Otezla Confidential Business Information in contravention of the Orders; and

   b. do not solicit, access, or use any Otezla Confidential Business Information that they are prohibited from receiving for any reason or purpose; and

7. take all actions necessary and appropriate to prevent access to, and the disclosure or use of, the Otezla Confidential Business Information by or to any Person(s) not authorized to access, receive, and/or use such information pursuant to the terms of the Orders or the Otezla Divestiture Agreements, including:

   a. establishing and maintaining appropriate firewalls, confidentiality protections, internal practices, training, communications, protocols, and system or network controls and restrictions;

b. to the extent practicable, maintaining Otezla Confidential Business Information separate from other data or information of the Respondents; and

c. ensuring by other reasonable and appropriate means that the Otezla Confidential Business Information is not shared with Respondents' personnel engaged in the Business related to the same or substantially the same type of Business as the Otezla Products (*e.g.*, Products Developed or in Development for the same or similar indications as the Otezla Products).

B. Respondents shall require, as a condition of continued employment post-divestiture of the Otezla Assets, that each employee that has had responsibilities related to the marketing or sales of the Otezla Products within the one (1) year period prior to the Divestiture Date, and each employee that has responsibilities related to the Development, marketing, or sales of those Retained Products that are Developed or in Development for the same or similar indications as the Otezla Products, in each case who have or may have had access to Otezla 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 Otezla Confidential Business Information as strictly confidential, including the nondisclosure of that information to all other employees, executives, or other personnel of the Respondents (other than as necessary to comply with the requirements of this Order).

C. Not later than thirty (30) days after the Divestiture Date, Respondents shall provide written notification of the restrictions on the use and disclosure of the Otezla Confidential Business Information by that Respondents' personnel to all of its employees who (i) may be in possession of such Otezla Confidential Business Information or (ii) may have access to such Otezla 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 two (2) years after the Divestiture Date.

Respondents shall provide a copy of the notification to the Acquirer. Respondents shall maintain complete records of all such notifications at that Respondent's principal executive offices within the United States and shall provide an officer's certification to the Commission affirming the implementation of, and compliance with, the acknowledgement program. Respondents shall provide the Acquirer with copies of all certifications, notifications, and reminders sent to that Respondent's personnel.

D. 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:

1. to assure such Respondent's compliance with any Otezla Divestiture 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

2. to defend against, respond to, or otherwise participate in any litigation, investigation, audit, process, subpoena, or other proceeding relating to the divestiture or any other aspect of an Otezla Product, the Otezla Assets, or the Otezla Business;

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

provided further, *however,* that pursuant to this Paragraph, a 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 Acquirer (but shall not be deemed to have violated this requirement if the 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.

VII. Asset Maintenance

IT IS FURTHER ORDERED that:

A. Until Respondents fully transfer and deliver the Otezla Assets to the Acquirer and fully provide, or cause to be provided, the related Product Manufacturing Technology related to the Otezla Products and Clinical Trials related to the Otezla Products to the Acquirer, Respondents shall take actions as are necessary to:

1. maintain the full economic viability and marketability of the Otezla Assets;

2. prevent the destruction, removal, wasting, deterioration, or impairment of any of the Otezla Assets;

3. ensure that the Otezla Assets are provided to the Acquirer in a manner without disruption, delay, or impairment of the regulatory approval processes related to the Otezla Business; and

4. ensure the completeness of the transfer and delivery of such Product Manufacturing Technology and Clinical Trials.

B. Respondents shall not sell, transfer, encumber, or otherwise impair the Otezla Assets (other than in the manner prescribed in this Order), nor take any action that lessens the full economic viability, marketability, or competitiveness of the Otezla Assets.

VIII. Clinical Trials

IT IS FURTHER ORDERED that, with respect to any ongoing Clinical Trial(s) as of the Divestiture Date related to the Otezla Products, Respondents shall:

A. designate employees of the Respondents that have worked on such Clinical Trial(s) who will be responsible for communicating directly with the Acquirer and/or its Clinical Research Organization Designee(s), and the Monitor, for the purpose of effecting any transition agreed upon between the Respondents and the Acquirer for the purposes of ensuring the continued prosecution of such Clinical Trials in a timely manner;

B. coordinate with the Acquirer to prepare any protocols necessary to transfer the Clinical Trials to the Acquirer or the Acquirer's Clinical Research Organization Designee(s);

C. assist the Acquirer to prepare and implement any Clinical Plan(s) and Regulatory Package(s) for the current phase of the Clinical Trial (*i.e.*, the phase as of the Divestiture Date) until such time or specified event as agreed upon with the Acquirer in an Otezla Divestiture Agreement occurs;

D. prepare and implement a detailed 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 information related to such Clinical Trial(s) to the Acquirer and/or its Clinical Research Organization Designee(s); and

E. provide, in a timely manner, assistance and advice to enable the Acquirer and/or its Clinical Research Organization Designee(s) to continue such Clinical Trial in its phase as of the Divestiture Date in the same quality, scope, and pace as was being achieved by the Respondents and in a manner consistent with Good Clinical Practice.

IX. Monitor

IT IS FURTHER ORDERED that:

A. Quantic Regulatory Services, LLC shall serve as the Monitor to observe and report on Respondents' compliance with all of Respondents' obligations as required by the Orders and the Otezla Divestiture Agreements pursuant to the agreement between Monitor and Respondents in Appendices A and B to this Order.

B. Not later than one (1) day after the Acquisition Date, Respondents shall confer on the Monitor all rights, powers, and authorities necessary to monitor each Respondent's compliance with the terms of the Orders.

C. 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 each 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 Monitor in a manner consistent with the purposes of the Orders and in consultation with the Commission;

2. Respondents shall provide access to all information and facilities, and make such arrangements with third parties, as are necessary to allow the Monitor to monitor compliance with the obligations to Transition Manufacture;

3. The Monitor shall act in consultation with the Commission or its staff, and shall serve as an independent third party and not as an employee or agent of the Respondents or of the Commission;

4. The Monitor shall serve until Respondents complete the Transition Manufacturing for the Acquirer;

provided, however, that the Monitor's service shall not extend more than four (4) years after 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.

D. Subject to any demonstrated legally recognized privilege, the Monitor shall have full and complete access to each Respondent'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 that Respondent's compliance with its obligations under the Orders.

E. Each 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 that Respondent's compliance with the Orders.

F. 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.

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

H. Respondents shall report to the Monitor in accordance with the requirements of the Orders and as otherwise provided in any agreement approved by the Commission. The Monitor shall evaluate the reports submitted to the Monitor by a Respondent, and any reports submitted by the Acquirer with respect to the performance of a Respondent's obligations under the Orders. Within thirty (30) days after the Order Date and every ninety (90) days thereafter, and at such other times as my be requested by staff of the Commission, the Monitor shall report in writing to the Commission concerning performance by the Respondents of the Respondents' obligations under the Orders. Among other things, the Monitor shall report in writing to the Commission concerning progress by the Acquirer or the Acquirer's Manufacturing Designee toward obtaining FDA approval to manufacture each Otezla Product and obtaining the ability to manufacture each Otezla Product in commercial quantities, in a manner consistent with cGMP, independently of Respondents.

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

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 BMS, which consent shall not be unreasonably withheld. If Respondent BMS has not opposed, in writing, including the reasons for opposing, the selection of a substitute Monitor within ten (10) days after notice by the staff of the Commission to Respondent BMS of the identity of any substitute Monitor, Respondents shall be deemed to have consented to the selection of the substitute Monitor; and

2. not later than ten (10) days after the Commission's appointment of the substitute Monitor, Respondents shall execute an agreement that, subject to the prior approval of the Commission, confers on that Monitor all the rights, powers, and authorities necessary to permit that Monitor to monitor each Respondent's compliance with the Orders in a manner consistent with the purposes of the Orders.

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 Orders.

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.

X. Divestiture Trustee

IT IS FURTHER ORDERED that:

A. If the Respondents have not fully complied with the obligations to assign, grant, license, divest, transfer, deliver, or otherwise convey the Otezla 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 a Respondent to comply with this Order.

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

C. Not later than ten (10) days after the appointment of a Divestiture Trustee, Respondents shall execute a trust agreement that, subject to the prior approval of the Commission, transfers to the Divestiture Trustee all rights and powers necessary to permit the Divestiture Trustee to effect the divestiture required by this Order. Any failure by Respondents to comply with a trust agreement approved by the Commission shall be a violation 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 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(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.

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(s). Any delays in

divestiture caused by a 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 Respondents' absolute and unconditional obligation to divest expeditiously and at no minimum price. The divestiture(s) shall be made in the manner and to an Acquirer that receives the prior approval of the Commission 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, 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 Maintain Assets in this matter.

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, 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(s) required by this Order.

XI. Compliance Reports

IT IS FURTHER ORDERED that:

A. Not later than five (5) days after the Acquisition Date, Respondents shall notify Commission staff of the Acquisition Date, including electronic copies of the notification to the Secretary of the Commission at ElectronicFilings@ftc.gov and to the Compliance Division at bccompliance@ftc.gov.

B. Not later than five (5) days after the Divestiture Date, Respondents shall notify Commission staff of the Divestiture Date, including electronic copies of the

notification to the Secretary of the Commission at ElectronicFilings@ftc.gov and to the Compliance Division at bccompliance@ftc.gov.

C. Not later than thirty (30) day after the Divestiture Date, Respondents shall submit complete copies of all of the Divestiture Agreements to the Secretary of the Commission at ElectronicFilings@ftc.gov and to the Compliance Division at bccompliance@ftc.gov.

D. Within thirty (30) days after the Order Date, and every ninety (90) days thereafter until Respondents have completed all of the following: (i) the transfer and delivery of all of the Otezla Assets to the Acquirer, (ii) the transfer and delivery of all of the Product Manufacturing Technology related to the Otezla Products to the Acquirer, (iii) the transfer and delivery of all Otezla Confidential Business Information to the Acquirer, and (iv) the provision of Transition Manufacturing to the Acquirer, Respondents shall submit to the Commission and, at the same time, to the Monitor, a verified written report setting forth in detail the manner and form in which the Respondents intend to comply, are complying, and have complied with the requirements of the Orders ("Compliance Reports").

E. Each Compliance Report shall contain sufficient information and documentation to enable the Commission independently to determine whether Respondents are in compliance with the Orders. Conclusory statements that Respondents have complied with their obligations under the Orders are insufficient. 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 the Orders, including:

1. a detailed description of all substantive contacts, negotiations, or recommendations related to (i) the transfer and delivery of all of the Otezla Assets to the Acquirer, (ii) the transfer and delivery of all of the Product Manufacturing Technology related to the Otezla Products and the Clinical Trial(s) related to the Otezla Products to the Acquirer, (iii) the transfer and delivery of all Otezla Confidential Business Information to the Acquirer, and (iv) the provision of Transition Manufacturing to the Acquirer; and

2. a detailed description of the timing for the completion of such obligations.

F. 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, 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.

G. Respondents shall verify each Compliance Report in the manner set forth in 28 U.S.C § 1746 by the Chief Executive Officer or other officer or employee specifically authorized to perform this function. Respondents shall submit an

original and 2 copies of each Compliance Report as required by Commission Rule 2.41(a), 16 C.F.R. § 2.41(a), including a paper original submitted to the Secretary of the Commission and electronic copies to the Secretary at ElectronicFilings@ftc.gov and to the Compliance Division at bccompliance@ftc.gov. In addition, Respondents shall provide a copy of each Compliance Report to the Monitor.

XII. Change in Respondents

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

A. any proposed dissolution of: Bristol-Myers Squibb Company or Celgene Corporation;

B. any proposed acquisition, merger, or consolidation of Bristol-Myers Squibb Company or Celgene Corporation; or

C. any other change in Respondents including, assignment and the creation or dissolution of subsidiaries, if such change might affect compliance obligations arising out of this Order.

XIII. Access

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

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

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

XIV. Purpose

IT IS FURTHER ORDERED that the purposes of the divestiture of the Otezla Assets and the provision of the related Product Manufacturing Technology and the related obligations imposed on the Respondents by this Order are:

A. to ensure the continued use of such assets for the purposes of the Otezla Business within the United States;

B. to create a viable and effective competitor that is independent of Respondents in the Otezla Business within the United States; and

C. to remedy the lessening of competition resulting from the proposed acquisition of Respondent Celgene by Respondent BMS as alleged in the Commission's Complaint in a timely and sufficient manner.

XV. Term

IT IS FURTHER ORDERED that this Order shall terminate on January 9, 2030.

By the Commission, Commissioners Chopra and Slaughter dissenting.

STATEMENT OF COMMISSIONER NOAH JOSHUA PHILLIPS

I write to address the dissenting statements issued by my colleagues, Commissioners Chopra and Slaughter.

From these statements, a reader unfamiliar with the U.S. antitrust laws could be forgiven for gleaning several inaccurate conclusions. First, companies in the U.S. may not merge unless the antitrust enforcement agencies permit them to do so. Second, to stop a merger, the government need not provide any theory as to why a merger violates the law, nor any evidence to support that theory. Third, antitrust enforcement agencies can and should condemn mergers they cannot prove violate the law because the agencies deem the business justifications for the merger insufficient.

The unfamiliar reader would be wrong on each count. That is not the law. (Nor, for that matter, is it sound policy.)

The structural remedy agreed to by the merging parties in this case addresses every competition concern uncovered after an extensive investigation. Every one. But Commissioners Chopra and Slaughter still dissent. Why?

Commissioner Chopra cites a study purporting to show that mergers "can choke off innovation". Okay. But how does this merger do that? Without an answer to that question, the logic is rather like saying an individual defendant is guilty of a crime because there is too much of that crime in society. Thank goodness that is not how our criminal justice system works.

He next writes that we must approach our investigations of pharmaceutical mergers with careful scrutiny and with great humility. I agree completely. What I fail to see is how careful scrutiny and great humility lead to the conclusion, without any clearly articulated theory of liability or facts to support it, that this merger violates the law – or, again without any facts in support, that the remedy is inadequate.

The next basis Commissioner Chopra offers for his dissent is his view that the merger is animated by financial and tax considerations, which he deems insufficient to justify the merger. Leaving aside the question of why he thinks the job of antitrust enforcers is to value-judge a merger beyond its impact upon competition, that gets the law precisely backwards. The parties get to merge unless we can show a harm to competition, not the other way round.

This dissent also alludes to "distorted" incentives of the buyer due to the overlapping ownership of the parties. I must admit that the precise meaning of that escapes me. Perhaps it is a reference to the theory of "common ownership", which has stoked great academic debate and about which I have spoken repeatedly.[1] Whatever the meaning, Commissioner Chopra fails to articulate how the merger will distort the buyer's incentives, much less in a way that violates the law. To sue, or to seek an additional remedy, we need more.

The dissenting commissioners both criticize the Commission's investigations of pharmaceutical mergers generally, expressing concern that they fail to capture all the harms to competition posed by such mergers.[2] But, again, the most they offer is speculation about vaguely articulated harms, without reference to any evidence that *this* merger is likely to exacerbate them. Nor do the dissenters cite a previous case that resulted in anticompetitive effects that they insinuate the Commission missed. The dissenting statements mention various violations of the antitrust laws committed by firms in the pharmaceutical industry, but neither explains how this merger makes such conduct more likely. For decades, the Federal Trade Commission has pursued enforcement against many different kinds of anticompetitive conduct in the pharmaceutical industry. That work, critical to controlling healthcare costs for Americans, will continue.

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1 Noah Joshua Phillips, Commissioner, U.S. Fed. Trade Comm'n, Taking Stock: Assessing Common Ownership, Address at the Global Antitrust Economics Conference (June 1, 2018), https://www.ftc.gov/system/files/documents/public_statements/1382461/phillips_-_taking_stock_6-1-18_0.pdf; Noah Joshua Phillips, Commissioner, U.S. Fed. Trade Comm'n, Competing for Companies: How M&A Drives Competition and Consumer Welfare, Address at the Global Antitrust Economics Conference (May 31, 2019), https://www.ftc.gov/system/files/documents/public_statements/1524321/phillips_-_competing_for_companies_5-31-19_0.pdf.

2 Like Commissioner Wilson, I believe staff conducted a careful investigation of this merger. See Statement of Commissioner Christine S. Wilson, In the Matter of Bristol-Myers Squibb Company / Celgene Corporation.

Neither dissenting commissioner argues that the consent order and associated divestiture are bad for competition or consumers, or identifies any additional remedy they believe is warranted. And neither proposes any basis to sue to stop the merger.[3] So, again, why dissent? At the end of the day, we are left only with the sense that Commissioners Chopra and Slaughter feel the merger will threaten competition and wish to dissociate themselves with it. To me, that is not enough. (Even if it were, a vote to join Commissioners Chopra and Slaughter would result, at the end of the day, in the merger without the remedy. Are they calling on their colleagues to vote with them?)

Returning to our unfamiliar reader, here is how the law actually works. First, to block a merger outright, U.S. antitrust enforcement agencies must convince a judge that it violates the law. In this country, where people and companies are free to do what they wish with their property subject to the constraints imposed by the law, our judges are somewhat hostile to the notion that we should block a merger when the parties have agreed to address *every* problem that we can identify. Second, we need to articulate a viable theory of harm to competition posed by the merger and produce evidence to support that theory. Third, our job is to enforce the antitrust laws, which guard against particular (competitive) harms that mergers may present. Other parts of the government guard against other harms posed by mergers, for example the Committee on Foreign Investment in the United States, which looks at certain investments for their potential impact on national security,[4] or the Securities and Exchange Commission, which reviews transactions to protect investors.[5] Our job is not to opine on whether a merger is "good" or "bad" for society as a whole, or to use our authority to make sure firms merge for reasons that someone might like (innovation) as opposed to reasons that they may not (tax).[6]

In reviewing the dissenting statements, readers – unfamiliar and otherwise – would do well to keep all of that in mind.

3 In fairness, Commissioner Chopra does state his view that the agency should litigate to block more pharmaceutical mergers outright. But he fails to answer whether the Commission should litigate this case, and – more importantly – on what legal and factual basis. That is the question we face today.

4 *See* 50 U.S.C. § 4565.

5 *See*, *e.g.*, 15 U.S.C. §§ 78m(d), 78n(d).

6 This is not to say that we should view financial or tax considerations as improper motivations for a merger.

DISSENTING STATEMENT OF COMMISSIONER ROHIT CHOPRA

Summary

- Today's troubles in the pharmaceutical industry are well known. Drug pricing is out-of-control and innovation is too slow. Given the consequences for human life, the FTC must ensure fierce competition in this market through close scrutiny of mergers and conduct.

- The agency has scored big victories in court to combat anticompetitive conduct in the industry. But, when it comes to mergers, Commissioners have typically voted to steer clear of the courtroom, instead focusing on settlements that address product overlaps.

- Given the size and potential impact of this massive merger, I am skeptical that the status quo approach will uncover the range of potential harms to American patients.

When it comes to life-saving pharmaceuticals, the Federal Trade Commission should never ignore serious warning signs that most Americans see clearly. Many of us depend on prescription drugs to survive, but too many cannot afford the high costs. The argument that sky-high prices are necessary for innovation has been falling apart, as more evidence reveals that many new drugs seem to be designed to extend exclusivity, rather than providing meaningful therapeutic benefits.[1]

Predicting the anticompetitive effects of massive mergers in any industry is difficult. This is especially true in pharmaceuticals, where research and discovery are core to competition. Some evidence shows that these mergers have choked off innovation,[2] creating harms that are immeasurable for those waiting for a cure.

Routine vs. Rigor

Over the years, the agency has worked to combat abuse of intellectual property and other anticompetitive conduct by pharmaceutical companies, achieving major victories in courts across the country. Our approach to pharmaceutical mergers, however, has focused primarily on reaching settlements, rather than litigation or in-depth merger studies. The agency has focused on seeking divestitures of individual products, usually to another major pharmaceutical player.

There have been longstanding, bipartisan concerns about whether this strategy is truly working. For example, in 2005, as he reflected on his six years of service as Commissioner,

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1 Donald W. Light & Joel R. Lexchin, *Pharmaceutical R&D: What do we get for all that money?*, 345 British Med. J. 22, 24 (2012), https://www.bmj.com/bmj/section-pdf/187604?path=/bmj/345/7869/Analysis.full.pdf.

2 *See generally,* Justus Haucap & Joel Stiebale, *How Mergers Affect Innovation: Theory and Evidence from the Pharmaceutical Industry* (Düsseldorf Inst. for Competition Economics, Discussion Paper No. 218, 2016), http://www.dice.hhu.de/fileadmin/redaktion/Fakultaeten/Wirtschaftswissenschaftliche_Fakultaet/DICE/Discussion_Paper/218_Hauca p_Stiebale.pdf.

Thomas Leary lamented that the agency's approach to these investigations mostly stayed the same, despite overarching concerns about other anticompetitive harms.[3]

During my time as a Commissioner, I have pushed for the agency to be more rigorous across all of our work by opening our eyes to new types of analysis and sources of evidence,[4] while avoiding assumptions that may be outdated. Given some of the clear warning signs in the industry, we must approach our investigations of pharmaceutical mergers with careful scrutiny and great humility about our longstanding practices.

This massive $74 billion merger between Bristol-Myers Squibb (NYSE: BMY) and Celgene (NASDAQ: CELG) may have significant implications for patients and inventors, so we must be especially vigilant. In my view, this transaction appears to be heavily motivated by financial engineering[5] and tax considerations[6] (as opposed to a genuine drive for greater discovery of life- saving medications), without clear benefits to patients or the public. The buyer's incentives might also be distorted, given overlaps in ownership.[7] In addition, there are also concerns about a

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3 Interview with Commissioner Thomas B. Leary, 19 (3) A.B.A. ANTITRUST HEALTH CARE CHRONICLE 1, 5 (2005), https://www.ftc.gov/public-statements/2005/09/health-care-interview-commissioner-thomas-b-leary.

4 I have previously noted that the agency can enhance its assessments of the likelihood of entry by new innovators, as well as its approach to vetting the financial condition of divestiture buyers. Statement of Commissioner Rohit Chopra, In the Matter of Fresenius Medical Care AG & Co. KGaA and NxStage Medical, Inc. (Feb. 19, 2019), https://www.ftc.gov/public-statements/2019/02/statement-commissioner-chopra-matter-fresenius-medical-care-ag-co-kgaa; Statement of Commissioner Rohit Chopra, In the Matter of Linde AG, Praxair, Inc., and Linde PLC (Oct. 22, 2018), https://www.ftc.gov/public-statements/2018/10/statement-commissioner-chopra-matter-linde-ag-praxair-inc-linde-plc.

5 This transaction will lead to changes in the merged firm's capital structure, as well as an acceleration of share buybacks. I fear that these changes will alter the firm's incentives in ways that might increase the likelihood of anticompetitive conduct. *See* Bristol-Myers Squibb, Press Release, Bristol-Myers Squibb Announces Agreement Between Celgene and Amgen to Divest OTEZLA® for $13.4 Billion (Aug. 26, 2019, 6:30 AM), https://news.bms.com/press-release/corporatefinancial-news/bristol-myers-squibb-announces-agreement-between-celgene-and-a.

6 Tax avoidance appears to be one of the primary motivations of the deal, rather than a meaningful increase in the firms' ability to innovate or operate effectively. *See, e.g.,* Siri Bulusu, *Celgene Holders May See Tax Benefit From Bristol-Myers Deal (1)*, BLOOMBERG TAX (Jan. 4, 2019, 4:43 PM), https://news.bloombergtax.com/daily-tax-report/celgene-holders-may-see-tax-benefit- from-bristol-myers-deal-1 (noting that the buyer went out of its way to make sure the stock component of the merger will be taxable and describing how that tax would be deductible by Celgene shareholders). Tax considerations were also relevant to Amgen, the Commission's approved buyer of a divested asset. Amgen publicly disclosed that it would recognize $2.2 billion in tax benefits, on a present value basis. *See* Michael Erman & Manas Mishra, *Amgen to buy Celgene psoriasis drug Otezla for $13.4 billion*, REUTERS (Aug. 26, 2019), https://www.reuters.com/article/us-bristol-myers-divestiture-amgen/amgen-to-buy-celgene-psoriasis-drug-otezla- for-13-4-billion-idUSKCN1VG102.

7 For example, I noted with great interest that two-thirds of Bristol-Myers Squibb's 100 largest shareholders also have stakes in Celgene, according to data assembled by Refinitiv. *See, e.g.,* Svea Herbst-Bayliss & Michael Erman, *Starboard joins opposition to Bristol-Myers' $74 billion Celgene deal*, REUTERS (Feb. 28, 2019, 6:59 AM), https://www.reuters.com/article/us-celgene-m-a-bristol-myers-wellington/starboard-joins-opposition-to-bristol-myers-74-billion-celgene-deal-idUSKCN1QH1K7.

history of anticompetitive conduct.[8] Expansive investigation for mergers like these is time well spent.

Again, with a few exceptions,[9] many FTC Commissioners have primarily scrutinized pharmaceutical mergers based on an examination of whether there are any product overlaps between the merging corporations, or where there may be clear-cut incentives to foreclose rivals with the ability to compete.[10] When there are no obvious overlaps or foreclosure possibilities, the Commission typically does not challenge any aspect of the transaction.[11]

I am deeply skeptical that this approach can unearth the complete set of harms to patients and innovation, based on the history of anticompetitive conduct of the firms seeking to merge and the characteristics of today's pharmaceutical industry when it comes to innovation. Will the merger facilitate a capital structure that magnifies incentives to engage in anticompetitive conduct or abuse of intellectual property? Will the merger deter formation of biotechnology firms that fuel much of the industry's innovation? How can we know the effects on competition if we do not rigorously study or investigate these and other critical questions? Given our approach, I am not confident that the Commission has sufficient information to determine the full scope of potential harms to competition of this massive merger.

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8 For example, last year, the Food & Drug Administration published a list of drug makers that were the subject of complaints that they had restricted generic drug companies from accessing drug samples, which enable generic firms to develop viable alternatives. Celgene was a top recipient of these complaints. Alison Kodjak, *How a Drugmaker Gamed The System To Keep Generic Competition Away*, NPR (May 17, 2018; 5:00 AM), https://www.npr.org/sections/health-shots/2018/05/17/571986468/how-a-drugmaker-gamed-the-system-to-keep-generic-competition-away.

9 *See, e.g.,* Statement of the Federal Trade Commission, In the Matter of Teva Pharmaceuticals Industries Ltd. and Allergan plc (July 27, 2016), https://www.ftc.gov/public-statements/2016/07/statement-federal-trade-commission-matter-teva-pharmaceuticals-industries; *cf.* Concurring Statement of Commissioner J. Thomas Rosch, Federal Trade Commission v. Ovation Pharmaceuticals, Inc. (Dec. 16, 2008), https://www.ftc.gov/public-statements/2008/12/concurring-statement-commissioner-j-thomas-rosch-federal-trade-commission.

10 In this matter, the Analysis of Agreement Containing Consent Orders to Aid Public Comment focuses primarily on a specific product market overlap. This is similar to many past analyses contained in public notices seeking comment on proposed consent orders in the FTC's pharmaceutical merger actions. *See, e.g.,* Analysis Of Agreement Containing Consent Orders To Aid Public Comment, *In the Matter of Boston Scientific Corporation,* File No. 191-0039, https://www.ftc.gov/system/files/documents/cases/191_0039_boston_scientific_aapc.pdf; Analysis Of Agreement Containing Consent Orders To Aid Public Comment, *In the Matter of Amneal Holdings, LLC, Amneal Pharmaceuticals LLC, Impax Laboratories, Inc., and Impax Laboratories, LLC,* File No. 181-0017, https://www.ftc.gov/system/files/documents/cases/1810017_amneal_impax_analysis_4-27-18.pdf. *See also* Markus Meier et al., FED. TRADE COMM'N, OVERVIEW OF FTC ACTIONS IN PHARMACEUTICAL PRODUCT AND DISTRIBUTION (2019),https://www.ftc.gov/system/files/attachments/competition-policy-guidance/overview_pharma_june_2019.pdf

11 For example, in January 2015 the Commission granted early termination of the Hart-Scott-Rodino waiting period and took no enforcement action against the proposed $66 billion merger between Actavis plc and Allergan, Inc. *See* Fed. Trade Comm'n, Early Termination Notices, *20150313: Actavis plc; Allergan, Inc.* (Jan. 9, 2015), https://www.ftc.gov/enforcement/premerger-notification-program/early-termination-notices/20150313.

Conclusion

The financial crisis and the Great Recession taught our country a tough lesson: when watchdogs wear blindfolds or fail to evolve with the marketplace, millions of American families can suffer the consequences. The regulators and enforcers of the mortgage industry failed to stop the widespread abuses that plagued the marketplace. And there are many more examples every year, from the opioid crisis to the failures of the Boeing 737 Max, where blindfolded regulators and the absence of rigorous investigation proved to be catastrophic to human life, despite so many warning signs.

When enforcers conduct wide-ranging, intensive inquiries that do not uncover unlawful conduct, then, of course, they cannot take action. However, when they wear blindfolds or cling to the status quo, they cannot assume that the public is protected.

For these reasons, I respectfully dissent.

DISSENTING STATEMENT OF COMMISSIONER REBECCA KELLY SLAUGHTER

The Federal Trade Commission has a long history of reviewing mergers between pharmaceutical manufacturers using an analytical framework that identifies specific product overlaps between the merging parties, including of drugs in development, and requiring divestitures of one of those products. This approach addresses significant competitive concerns in these mergers,[1] but I am concerned that it does not fully capture all of the competitive consequences of these transactions.[2]

The consent decree in this case follows the Commission's standard approach. It remedies a serious concern about a drug-level overlap between BMS's development-stage BMS 986165 (or "TYK2") and Celgene's on-market Otezla for the treatment of moderate-to-severe psoriasis. This is important, and I support the Commission's effort to remedy this drug-level overlap.

1 Within the standard analytical framework for pharmaceutical mergers, the Commission has done a good job of studying the effects of previous divestitures, and has taken seriously the lesson that divestitures of on-market, rather than pipeline products, are often more likely to succeed in preserving competition among the overlapping products. *See* Bruce Hoffman, *It Only Takes Two to Tango: Reflections on Six Months at the FTC*, at 6 (Feb. 2, 2018).

2 The Commission has been very successful in negotiating settlements with merging parties to address drug overlaps. The Commission has not recently litigated pharmaceutical merger cases, and, although merger litigation in other industries and merger guidelines provide useful guidance, we simply do not have a contemporary body of pharmaceutical merger caselaw to clarify the boundaries for our analytical approach.

However, I remain concerned that this analytical approach is too narrow. In particular, I believe the Commission should more broadly consider whether any pharmaceutical merger is likely to exacerbate anticompetitive conduct by the merged firm or to hinder innovation.

Several recent developments enhance my concerns. Branded drug prices have increased substantially in recent years,[3] and pharmaceutical merger activity persists at a high pace.[4] The high rate of drug company consolidation has coincided with a sea change in the structure of pharmaceutical research and development; recent studies suggest mergers may inhibit research, development, or approval in this changing environment.[5] In addition, the pharmaceutical industry has long been the focus of anticompetitive conduct enforcement by both the Commission and private litigants, including for practices such as pay-for-delay settlements,[6] sham litigation,[7] and anticompetitive product hopping.[8] We must carefully consider the facts in each specific merger to understand whether or how it may facilitate anticompetitive conduct, and therefore be more likely to result in a substantial lessening of competition.

Going forward, I hope the Commission will take a more expansive approach to analyzing the full range of competitive consequences of pharmaceutical mergers. I urge not only the Commission, but also researchers and industry experts to think carefully and creatively about these

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3 *See* IQVIA Institute for Human Data Science, *The Global Use of Medicine in 2019 and Outlook to 2023*, at 11 (Jan. 29, 2019); IQVIA Institute for Human Data Science, *Medicine Use and Spending in the U.S.*, at 8 (Apr. 19, 2018); Laura Entis, *Why Does Medicine Cost So Much? Here's How Drug Prices Are Set*, TIME (Apr. 9, 2019), https://time.com/5564547/drug-prices-medicine/; *see also* Joanna Shepherd, *The Prescription for Rising Drug Prices: Competition or Price Controls?*, 27 HEALTH MATRIX 315, 315-16 (2017); Aimee Picchi, *Drug Prices in 2019 are Surging, With Hikes at 5 Times Inflation*, CBS NEWS (July 1, 2019), https://www.cbsnews.com/news/drug- prices-in-2019-are-surging-with-hikes-at-5-times-inflation/.

4 *See* Barak Richman, et al., *Pharmaceutical M&A Activity: Effects on Prices, Innovation, and Competition*, 48 LOY. U. CHI. L. J. 787, 790-91 (2017); Meagan Parrish, *What's Behind all the M&A Deals in Pharma*, PHARMA MANUFACTURING (July 31, 2019).

5 *See* Justus Haucap & Joel Stiebale, *Research: Innovation Suffers When Drug Companies Merge*, HARVARD BUSINESS REVIEW (Aug. 3, 2016); Justus Haucap & Joel Stiebale, *How Mergers Affect Innovation: Theory and Evidence From the Pharmaceutical Industry* (2016) (finding a negative effect on research and development activity of the merged firm and rival firms); *but see* Richman, et al., *supra* note 4 at 799-801, 817-18 (finding a positive correlation between increased pharmaceutical merger and drug development activity, but noting competitive concerns about a "bottleneck" in FDA approval).

6 *See* Press Release, Fed. Trade Comm'n, *Last Remaining Defendant Settles FTC Suit that Led to Landmark Supreme Court Ruling on Drug Company "Reverse Payments"* (Feb. 28, 2019), https://www.ftc.gov/news- events/press-releases/2019/02/last-remaining-defendant-settles-ftc-suit-led-landmark-supreme.

7 *See* Press Release, Fed. Trade Comm'n, *Statement of FTC Chairman Joe Simons Regarding Federal Court Ruling in FTC v. AbbVie* (June 29, 2018), https://www.ftc.gov/news-events/press-releases/2018/06/statement-ftc-chairman-joe-simons-regarding-federal-court-ruling.

8 *See* Press Release, Fed. Trade Comm'n, *Reckitt Benckiser Group plc to Pay $50 Million to Consumers, Settling FTC Charges that the Company Illegally Maintained a Monopoly over the Opioid Addiction Treatment Suboxone* (July 11, 2019), https://www.ftc.gov/news-events/press-releases/2019/07/reckitt-benckiser-group-plc-pay-50- million-consumers-settling-ftc.

cases, and in particular to study the effects of recent consummated mergers on drug research, development, and approval. Outside of merger enforcement, we should also continue to police aggressively business practices that suppress competition. Indeed, as Commissioner Chopra and I have explained elsewhere, we should unleash the full scope of our authority under Section 5 to combat high drug prices.[9]

The problem of high drug prices is too important to leave any potential solutions unexhausted. As a society, we should also consider all other policy interventions that would help combat high drug prices.[10]

9 *See* Statement of Commissioners Rohit Chopra and Rebecca Kelly Slaughter Regarding the Federal Trade Commission Report on the Use of Section 5 to Address Off-Patent Pharmaceutical Price Spikes, (June 27, 2019).

10 The problem of high drug prices has prompted a number of proposed policy solutions in addition to antitrust enforcement, including (1) reference pricing, (2) reforming import restrictions, (3) innovation prizes, and (4) Medicare Part D price negotiation. *See* So-Yeon Kang, et al., *Using External Reference Pricing in Medicare Part D to Reduce Drug Price Differentials With Other Countries*, 5 HEALTH AFF. 38 (2019); Tim Wu, *How to Stop Drug Price Gouging*, N.Y. TIMES (Apr. 20, 2017), https://www.nytimes.com/2017/04/20/opinion/how-to-stop-drug-price- gouging.html; Charles Silver & David A. Hyman, *Here's a Plan to Fight High Drug Prices That Could Unite Libertarians and Socialists*, VOX (Jun. 21, 2018), https://www.vox.com/the-big- idea/2018/6/21/17486128/prescription-drug-prices-monopolies-epipen-shkreli-sanders-patents-prizes; Juliette Cubanski & Tricia Neuman, *Searching for Savings in Medicare Drug Price Negotiations*, Henry J. Kaiser Family Foundation (Apr. 26, 2018).

Concurring Statement

STATEMENT OF COMMISSIONER CHRISTINE S. WILSON

The Commission has accepted, subject to final approval after receiving public comments, an Agreement Containing Consent Order from Bristol-Myers Squibb Company and Celgene Corporation that remedies the anticompetitive effect that otherwise would arise from BMS's proposed acquisition of Celgene. All members of the Commission (including Commissioners Chopra and Slaughter)[1] agree that the ***only*** evidence of harm to competition that staff found was in the market for oral products that treat moderate-to-severe psoriasis.[2] All members of the Commission also agree that the remedy in that market – a complete divestiture of all of Celgene's products and associated assets in that area – will preserve competition in that market. Moreover, this $13 billion divestiture is the largest in the history of U.S. merger enforcement.

I agree with Commissioner Slaughter that pharmaceutical price levels in the United States today are cause for concern. And there is ample evidence that prices of branded pharmaceuticals have increased much faster – perhaps six to eight times as fast – as prices in the rest of the economy.[3]

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1 *See* Dissenting Statement of Commissioner Rebecca Kelly Slaughter, In the Matter of Bristol-Myers Squibb and Celgene; Dissenting Statement of Commissioner Rohit Chopra on Bristol-Myers Squibb/Celgene.

2 While Commissioner Chopra agrees that there is no evidence of harm to innovation, he concludes that the lack of evidence implies there is a problem with the investigative process. I disagree with Commissioner Chopra's hypothesis.

Staff conducted the investigation of this proposed transaction in the same careful manner that all pharmaceutical transactions are investigated. The investigation examined the likely competition between and among all of BMS and Celgene's current products and those now in development. The investigation identified a likely harm to innovation involving oral products to treat moderate-to-severe psoriasis; the identified overlap includes a product that is still in development by BMS. In addition, staff investigated whether the proposed transaction would decrease innovation competition; instead, the investigation found that reduced innovation competition was unlikely.

Moreover, there is no reason to believe there will be reduced innovation in the pharmaceutical industry as a result of this transaction. No fewer than 711 companies are conducting late-stage research and development in oncology, the therapeutic category in which BMS and Celgene conduct research. *See* IQVIA Institute Global Oncology Trends 2019, at 19, May 2019, *available at* https://www.iqvia.com/-/media/iqvia/pdfs/institute-reports/global-oncology- trends-2019.pdf.

To support his hypothesis that there must be additional unidentified harm to innovation, Commissioner Chopra seeks to introduce factors outside the analytical framework demanded by the statutes enforced by the Commission, including Section 7 of the Clayton Act, without offering any evidence to show that these non-competition factors may reduce innovation.

3 *See, e.g.*, SUZANNE M. KIRCHHOFF ET AL., CONGRESSIONAL RESEARCH SERVICE, FREQUENTLY ASKED QUESTIONS ABOUT PRESCRIPTION DRUG PRICING AND POLICY, at 8-9 (Apr. 24, 2018), *available at* https://fas.org/sgp/crs/misc/R44832.pdf (plotting CPI-U data from the U.S. Bureau of Labor Statistics); STEPHEN W. SCHONDELMEYER & LEIGH PURVIS, AARP PUBLIC POLICY INSTITUTE, RX PRICE WATCH REPORT: TRENDS IN RETAIL PRICES OF BRAND NAME PRESCRIPTION DRUGS WIDELY USED BY OLDER AMERICANS: 2017 YEAR-END UPDATE, at (Sept. 2018), *available at* https://www.aarp.org/content/dam/aarp/ppi/2018/09/trends-in-retail-prices-of-brand- name-prescription-drugs-year-end-update.pdf (using data from Truven MarketScan to estimate that "brand name drug prices went up more than 8.5 times the rate of general inflation during [the] 12-year period [from December 31, 2005 to December 31, 2017]"); Robert Pearl, *How Big Pharma Might Be Cut Down to Size*, FORBES.COM, May 11, 2017, *available at* https://www.forbes.com/sites/robertpearl/2017/05/11/how-big-pharma-might-be-cut-down-to- size/

Unfortunately, many of the causes of higher drug prices, including systemic distortions created by massive regulatory regimes and a pervasive principal/agent problem, fall outside the jurisdiction and legal authority of the Federal Trade Commission. But within its limited authority as a competition agency, the Commission can – and does – pursue a comprehensive agenda to address anticompetitive mergers and unlawful conduct in the pharmaceutical industry. Specifically, the Commission:

- **Carefully Screens Pharmaceutical Mergers:** Similar to the current enforcement action, the Commission routinely has challenged anticompetitive mergers and acquisitions. During the past five years, the Commission has issued complaints challenging 13 mergers and required the divestiture of 130 branded and generic products to address competitive overlaps for the sale or development of particular drugs.[4]

- **Combats Anticompetitive Patent Litigation Settlements:** In 2013, the FTC won a landmark victory at the Supreme Court in the *Actavis* case,[5] and has prevailed in subsequent challenges of similar agreements. For instance, earlier this year, the Commission issued a unanimous opinion condemning a patent litigation settlement after finding that the brand manufacturer possessed market power in the market for branded and generic oxymorphone ER, the potential generic entrant received a large and unjustified payment, and the respondent failed to show a cognizable justification for the restraint.[6] The Commission's successful challenges of prior settlements have substantially reduced the number of anticompetitive patent litigation settlements into which companies are entering today.

- **Challenges Abuse of FDA Regulatory Processes:** The Commission has brought several cases alleging that pharmaceutical companies misuse FDA regulatory processes to impede competition. For example, in 2014 the FTC challenged a pharmaceutical company for abusing the litigation process by filing meritless patent lawsuits against competitors to keep them off the market. The Commission won a

("[A]ccording to the U.S. Bureau of Labor Statistics, prices for U.S.-made pharmaceuticals have climbed over the past decade six times as fast as the cost of goods and services overall."); CHARLES SILVER & DAVID A. HYMAN, OVERCHARGED: WHY AMERICANS PAY TOO MUCH FOR HEALTH CARE 25-27 (2018) (discussing analyses from Schondelmeyer & Purvis, Pearl, and others).

4 *See Baxter Int'l Inc.*, Dkt. No. C-4620 (F.T.C. July 20, 2017); *Amneal Holdings, LLC*, Dkt. No. C-4650 (F.T.C. Apr. 27, 2018); FTC v. Mallinckrodt ARD Inc., No. 1:17-cv-00120 (D.D.C. Jan. 18, 2017); *Mylan, N.V.*, Dkt. No. C-4590 (F.T.C. July 26, 2016); *Teva Pharmaceutical Indus. Ltd.*, Dkt. No. C-4589 (F.T.C. July 26, 2016); *Hikma Pharmaceuticals PLC*, Dkt. No. C-4572 (F.T.C. Mar. 28, 2016); *Hikma Pharmaceuticals PLC*, Dkt. No. C-4568 (F.T.C. Feb. 26, 2016); *Lupin Ltd.*, Dkt. No. C-4566 (F.T.C. Feb. 18, 2016); *Endo Int'l PLC*, Dkt. No. C-4539 (F.T.C. Sept. 24, 2015); *Pfizer Inc.*, Dkt. No. C-4537 (F.T.C. Aug. 21, 2015); *Impax Labs, Inc.*, Dkt. No. C-4511 (F.T.C. Mar. 5, 2015); *Novartis AG*, Dkt. No. C-4510 (F.T.C. Feb. 20, 2015); *Sun Pharmaceutical Indus. Ltd*, Dkt. No. C-4506 (F.T.C. Jan. 30, 2015).

5 FTC v. Actavis, Inc., 570 U.S. 136 (2013).

6 *See*, *e.g.*, *Impax Laboratories, Inc.*, Dkt. No. 9373 (F.T.C. April 3, 2019) (Commission Decision).

judgment for $448 million.[7] The FTC also sued Shire ViroPharma in 2017, alleging anticompetitive abuse of the FDA citizen-petition process to keep the FDA from approving the competitive products, thereby keeping those lower-cost drugs off the market. (Unfortunately, the Commission lost the case on a statutory construction issue that kept the Court of Appeals from ruling on the merits of the allegations.[8]) And under Chairman Tim Muris, the FTC challenged wrongful listings in the FDA Orange Book[9] by BMS, one of the very parties before us today, that allegedly were used obtain unwarranted automatic 30-month stays of FDA approval of generic pharmaceuticals that would have competed with BMS branded products.[10]

- **Advocates for the Reform of Misused Regulations:** The FTC advised the FDA and Congress of possible abuses of the Risk Evaluation and Mitigation Strategy (REMS) framework to forestall competitors' entry by denying access to branded drugs required to conduct bioequivalence testing, a gating factor for FDA approval to launch.[11] In remarks before a Subcommittee of the Senate Committee on Commerce, Science, and Transportation, I encouraged Congress to take action on this front.[12] And under the bipartisan leadership of first Chairman Bob Pitofsky and then Chairman Tim Muris, the FTC conducted a 6(b) study of generic drugs and issued a report recommending refinements to the Hatch Waxman Act and changes to the FDA regulatory framework, many of which were implemented, so as to fulfill the original balance of innovation and competition struck by the Hatch Waxman Act.

7 FTC v. AbbVie, Inc. 329 F. Supp. 3d 98 (E.D. Pa. 2018).

8 FTC v. Shire ViroPharma, Inc., 917 F.3d 147, 156 (3d Cir. 2019).

9 Pursuant to the FDC Act, a brand-name drug manufacturer seeking to market a new drug product must first obtain FDA approval by filing a New Drug Application ("NDA"). At the time the NDA is filed, the NDA filer must also provide the FDA with certain categories of information regarding patents that cover the drug that is the subject of its NDA. 21 U.S.C. § 355(b)(1). Upon receipt of the patent information, the FDA is required to list it in an agency publication entitled "Approved Drug Products with Therapeutic Equivalence," commonly known as the "Orange Book." *Id.* § 355(j)(7)(A).

10 *See* Complaint, *Bristol-Myers Squibb Co.*, Dkt. No. C-4076 (F.T.C. filed Apr. 14, 2003).

11 *See, e.g.*, Statement of the Federal Trade Commission to the Department of Health and Human Services Regarding the HHS Blueprint to Lower Drug Prices and Reduce Out-of-Pocket Costs (July 16, 2018); Prepared Statement of Markus H. Meier, Acting Director, Bureau of Competition, Federal Trade Commission before the U.S. House of Representatives, Judiciary Committee, Subcommittee on Regulatory Reform, Commercial and Antitrust Laws, on "Antitrust Concerns and the FDA Approval Process" (July 27, 2017).

12 *See* Commissioner Christine S. Wilson, Oral Statement before Senate Committee on Commerce, Science & Transportation, Subcommittee on Consumer Protection, Product Safety, Insurance, & Data Protection (Nov. 27, 2018).

- **Challenges Novel Anticompetitive Strategies As They Arise:** Earlier this year the Commission challenged and settled a case against Reckitt Benckiser Group plc alleging that Reckitt introduced a film version of Suboxone, which treats opioid addiction, and pushed the market to use the film version rather than the existing tablet version that was about to face generic competition.[13] The complaint alleged that Reckitt pushed the market toward the film and away from the tablets by claiming the film was safer than tablets while having no data to back up the claim and significantly raising the price of the tablet when the film was costlier to make. Under the terms of the settlement, Reckitt was required to contribute $50 million to a fund to be distributed to those who were overcharged.[14]

- **Informs Courts of Relevant Competition Principles and Policies:** The Commission has filed briefs as amicus curiae in cases involving patent litigation settlements,[15] REMS and restricted distribution systems,[16] and product hopping.[17]

This list of actions by the FTC is by no means exhaustive.[18] But the message is clear — the FTC uses the full force and weight of its authority to protect consumers from unlawful conduct that increases prices and reduces innovation in this important sector of our economy.

Notwithstanding the Commission's valiant efforts, there are many factors that contribute to increasing drug prices but that are not cognizable under the antitrust laws, and therefore that the FTC does not have the legal authority to fix. Even if the FTC and other government enforcers did

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13 *See* Joint Motion for Entry of Stipulated Order for Permanent Injunction and Equitable Monetary Relief, FTC v. Reckitt Benckiser Group, PLC, No. 1:19-cv-00028 (W.D. Va. filed July 11, 2019).

14 I was recused from this enforcement action because, before joining the Commission, I represented a generic drug company before the FTC and FDA challenging this anticompetitive conduct.

15 *See, e.g.*, Br. of *amicus curiae* Federal Trade Commission in Support of Plaintiffs-Appellants, *In re* Lamictal Direct Purchaser Antitrust Litigation, No. 2:12-cv-995, (3d Cir. filed Apr. 28, 2014) (explaining that a commitment not to introduce an authorized generic product is the type of settlement subject to antitrust scrutiny); Supp. Br. of *amicus curiae* Federal Trade Commission in Support of Plaintiffs-Appellants, *In re* Effexor XR Antitrust Litig., No. 3:11-cv-05479 (3d Cir. filed Mar. 17, 2016) (explaining that litigation settlements among private parties are private commercial agreements and are not exempt from antitrust scrutiny under the *Noerr* doctrine).

16 *See, e.g.*, Br. of *amicus curiae* Federal Trade Commission, Mylan Pharmaceuticals, Inc. v. Celgene, No. 2:14-cv-2094 (D.N.J. filed June 17, 2014) (explaining that a monopolist's refusal to sell to potential competitors may, under certain limited circumstances, violate Section 2 of the Sherman Act and that a brand name drug manufacturer's patents do not reach activities undertaken in connection with bioequivalence testing).

17 *See* Br. of *amicus curiae* Federal Trade Commission, Mylan Pharmaceuticals, Inc. v. Warner Chilcott Public Ltd. Co., No. 12-cv-3824 (E.D. Pa. filed Nov. 21, 2012) (explaining that minor, non-therapeutic changes to a branded pharmaceutical product that harm generic competition can constitute exclusionary conduct that violates U.S. antitrust laws).

18 For a complete review of the Commission's ongoing and extensive efforts to combat anticompetitive mergers and unlawful conduct in the pharmaceutical industry, *see* Markus H. Meier, Bradley S. Albert, & Kara Monahan, Overview of FTC Actions in Pharmaceutical Products and Distribution (Sept. 2019), available at https://www.ftc.gov/system/files/attachments/competition-policy-guidance/20190930_overview_pharma_final.pdf.

their job flawlessly (and our "retrospective" reviews of our past work suggests we do quite well), pharmaceutical prices would still rise for many other reasons. For example, last year the Trump Administration released two reports identifying various market imperfections in health care markets, including prescription drug markets, and various regulatory and legislative reforms that would increase consumer choice and provider competition.[19] Similarly, former FDA Administrator Scott Gottlieb has identified several flaws in the market for biosimilars – generic biologic medicines – that he believes require Congressional action.[20] And Professors David Hyman (also a former FTC Special Counsel) and Charles Silver have identified a host of other legal and regulatory factors that increase drug prices,[21] including FDA delays in processing generic applications and a Medicare system pursuant to which the government purchases one- third of all retail drugs but is barred from negotiating the prices that it pays.[22]

There is broad concern about prescription drug price levels, and I share those concerns. But here, Commission staff conducted a thorough investigation and found evidence that the acquisition of Celgene by BMS would, if not addressed, diminish competition in one relevant market. Commission staff then negotiated a record-breaking consent agreement that replaces the competition otherwise lost because of the merger by divesting all of Celgene's relevant products and assets to a new and robust competitor. Rather than asserting that staff should have found something – anything – more to justify asking a court to block the transaction, we should recognize the limited authority we have been granted by Congress and encourage other responsible governmental actors to fix the many problems in this sector that lie beyond our jurisdiction.

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19 U.S. DEP'T OF HEALTH AND HUMAN SERVS., AMERICAN PATIENTS FIRST: A TRUMP ADMINISTRATION BLUEPRINT TO LOWER DRUG PRICES AND REDUCE OUT-OF-POCKET COSTS (May 2018), *available at* https://www.hhs.gov/sites/default/files/AmericanPatientsFirst.pdf; U.S. DEP'T OF HEALTH AND HUMAN SERVS., U.S. DEP'T OF THE TREASURY, & U.S. DEP'T OF LABOR, REFORMING AMERICA'S HEALTHCARE SYSTEM THROUGH CHOICE AND COMPETITION 63-67 (2018), *available at* https://www.hhs.gov/sites/default/files/Reforming-Americas-Healthcare-System-Through-Choice-and-Competition.pdf (discussing, *e.g.*, the use of "any-willing-provider" laws in the context of drug prescription plans and Medicare Part D). FTC staff consulted with HHS on the latter report. *See id.* at 3 ("Executive Order 13813, … requires the Secretary of Health and Human Services (HHS), in consultation with the secretaries of the Treasury and Labor and the Federal Trade Commission, to provide a report to the President.").

20 Scott Gottlieb, Op-Ed, *Don't Give Up on Biosimilars—Congress Can Give Them a Boost*, WALL ST. J., Aug. 25, 2019, https://www.wsj.com/articles/dont-give-up-on-biosimilarscongress-can-give-them-a-boost-11566755042

21 *See, e.g.*, Charles Silver & David A. Hyman, *Here's a Plan to Fight High Drug Prices that Could Unite Libertarians and Socialists*, VOX.COM, June 21, 2018, https://www.vox.com/the-big-idea/2018/6/21/17486128/prescription-drug-prices-monopolies-epipen-shkreli-sanders-patents-prizes; *see also* Statement of Commissioner Rebecca Kelly Slaughter, *supra* note 1, at 2 n.10 (citing Silver & Hyman approvingly).

22 *See* SILVER & HYMAN, *supra* note 3, at 53-60.

ANALYSIS OF CONSENT ORDERS TO AID PUBLIC COMMENT

INTRODUCTION

The Federal Trade Commission ("Commission") has accepted, subject to final approval, an Agreement Containing Consent Orders ("Consent Agreement") from Bristol-Myers Squibb Company ("BMS") and Celgene Corporation ("Celgene") designed to remedy the anticompetitive effects resulting from BMS's proposed acquisition of Celgene. The proposed Decision and Order ("Order") contained in the Consent Agreement requires Celgene to divest all rights and assets related to its Otezla business to Amgen, Inc. ("Amgen").

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

Pursuant to an Agreement and Plan of Merger dated as of January 2, 2019, BMS plans to acquire all of the voting securities of Celgene in a cash and stock transaction with an equity value of approximately $74 billion (the "Acquisition"). The Commission's Complaint alleges that the proposed Acquisition, if consummated, would violate Section 7 of the Clayton Act, as amended, 15 U.S.C. § 18, and Section 5 of the Federal Trade Commission Act, as amended, 15 U.S.C. § 45, by substantially lessening competition in the U.S. market for oral products to treat moderate-to-severe psoriasis. The proposed Consent Agreement will remedy the alleged violations by preserving the competition that otherwise would be lost in this market as a result of the proposed Acquisition.

THE PARTIES

Headquartered in New York City, BMS researches, develops, manufactures, and sells prescription pharmaceutical products and biologic products in several therapeutic areas, including oncology, cardiology, virology, and inflammatory diseases. Among other products, BMS is developing an oral product to treat moderate-to-severe psoriasis. Like BMS, Celgene researches, develops, manufactures and sells prescription pharmaceutical products in the United States. Celgene markets eight products, including an oral treatment for moderate-to-severe psoriasis.

THE RELEVANT PRODUCT AND STRUCTURE OF THE MARKET

Psoriasis is a chronic skin disease caused by an overactive immune system. The disease causes skin cells to multiply faster than normal and leads to a build-up of cells on the skin surface, forming bumpy red patches that are covered with white scales, known as plaques. The plaques can appear anywhere on the body, although they are most commonly found on the scalp, elbows, knees, and lower back. The severity of psoriasis (mild, moderate, or severe) is determined based upon the percentage of body surface area affected and the parts of the body that are affected. Typically, mild psoriasis covers less than 3 percent of the body, moderate psoriasis covers 3 to 10 percent of the body and severe psoriasis covers more than 10 percent of the body.

When deciding how to treat psoriasis, dermatologists typically evaluate the severity of the disease, any risk factors or contraindications for the patient, and the patient's preferences. Dermatologists consider efficacy data, safety data, and side effect profile of each product, as well as mode of administration to select the appropriate treatment course for their patients. While many injectable and infused products are approved to treat moderate-to-severe psoriasis, a number of patients object to such injections or find them inconvenient. For those patients, dermatologists often select an oral product.

Celgene's apremilast, marketed under the brand name Otezla, is a phosphodiesterase 4 inhibitor. Otezla is the most popular oral product approved to treat moderate-to-severe psoriasis in the United States. Several older oral generic products, including methotrexate and acitretin, are approved by the U.S. Food and Drug Administration ("FDA") to treat psoriasis that does not respond to light, topical agents, and other forms of therapy. These drugs are still occasionally used in the treatment of psoriasis, but most doctors have moved to prescribing newer agents with better efficacy, better safety, or a more favorable side effect profile for patients with moderate- to-severe psoriasis who desire an oral treatment. BMS is developing BMS 986165, an oral, selective tyrosine kinase 2 inhibitor that is the most advanced oral treatment in development for moderate-to-severe psoriasis.

THE RELEVANT GEOGRAPHIC MARKET

The United States is the relevant geographic market in which to assess the competitive effects of the proposed Acquisition. Oral products to treat moderate-to-severe psoriasis are prescription pharmaceutical products and regulated by FDA. As such, products sold outside the United States, but not approved for sale in the United States, do not provide viable competitive alternatives for U.S. consumers.

COMPETITIVE EFFECTS OF THE ACQUISITION

The proposed Acquisition would likely result in substantial competitive harm to consumers in the market for oral products to treat moderate-to-severe psoriasis. Celgene is currently the market leader and BMS would likely be the next entrant into the market. Upon entry, BMS 986165 likely will compete directly with, and take sales from, Otezla.

ENTRY CONDITIONS

Entry in the relevant market would not be timely, likely, or sufficient in magnitude, character, and scope to deter or counteract the anticompetitive effects of the proposed Acquisition. New entry would require significant investment of time and money for product research and development, regulatory approval by the FDA, developing clinical history supporting the long-term efficacy of the product, and establishing a U.S. sales and service infrastructure. Such development efforts are difficult, time-consuming, and expensive, and often fail to result in a competitive product reaching the market.

THE CONSENT AGREEMENT

The Consent Agreement eliminates the competitive concerns raised by the proposed Acquisition by requiring BMS and Celgene to divest Celgene's worldwide Otezla business, including its regulatory approvals, intellectual property, contracts, and inventory to Amgen.[1] BMS and Celgene also must transfer all confidential business information, research and development information, regulatory, formulation, and manufacturing reports related to the divested products, as well as provide access to employees who possess or are able to identify such information. Additionally, to ensure that the divestiture is successful and to maintain continuity of supply, the proposed Order requires BMS and Celgene to supply Amgen with Otezla for a limited time while Amgen establishes its own manufacturing capability. The provisions of the Consent Agreement ensure that Amgen becomes an independent, viable, and effective competitor in the U.S. market.

Founded in 1980 and headquartered in Thousand Oaks, California, Amgen discovers, develops, manufactures and sells innovative human pharmaceutical and biologic products.

Amgen's existing business includes products that are highly complementary to the divestiture assets. Amgen has the expertise, U.S. sales infrastructure, and resources to restore the competition that otherwise would have been lost due to the proposed Acquisition.

BMS and Celgene must accomplish the divestitures no later than ten days after consummating the proposed Acquisition. If the Commission determines that Amgen is not an acceptable acquirer, or that the manner of the divestitures is not acceptable, the proposed Order requires BMS and Celgene to unwind the sale of rights and assets to Amgen and then divest the affected product to a Commission-approved acquirer within six months of the date the Order becomes final. To ensure compliance with the Order, the Commission has agreed to appoint a Monitor to ensure that BMS and Celgene comply with all of their obligations pursuant to the Consent Agreement and to keep the Commission informed about the status of the transfer of the Otezla rights and assets to Amgen. The proposed Order further allows the Commission to appoint a trustee in the event that BMS and Celgene fail to divest the products as required.

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 Order or to modify its terms in any way.

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1 News reports have suggested that the combined BMS/Celgene will be allowed to retain BMS's marketed cancer drug, Opdivo, and divest Celgene's development-stage cancer drug, tislelizumab. *See* Alaric Dearment, *BeiGene regains global rights to checkpoint inhibitor from Celgene*, MEDCITYNEWS (June 18, 2019), https://medcitynews.com/2019/06/beigene-regains-global-rights-to-checkpoint-inhibitor-from-celgene/. However, Celgene returned the rights to tislelizumab to BeiGene in June, eliminating the potential future overlap between Opdivo and tislelizumab.

Complaint

IN THE MATTER OF

DCR WORKFORCE, INC.

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

Docket No. C-4698; File No. 182 3188
Complaint, January 13, 2020 – Decision, January 13, 2020

This consent order addresses DCR Workforce, Inc.'s violation of Section 5 of the Federal Trade Commission Act by stating it complied with the EU-U.S. Privacy Shield Framework when it was not a current participant. The complaint alleges that Respondent obtained the Privacy Shield certification through the Department of Commerce in January 2017, that certification lapsed by February 2018, but continued to claim that it participates in the EU-U.S. Privacy Shield framework after its certification lapsed. Under the order Respondent must not misrepresent in any manner the extent to which Respondent is a participant in any privacy or security program sponsored by a government or any self-regulatory or standard-setting organization.

Participants

For the *Commission*: *Monique F. Einhorn* and *Robin Wetherill.*

For the *Respondents*: *Andrew N. Cove, Cove Law, P.A.*.

COMPLAINT

The Federal Trade Commission ("FTC"), having reason to believe that DCR Workforce, 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 DCR Workforce, Inc. is a Florida corporation with its principal office or place of business at 7795 NW Beacon Square Boulevard, Suite 201, Boca Raton, FL 33487.

2. Respondent provides workforce management software.

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, https://www.dcrworkforce.com/privacy-policy.html, privacy policies and statements about its practices, including statements related to its participation in the EU-U.S. Privacy Shield framework agreed upon by the U.S. government and the European Commission.

Privacy Shield

5. The EU-U.S. Privacy Shield framework ("Privacy Shield") was designed by the U.S. Department of Commerce ("Commerce") and the European Commission to provide a

mechanism for U.S. companies to transfer personal data outside of the EU that is consistent with the requirements of the European Union Directive on Data Protection. Enacted in 1995, the Directive sets forth EU requirements for privacy and the protection of personal data. Among other things, it requires EU Member States to implement legislation that prohibits the transfer of personal data outside the EU, with exceptions, unless the European Commission 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, Commerce and the European Commission negotiated the EU-U.S. Privacy Shield framework, which went into effect in July 2016. The EU-U.S. Privacy Shield framework allows companies to transfer personal data lawfully from the EU to the United States. To join the EU-U.S. Privacy Shield framework, a company must self-certify to Commerce that it complies with the Privacy Shield Principles and related requirements that have been deemed to meet the EU's adequacy standard.

7. Companies under the jurisdiction of the FTC, as well as the U.S. Department of Transportation, are eligible to join the EU-U.S. Privacy Shield framework. A company under the FTC's jurisdiction that claims it has self-certified to the Privacy Shield Principles, but failed to self-certify to Commerce, or failed to comply with the Privacy Shield Principles 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, https://www.privacyshield.gov/welcome, where it posts the names of companies that have self-certified to the EU-U.S. Privacy Shield framework. The listing of companies, https://www.privacyshield.gov/list, indicates whether the company's self-certification is current.

9. Respondent has disseminated or caused to be disseminated privacy policies and statements on the https://www.dcrworkforce.com/privacy-policy.html website, including, but not limited to, the following statements:

> **Adherence to International Privacy Laws**
> DCR Workforce complies with the EU-U.S. Privacy Shield Framework as set forth by the U.S. Department of Commerce regarding the collection, use, and retention of personal information transferred from the European Union to the United States. DCR Workforce has certified to the Department of Commerce that it adheres to the Privacy Shield Principles. If there is any conflict between the terms in this privacy policy and the Privacy Shield Principles, the Privacy Shield Principles shall govern. To learn more about the Privacy Shield program, and to view our certification, please visit https://www.privacyshield.gov/ (http://www.privacyshield.gov/)

10. Although Respondent obtained Privacy Shield certification in January 2017, that certification lapsed by February 2018. After allowing its certification to lapse, Respondent continued to claim, as indicated in paragraph 9, that it participates in the EU-U.S. Privacy Shield framework.

Count 1-Privacy Misrepresentation

11. As described in Paragraph 9, Respondent represents, directly or indirectly, expressly or by implication, that it is a current participant in the EU-U.S Privacy Shield framework.

12. In fact, as described in Paragraph 10, Respondent was not a current participant in the EU-U.S. Privacy Shield framework. Therefore, the representation set forth in Paragraph 11 is false or misleading.

Violations of Section 5 of the FTC Act

13. 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 thirteenth day of January, 2020, has issued this complaint against Respondent.

By the Commission.

DECISION

The Federal Trade Commission ("Commission") initiated an investigation of certain acts and practices of the Respondent named above in the caption. The Commission's Bureau of Consumer Protection ("BCP") prepared and furnished to Respondent a draft Complaint. BCP proposed to present the draft Complaint to the Commission for its consideration. If issued by the Commission, the draft Complaint would charge Respondent with violation of the Federal Trade Commission Act.

Respondent and BCP thereafter executed an Agreement Containing Consent Order ("Consent Agreement"). The Consent Agreement includes: 1) statements by Respondent that it neither admits nor denies any of the allegations in the Complaint, except as specifically stated in this Decision and Order, and that only for purposes of this action, it admits the facts necessary to establish jurisdiction; and 2) waivers and other provisions as required by the Commission's Rules.

The Commission considered the matter and determined that it had reason to believe that Respondent has violated the Federal Trade Commission Act, and that a Complaint should issue stating its charges in that respect. The Commission accepted the executed Consent Agreement and placed it 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 Rule 2.34, the Commission issues its Complaint, makes the following Findings, and issues the following Order:

Findings

1. Respondent DCR Workforce, Inc. is a Florida corporation with its principal office or place of business at 7795 NW Beacon Square Boulevard, Suite 201, Boca Raton, FL 33487.

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

ORDER

Definitions

For purposes of this Order, the following definition applies:

A. "Respondent" means DCR Workforce, Inc., a corporation, and its successors and assigns.

Provisions

I. Prohibition against Misrepresentations about Participation in or Compliance with Privacy Programs

IT IS ORDERED that Respondent and its officers, agents, 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 the advertising, marketing, promotion, offering for sale, or sale of any product or service must 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 a government or any self-regulatory or standard-setting organization, including but not limited to the EU-U.S. Privacy Shield framework and the Swiss-U.S. Privacy Shield framework.

II. Acknowledgments of the Order

IT IS FURTHER ORDERED that Respondent obtain acknowledgments of receipt of this Order:

A. Respondent, within ten (10) days after the effective date of this Order, must submit to the Commission an acknowledgment of receipt of this Order.

B. For twenty (20) years after the issuance date of this Order, Respondent must deliver a copy of this Order to: (1) all principals, officers, directors, and LLC managers and members; (2) all employees having managerial responsibilities for conduct related to the subject matter of the Order and all agents and representatives who participate in conduct related to the subject matter of the Order; and (3) any

business entity resulting from any change in structure as set forth in the Provision titled Compliance Report and Notices. Delivery must occur within ten (10) days after the effective date of this Order for current personnel. For all others, delivery must occur before they assume their responsibilities.

C. From each individual or entity to which Respondent delivered a copy of this Order, Respondent must obtain, within thirty (30) days, a signed and dated acknowledgment of receipt of this Order.

III. Compliance Report and Notices

IT IS FURTHER ORDERED that Respondent make timely submissions to the Commission:

A. Sixty (60) days after the issuance date of this Order, Respondent must submit a compliance report, sworn under penalty of perjury, in which Respondent must: (a) identify the primary physical, postal, and email address and telephone number, as designated points of contact, which representatives of the Commission, may use to communicate with Respondent; (b) identify all of Respondent's businesses by all of their names, telephone numbers, and physical, postal, email, and Internet addresses; (c) describe the activities of each business; (d) describe in detail whether and how Respondent is in compliance with each Provision of this Order; and (e) provide a copy of each Acknowledgment of the Order obtained pursuant to this Order, unless previously submitted to the Commission.

B. Respondent must submit a compliance notice, sworn under penalty of perjury, within fourteen (14) days of any change in the following: (1) any designated point of contact; or (2) the structure of Respondent or any entity that Respondent has any ownership interest in or controls directly or indirectly that may affect compliance obligations arising under this Order, including: creation, merger, sale, or dissolution of the entity or any subsidiary, parent, or affiliate that engages in any acts or practices subject to this Order.

C. Respondent must submit notice of the filing of any bankruptcy petition, insolvency proceeding, or similar proceeding by or against Respondent within fourteen (14) days of its filing.

D. Any submission to the Commission required by this Order to be sworn under penalty of perjury must be true and accurate and comply with 28 U.S.C. § 1746, such as by concluding: "I declare under penalty of perjury under the laws of the United States of America that the foregoing is true and correct. Executed on: _____" and supplying the date, signatory's full name, title (if applicable), and signature.

E. Unless otherwise directed by a Commission representative in writing, all submissions to the Commission pursuant to this Order must 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 *DCR Workforce, Inc*., FTC File No. 182 3188, Docket No. C-4698.

IV. Recordkeeping

IT IS FURTHER ORDERED that Respondent must create certain records for twenty (20) years after the issuance date of the Order, and retain each such record for five (5) years. Specifically, Respondent must create and retain the following records:

A. accounting records showing the revenues from all goods or services sold;

B. personnel records showing, for each person providing services, whether as an employee or otherwise, that person's: name; addresses; telephone numbers; job title or position; dates of service; and (if applicable) the reason for termination;

C. all records necessary to demonstrate full compliance with each provision of this Order, including all submissions to the Commission; and

D. a copy of each widely disseminated representation by Respondent making any representation subject to this Order, and all materials that were relied upon in making the representation.

V. Compliance Monitoring

IT IS FURTHER ORDERED that, for the purpose of monitoring Respondent's compliance with this Order:

A. Within ten (10) days of receipt of a written request from a representative of the Commission, Respondent must: submit additional compliance reports or other requested information, which must be sworn under penalty of perjury, and produce records for inspection and copying.

B. For matters concerning this Order, representatives of the Commission are authorized to communicate directly with Respondent. Respondent must permit representatives of the Commission to interview anyone affiliated with Respondent who has agreed to such an interview. The interviewee may have counsel present.

C. The Commission may use all other lawful means, including posing through its representatives as consumers, suppliers, or other individuals or entities, to Respondent or any individual or entity affiliated with Respondent, without the necessity of identification or prior notice. Nothing in this Order limits the

Commission's lawful use of compulsory process, pursuant to Sections 9 and 20 of the FTC Act, 15 U.S.C. §§ 49, 57b-1.

VI. Order Effective Dates

IT IS FURTHER ORDERED that this Order is final and effective upon the date of its publication on the Commission's website (ftc.gov) as a final order. This Order will terminate January 13, 2040, or twenty (20) years from the most recent date that the United States or the Commission files a complaint (with or without an accompanying settlement) 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 Provision 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 Provision.

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 Provision as though the complaint had never been filed, except that the Order will not terminate between the date such complaint is filed and the later of the deadline for appealing such dismissal or ruling and the date such dismissal or ruling is upheld on appeal.

By the Commission.

ANALYSIS OF CONSENT ORDER TO AID PUBLIC COMMENT

The Federal Trade Commission ("Commission") has accepted, subject to final approval, an agreement containing a consent order from DCR Workforce, Inc. ("DCR Workforce" or "Respondent").

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

Analysis to Aid Public Comment

This matter concerns alleged false or misleading representations that DCR Workforce made concerning its participation in the Privacy Shield framework agreed upon by the U.S. and the European Union ("EU"). The Privacy Shield framework allows U.S. companies to receive personal data transferred from the EU without violating EU. The frameworks consist of a set of principles and related requirements that have been deemed by the European Commission as providing "adequate" privacy protection. The principles include notice; choice; accountability for onward transfer; security; data integrity and purpose limitation; access; and recourse, enforcement, and liability. The related requirements include, for example, securing an independent recourse mechanism to handle any disputes about how the company handles information about EU citizens.

To participate in the frameworks, a company must comply with the Privacy Shield principles and self-certify that compliance to the U.S. Department of Commerce ("Commerce"). Commerce reviews companies' self-certification applications and maintains a public website, https://www.privacyshield.gov/list, where it posts the names of companies who have completed the requirements for certification. Companies are required to recertify every year in order to continue benefitting from Privacy Shield.

DCR Workforce provides workforce management software. According to the Commission's complaint, DCR Workforce published on its website, http://www.dcrworkforce.com, a privacy policy containing statements related to its participation in Privacy Shield.

The Commission's proposed one-count complaint alleges that Respondent violated Section 5(a) of the Federal Trade Commission Act. Specifically, the proposed complaint alleges that Respondent engaged in a deceptive act or practice by falsely representing that it was a certified participant in the EU-U.S. Shield Framework.

Part I of the proposed order prohibits the company 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 EU-U.S. Privacy Shield framework and the Swiss-U.S. Privacy Shield framework.

Parts II through V of the proposed order are reporting and compliance provisions. Part II requires acknowledgement of the order and dissemination of the order now and in the future to persons with responsibilities relating to the subject matter of the order. Part III ensures notification to the FTC of changes in corporate status and mandates that the company submit an initial compliance report to the FTC. Part IV requires the company to create certain documents relating to its compliance with the order for twenty (20) years and to retain those documents for a five-year period. Part V mandates that the company make available to the FTC information or subsequent compliance reports, as requested.

Part VI is a provision "sun-setting" 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

214 TECHNOLOGIES, INC.
D/B/A
TRUEFACE.AI

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

Docket No. C-4699; File No.182 3193
Complaint, January 13, 2020 – Decision, January 13, 2020

This consent order addresses 214 Technologies, Inc.'s, a corporation also doing business as Trueface.ai, violation of Section 5 of the Federal Trade Commission Act by stating it participated in the EU-U.S. Privacy Shield when it was not certified to participate. The complaint alleges that Respondent disseminated false and misleading privacy policies and statements from March 2018 until October 2018 regarding its participation in the EU-U.S. Privacy Shield framework. Respondent was never certified to participate in the EU-U.S. Privacy Shield framework. Under the order Respondent must not misrepresent the extent to which Respondent is a member of any privacy or security program sponsored by a government or any self-regulatory or standard-setting organization.

Participants

For the *Commission*: *Monique F. Einhorn* and *Robin Wetherill.*

For the *Respondents*: *Kevin Vela and R. Jeffrey Villalobos, Vela Wood Law.*

COMPLAINT

The Federal Trade Commission ("FTC"), having reason to believe that 214 Technologies, Inc., a corporation also doing business as Trueface.ai, 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 214 Technologies, Inc. is a Delaware corporation also doing business as Trueface.ai with its principal office or place of business at 520 Broadway, Santa Monica, CA 90401.

2. Respondent provides face recognition and digital identity verification services.

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 set forth on its website, https://www.trueface.ai/privacy, privacy policies and statements about its practices, including statements related to its participation in the EU-U.S. Privacy Shield framework agreed upon by the U.S. government and the European Commission.

5. In fact, Respondent has not been certified to participate in the EU-U.S. Privacy Shield framework.

Privacy Shield

6. The EU-U.S. Privacy Shield framework ("Privacy Shield") was designed by the U.S. Department of Commerce ("Commerce") and the European Commission to provide a mechanism for U.S. companies to transfer personal data outside of the EU that is consistent with the requirements of the European Union Directive on Data Protection. Enacted in 1995, the Directive sets forth EU requirements for privacy and the protection of personal data. Among other things, it requires EU Member States to implement legislation that prohibits the transfer of personal data outside the EU, with exceptions, unless the European Commission 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.

7. To satisfy the EU adequacy standard for certain commercial transfers, Commerce and the European Commission negotiated the EU-U.S. Privacy Shield framework, which went into effect in July 2016. The EU-U.S. Privacy Shield framework allows companies to transfer personal data lawfully from the EU to the United States. To join the EU-U.S. Privacy Shield framework, a company must self-certify to Commerce that it complies with the Privacy Shield Principles and related requirements that have been deemed to meet the EU's adequacy standard.

8. Companies under the jurisdiction of the FTC, as well as the U.S. Department of Transportation, are eligible to join the EU-U.S. Privacy Shield framework. A company under the FTC's jurisdiction that claims it has self-certified to the Privacy Shield 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.

9. Commerce maintains a public website, https://www.privacyshield.gov/welcome, where it posts the names of companies that have self-certified to the EU-U.S. Privacy Shield framework. The listing of companies, https://www.privacyshield.gov/list, indicates whether the company's self-certification is current.

10. From approximately March 2018 until October 2018, Respondent disseminated or caused to be disseminated privacy policies and statements on the https://www.trueface.ai/privacy website, including, but not limited to, the following statements:

> **Privacy Shield**
> Trueface.ai complies with the EU-U.S. Privacy Shield Framework as set forth by the U.S. Department of Commerce regarding the collection, use, and retention of personal information transferred from the European Union to the United States. Trueface.ai has certified to the Department of Commerce that it adheres to the Privacy Shield Principles. If there is any conflict between the terms in this privacy policy and the Privacy Shield Principles, the Privacy Shield Principles shall govern. To learn more about the Privacy Shield program, and to view our certification, please visit the Privacy Shield website (https://www.privacyshield.gov).

> In compliance with the Privacy Shield Principles, Trueface.ai commits to resolve complaints about our collection or use of your personal information. EU individuals with inquiries or complaints regarding our Privacy Shield policy should first contact Trueface.ai at: support@trueface.ai.
>
> "Trueface.ai has further committed to refer unresolved Privacy Shield complaints to EU Data Protection Authorities, an alternative dispute resolution provider located in the EU. If you do not receive timely acknowledgment of your complaint from us, or if we have not addressed your complaint to your satisfaction, please contact or visit here (http://ec.europa.eu/newsroom/article29/item-detail.cfm?item_id=612080) for more information or to file a complaint. The services of the EU Data Protection Authorities are provided at no cost to you.

11. Although Respondent initiated an application to Commerce for Privacy Shield certification in January 2018, it did not complete the steps necessary to participate in the EU-U.S. Privacy Shield framework and continued to make the statements described in Paragraph 10 in its privacy policy. Therefore, the representation set forth in Paragraph 10 was false and misleading.

Count 1-Privacy Misrepresentation

12. As described in Paragraph 10, Respondent represented, directly or indirectly, expressly or by implication, that it was a participant in the EU-U.S Privacy Shield framework.

13. In fact, as described in Paragraph 11, Respondent was never certified to participate in the EU-U.S. Privacy Shield framework. Therefore, the representation set forth in Paragraph 10 was false or misleading.

Violations of Section 5 of the FTC Act

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 thirteenth day of January 2020, has issued this complaint against Respondent.

By the Commission.

DECISION

The Federal Trade Commission ("Commission") initiated an investigation of certain acts and practices of the Respondent named above in the caption. The Commission's Bureau of Consumer Protection ("BCP") prepared and furnished to Respondent a draft Complaint. BCP proposed to present the draft Complaint to the Commission for its consideration. If issued by the Commission, the draft Complaint would charge Respondent with violation of the Federal Trade Commission Act.

Respondent and BCP thereafter executed an Agreement Containing Consent Order ("Consent Agreement"). The Consent Agreement includes: 1) statements by Respondent that it neither admits nor denies any of the allegations in the Complaint, except as specifically stated in this Decision and Order, and that only for purposes of this action, it admits the facts necessary to establish jurisdiction; and 2) waivers and other provisions as required by the Commission's Rules.

The Commission considered the matter and determined that it had reason to believe that Respondent has violated the Federal Trade Commission Act, and that a Complaint should issue stating its charges in that respect. The Commission accepted the executed Consent Agreement and placed it 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 Rule 2.34, the Commission issues its Complaint, makes the following Findings, and issues the following Order:

Findings

1. Respondent 214 Technologies, Inc. is a Delaware corporation also doing business as Trueface.ai with its principal office or place of business at 520 Broadway, Santa Monica, CA 90401.

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

ORDER

Definitions

For purposes of this Order, the following definition applies:

A. "Respondent" means 214 Technologies, Inc., also doing business as Trueface.ai, a corporation and its successors and assigns.

Provisions

I. Prohibition against Misrepresentations about Participation in or Compliance with Privacy Programs

IT IS ORDERED that Respondent and its officers, agents, 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 the advertising, marketing, promotion, offering for sale, or sale of any product or service must 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 a government or any self-regulatory or standard-setting organization, including but not limited to the EU-U.S. Privacy Shield framework and the Swiss-U.S. Privacy Shield framework.

II. Acknowledgments of the Order

IT IS FURTHER ORDERED that Respondent obtain acknowledgments of receipt of this Order:

A. Respondent, within ten (10) days after the effective date of this Order, must submit to the Commission an acknowledgment of receipt of this Order.

B. For five (5) years after the issuance date of this Order, Respondent must deliver a copy of this Order to: (1) all principals, officers, directors, and LLC managers and members; (2) all employees having managerial responsibilities for conduct related to the subject matter of the Order and all agents and representatives who participate in conduct related to the subject matter of the Order; and (3) any business entity resulting from any change in structure as set forth in the Provision titled Compliance Report and Notices. Delivery must occur within ten (10) days after the effective date of this Order for current personnel. For all others, delivery must occur before they assume their responsibilities.

C. From each individual or entity to which Respondent delivered a copy of this Order, Respondent must obtain, within thirty (30) days, a signed and dated acknowledgment of receipt of this Order.

III. Compliance Report and Notices

IT IS FURTHER ORDERED that Respondent make timely submissions to the Commission:

A. Sixty (60) days after the issuance date of this Order, Respondent must submit a compliance report, sworn under penalty of perjury, in which Respondent must: (a) identify the primary physical, postal, and email address and telephone number, as designated points of contact, which representatives of the Commission, may use to

communicate with Respondent; (b) identify all of Respondent's businesses by all of their names, telephone numbers, and physical, postal, email, and Internet addresses; (c) describe the activities of each business; (d) describe in detail whether and how Respondent is in compliance with each Provision of this Order; and (e) provide a copy of each Acknowledgment of the Order obtained pursuant to this Order, unless previously submitted to the Commission.

B. Respondent must submit a compliance notice, sworn under penalty of perjury, within fourteen (14) days of any change in the following: (1) any designated point of contact; or (2) the structure of Respondent or any entity that Respondent has any ownership interest in or controls directly or indirectly that may affect compliance obligations arising under this Order, including: creation, merger, sale, or dissolution of the entity or any subsidiary, parent, or affiliate that engages in any acts or practices subject to this Order.

C. Respondent must submit notice of the filing of any bankruptcy petition, insolvency proceeding, or similar proceeding by or against Respondent within fourteen (14) days of its filing.

D. Any submission to the Commission required by this Order to be sworn under penalty of perjury must be true and accurate and comply with 28 U.S.C. § 1746, such as by concluding: "I declare under penalty of perjury under the laws of the United States of America that the foregoing is true and correct. Executed on: _____" and supplying the date, signatory's full name, title (if applicable), and signature.

E. Unless otherwise directed by a Commission representative in writing, all submissions to the Commission pursuant to this Order must 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 *214 Technologies, Inc*., FTC File No. 1823193, Docket No. C-4699.

IV. Recordkeeping

IT IS FURTHER ORDERED that Respondent must create certain records for ten (10) years after the issuance date of the Order, and retain each such record for five (5) years. Specifically, Respondent must create and retain the following records:

A. personnel records showing, for each person providing services, whether as an employee or otherwise, that person's: name; addresses; telephone numbers; job title or position; dates of service; and (if applicable) the reason for termination;

B. all records necessary to demonstrate full compliance with each provision of this Order, including all submissions to the Commission; and

C. a copy of each widely disseminated representation by Respondent making any representation subject to this Order, and all materials that were relied upon in making the representation.

V. Compliance Monitoring

IT IS FURTHER ORDERED that, for the purpose of monitoring Respondent's compliance with this Order:

A. Within ten (10) days of receipt of a written request from a representative of the Commission, Respondent must: submit additional compliance reports or other requested information, which must be sworn under penalty of perjury, and produce records for inspection and copying.

B. For matters concerning this Order, representatives of the Commission are authorized to communicate directly with Respondent. Respondent must permit representatives of the Commission to interview anyone affiliated with Respondent who has agreed to such an interview. The interviewee may have counsel present.

C. The Commission may use all other lawful means, including posing through its representatives as consumers, suppliers, or other individuals or entities, to Respondent or any individual or entity affiliated with Respondent, without the necessity of identification or prior notice. Nothing in this Order limits the Commission's lawful use of compulsory process, pursuant to Sections 9 and 20 of the FTC Act, 15 U.S.C. §§ 49, 57b-1.

VI. Order Effective Dates

IT IS FURTHER ORDERED that this Order is final and effective upon the date of its publication on the Commission's website (ftc.gov) as a final order. This Order will terminate on January 13, 2040, or twenty (20) years from the most recent date that the United States or the Commission files a complaint (with or without an accompanying settlement) 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 Provision 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 Provision.

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 Provision as though the complaint had

never been filed, except that the Order will not terminate between the date such complaint is filed and the later of the deadline for appealing such dismissal or ruling and the date such dismissal or ruling is upheld on appeal.

By the Commission.

ANALYSIS OF CONSENT ORDER TO AID PUBLIC COMMENT

The Federal Trade Commission ("Commission") has accepted, subject to final approval, an agreement containing a consent order from 214 Technologies, Inc. ("214 Technologies" or "Respondent").

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

This matter concerns alleged false or misleading representations that 214 Technologies made concerning its participation in the Privacy Shield framework agreed upon by the U.S. and the European Union ("EU"). The Privacy Shield framework allows U.S. companies to receive personal data transferred from the EU without violating EU. The frameworks consist of a set of principles and related requirements that have been deemed by the European Commission as providing "adequate" privacy protection. The principles include notice; choice; accountability for onward transfer; security; data integrity and purpose limitation; access; and recourse, enforcement, and liability. The related requirements include, for example, securing an independent recourse mechanism to handle any disputes about how the company handles information about EU citizens.

To participate in the frameworks, a company must comply with the Privacy Shield principles and self-certify that compliance to the U.S. Department of Commerce ("Commerce"). Commerce reviews companies' self-certification applications and maintains a public website, https://www.privacyshield.gov/list, where it posts the names of companies who have completed the requirements for certification. Companies are required to recertify every year in order to continue benefitting from Privacy Shield.

214 Technologies provides face recognition and digital identity verification services. According to the Commission's complaint, 214 Technologies published on its website, http://www.trueface.ai, a privacy policy containing statements related to its participation in Privacy Shield.

Analysis to Aid Public Comment

The Commission's proposed one-count complaint alleges that Respondent violated Section 5(a) of the Federal Trade Commission Act. Specifically, the proposed complaint alleges that Respondent engaged in a deceptive act or practice by falsely representing that it was a certified participant in the EU-U.S. Privacy Shield Framework.

Part I of the proposed order prohibits the company 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 EU-U.S. Privacy Shield framework and the Swiss-U.S. Privacy Shield framework.

Parts II through V of the proposed order are reporting and compliance provisions. Part II requires acknowledgement of the order and dissemination of the order now and in the future to persons with responsibilities relating to the subject matter of the order. Part III ensures notification to the FTC of changes in corporate status and mandates that the company submit an initial compliance report to the FTC. Part IV requires the company to create certain documents relating to its compliance with the order for ten (10) years and to retain those documents for a five-year period. Part V mandates that the company make available to the FTC information or subsequent compliance reports, as requested.

Part VI is a provision "sun-setting" 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

LOTADATA, INC.

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

Docket No. C-4700; File No. 182 3194
Complaint, January 13, 2020 – Decision, January 13, 2020

This consent order addresses LotaData, Inc.'s violation of Section 5 of the Federal Trade Commission Act by stating it participated in the EU-U.S. and the Swiss-U.S. Privacy Shield frameworks when it had not been certified to participate in either. The complaint alleges that Respondent disseminated privacy policies and statements that Defendant complied with the EU-U.S. and the Swiss-U.S. Privacy Shield Framework after it was never certified to participate. Under the order Respondent must not misrepresent the extent to which Respondent participates in any privacy or security program sponsored by government or any self-regulatory or standard-setting organization.

Participants

For the *Commission*: *Monique F. Einhorn* and *Robin Wetherill.*

For the *Respondents*: *Apurva Kumar - CEO, pro se.*

COMPLAINT

The Federal Trade Commission ("FTC"), having reason to believe that LotaData, 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 LotaData, Inc. is a Delaware corporation with its principal office or place of business at 169 11th Street, San Francisco, CA 94103.

2. Respondent provides analysis of mobile users' location data.

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, https://www.lotadata.com/privacy_policy privacy policies and statements about its practices, including statements related to its participation in the EU-U.S. and the Swiss-U.S. Privacy Shield frameworks agreed upon by the U.S. government and the European Commission.

5. In fact, Respondent has not been certified to participate in either the EU-U.S. or the Swiss-U.S. Privacy Shield frameworks.

Privacy Shield

6. The EU-U.S. Privacy Shield framework ("Privacy Shield") was designed by the U.S. Department of Commerce ("Commerce") and the European Commission to provide a mechanism for U.S. companies to transfer personal data outside of the EU that is consistent with the requirements of the European Union Directive on Data Protection. Enacted in 1995, the Directive sets forth EU requirements for privacy and the protection of personal data. Among other things, it requires EU Member States to implement legislation that prohibits the transfer of personal data outside the EU, with exceptions, unless the European Commission 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.

7. To satisfy the EU adequacy standard for certain commercial transfers, Commerce and the European Commission negotiated the EU-U.S. Privacy Shield framework, which went into effect in July 2016. The EU-U.S. Privacy Shield framework allows companies to transfer personal data lawfully from the EU to the United States. To join the EU-U.S. Privacy Shield framework, a company must self-certify to Commerce that it complies with the Privacy Shield Principles and related requirements that have been deemed to meet the EU's adequacy standard.

8. Companies under the jurisdiction of the FTC, as well as the U.S. Department of Transportation, are eligible to join the EU-U.S. Privacy Shield framework. A company under the FTC's jurisdiction that claims it has self-certified to the Privacy Shield 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.

9. The Swiss-U.S. Privacy Shield framework is identical to the EU-U.S. Privacy Shield framework and is consistent with the requirements of the Swiss Federal Act on Data Protection.

10. Commerce maintains a public website, https://www.privacyshield.gov/welcome, where it posts the names of companies that have self-certified to the EU-U.S. and/or the Swiss-U.S.Privacy Shield frameworks. The listing of companies, https://www.privacyshield.gov/list, indicates whether the company's self-certification is current.

11. Respondent has disseminated or caused to be disseminated privacy policies and statements on the https://www.lotadata.com/privacy_policy, website, including, but not limited to, the following statements:

> **Privacy Shield**
> LotaData complies with the EU-U.S. Privacy Shield Framework and the Swiss-U.S. Privacy Shield Framework as set forth by the U.S. Department of Commerce regarding the collection, use, and retention of personal information transferred from the European Union and Switzerland to the United States. LotaData has certified to the Department of Commerce that it adheres to the Privacy Shield Principles. To learn more about the Privacy Shield program, and to view our certification, please visit https://www.privacyshield.gov/.

12. Although Respondent initiated an application to Commerce for Privacy Shield certification in November 2017, it did not complete the steps necessary to participate in either the EU-U.S. or the Swiss-U.S. Privacy Shield frameworks and continued to make the statements described in Paragraph 11 in its privacy policy. Therefore, the representation set forth in Paragraph 11 is false and misleading.

Count 1-Privacy Misrepresentation

13. As described in Paragraph 11, Respondent represents, directly or indirectly, expressly or by implication, that it is a participant in the EU-U.S and the Swiss-U.S. Privacy Shield frameworks.

14. In fact, as described in Paragraph 12, Respondent was never certified to participate in either the EU-U.S. or the Swiss-U.S. Privacy Shield frameworks. Therefore, the representation set forth in Paragraph 11 is false or misleading.

Violations of Section 5 of the FTC Act

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 thirteenth day of January 2020, has issued this complaint against Respondent.

By the Commission.

DECISION

The Federal Trade Commission ("Commission") initiated an investigation of certain acts and practices of the Respondent named above in the caption. The Commission's Bureau of Consumer Protection ("BCP") prepared and furnished to Respondent a draft Complaint. BCP proposed to present the draft Complaint to the Commission for its consideration. If issued by the Commission, the draft Complaint would charge Respondent with violation of the Federal Trade Commission Act.

Respondent and BCP thereafter executed an Agreement Containing Consent Order ("Consent Agreement"). The Consent Agreement includes: 1) statements by Respondent that it neither admits nor denies any of the allegations in the Complaint, except as specifically stated in this Decision and Order, and that only for purposes of this action, it admits the facts necessary to establish jurisdiction; and 2) waivers and other provisions as required by the Commission's Rules.

The Commission considered the matter and determined that it had reason to believe that Respondent has violated the Federal Trade Commission Act, and that a Complaint should issue stating its charges in that respect. The Commission accepted the executed Consent Agreement and placed it 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 Rule 2.34, the Commission issues its Complaint, makes the following Findings, and issues the following Order:

Findings

1. Respondent LotaData, Inc. is a Delaware corporation with its principal office or place of business at 169 11th Street, San Francisco, CA 94103

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

ORDER

Definitions

For purposes of this Order, the following definition applies:

A. "Respondent" means LotaData, Inc., a corporation, and its successors and assigns.

Provisions

I. Prohibition against Misrepresentations about Participation in or Compliance with Privacy Programs

IT IS ORDERED that Respondent and its officers, agents, 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 the advertising, marketing, promotion, offering for sale, or sale of any product or service must 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 a government or any self-regulatory or standard-setting organization, including but not limited to the EU-U.S. Privacy Shield framework and the Swiss-U.S. Privacy Shield framework.

II. Acknowledgments of the Order

IT IS FURTHER ORDERED that Respondent obtain acknowledgments of receipt of this Order:

A. Respondent, within ten (10) days after the effective date of this Order, must submit to the Commission an acknowledgment of receipt of this Order.

B. For five (5) years after the issuance date of this Order, Respondent must deliver a copy of this Order to: (1) all principals, officers, directors, and LLC managers and members; (2) all employees having managerial responsibilities for conduct related to the subject matter of the Order and all agents and representatives who participate in conduct related to the subject matter of the Order; and (3) any business entity resulting from any change in structure as set forth in the Provision titled Compliance Report and Notices. Delivery must occur within ten (10) days after the effective date of this Order for current personnel. For all others, delivery must occur before they assume their responsibilities.

C. From each individual or entity to which Respondent delivered a copy of this Order, Respondent must obtain, within thirty (30) days, a signed and dated acknowledgment of receipt of this Order.

III. Compliance Report and Notices

IT IS FURTHER ORDERED that Respondent make timely submissions to the Commission:

A. Sixty (60) days after the issuance date of this Order, Respondent must submit a compliance report, sworn under penalty of perjury, in which Respondent must: (a) identify the primary physical, postal, and email address and telephone number, as designated points of contact, which representatives of the Commission, may use to communicate with Respondent; (b) identify all of Respondent's businesses by all of their names, telephone numbers, and physical, postal, email, and Internet addresses; (c) describe the activities of each business; (d) describe in detail whether and how Respondent is in compliance with each Provision of this Order; and (e) provide a copy of each Acknowledgment of the Order obtained pursuant to this Order, unless previously submitted to the Commission.

B. Respondent must submit a compliance notice, sworn under penalty of perjury, within fourteen (14) days of any change in the following: (1) any designated point of contact; or (2) the structure of Respondent or any entity that Respondent has any ownership interest in or controls directly or indirectly that may affect compliance obligations arising under this Order, including: creation, merger, sale, or dissolution of the entity or any subsidiary, parent, or affiliate that engages in any acts or practices subject to this Order.

C. Respondent must submit notice of the filing of any bankruptcy petition, insolvency proceeding, or similar proceeding by or against Respondent within fourteen (14) days of its filing.

D. Any submission to the Commission required by this Order to be sworn under penalty of perjury must be true and accurate and comply with 28 U.S.C. § 1746, such as by concluding: "I declare under penalty of perjury under the laws of the United States of America that the foregoing is true and correct. Executed on: _____" and supplying the date, signatory's full name, title (if applicable), and signature.

E. Unless otherwise directed by a Commission representative in writing, all submissions to the Commission pursuant to this Order must 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 *LotaData, Inc*., FTC File No. 1823194, Docket No. C-4700.

IV. Recordkeeping

IT IS FURTHER ORDERED that Respondent must create certain records for ten (10) years after the issuance date of the Order, and retain each such record for five (5) years. Specifically, Respondent must create and retain the following records:

A. personnel records showing, for each person providing services, whether as an employee or otherwise, that person's: name; addresses; telephone numbers; job title or position; dates of service; and (if applicable) the reason for termination;

B. all records necessary to demonstrate full compliance with each provision of this Order, including all submissions to the Commission; and

C. a copy of each widely disseminated representation by Respondent making any representation subject to this Order, and all materials that were relied upon in making the representation.

V. Compliance Monitoring

IT IS FURTHER ORDERED that, for the purpose of monitoring Respondent's compliance with this Order:

A. Within ten (10) days of receipt of a written request from a representative of the Commission, Respondent must: submit additional compliance reports or other requested information, which must be sworn under penalty of perjury, and produce records for inspection and copying.

B. For matters concerning this Order, representatives of the Commission are authorized to communicate directly with Respondent. Respondent must permit representatives of the Commission to interview anyone affiliated with Respondent who has agreed to such an interview. The interviewee may have counsel present.

C. The Commission may use all other lawful means, including posing through its representatives as consumers, suppliers, or other individuals or entities, to Respondent or any individual or entity affiliated with Respondent, without the necessity of identification or prior notice. Nothing in this Order limits the Commission's lawful use of compulsory process, pursuant to Sections 9 and 20 of the FTC Act, 15 U.S.C. §§ 49, 57b-1.

VI. Order Effective Dates

IT IS FURTHER ORDERED that this Order is final and effective upon the date of its publication on the Commission's website (ftc.gov) as a final order. This Order will terminate on January 13, 2040, or twenty (20) years from the most recent date that the United States or the Commission files a complaint (with or without an accompanying settlement) 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 Provision 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 Provision.

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 Provision as though the complaint had never been filed, except that the Order will not terminate between the date such complaint is filed and the later of the deadline for appealing such dismissal or ruling and the date such dismissal or ruling is upheld on appeal.

By the Commission.

ANALYSIS OF CONSENT ORDER TO AID PUBLIC COMMENT

The Federal Trade Commission ("Commission") has accepted, subject to final approval, an agreement containing a consent order from LotaData, Inc. ("LotaData" or "Respondent").

The proposed consent order ("proposed order") has been placed on the public record for thirty (30) days for receipt of comments by interested persons. Comments received during this period will become part of the public record. After thirty (30) days, the Commission will again

review the agreement and the comments received, and will decide whether it should withdraw from the agreement and take appropriate action or make final the agreement's proposed order.

This matter concerns alleged false or misleading representations that LotaData made concerning its participation in the Privacy Shield frameworks agreed upon by the U.S. and, respectively, the European Union ("EU") and the Swiss Federation. The Privacy Shield frameworks allow U.S. companies to receive personal data transferred from the EU and Switzerland without violating EU or Swiss law. The frameworks consist of a set of principles and related requirements that have been deemed by the European Commission and the Swiss authorities as providing "adequate" privacy protection. The principles include notice; choice; accountability for onward transfer; security; data integrity and purpose limitation; access; and recourse, enforcement, and liability. The related requirements include, for example, securing an independent recourse mechanism to handle any disputes about how the company handles information about EU citizens.

To participate in the frameworks, a company must comply with the Privacy Shield principles and self-certify that compliance to the U.S. Department of Commerce ("Commerce"). Commerce reviews companies' self-certification applications and maintains a public website, https://www.privacyshield.gov/list, where it posts the names of companies who have completed the requirements for certification. Companies are required to recertify every year in order to continue benefitting from Privacy Shield.

LotaData provides analysis of mobile users' location data. According to the Commission's complaint, LotaData published on its website, http://www.lotadata.com, a privacy policy containing statements related to its participation in Privacy Shield.

The Commission's proposed one-count complaint alleges that Respondent violated Section 5(a) of the Federal Trade Commission Act. Specifically, the proposed complaint alleges that Respondent engaged in a deceptive act or practice by falsely representing that it was a certified participant in the EU-U.S. and Swiss-U.S. Privacy Shield Frameworks.

Part I of the proposed order prohibits the company 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 EU-U.S. Privacy Shield framework and the Swiss-U.S. Privacy Shield framework.

Parts II through V of the proposed order are reporting and compliance provisions. Part II requires acknowledgement of the order and dissemination of the order now and in the future to persons with responsibilities relating to the subject matter of the order. Part III ensures notification to the FTC of changes in corporate status and mandates that the company submit an initial compliance report to the FTC. Part IV requires the company to create certain documents relating to its compliance with the order for ten (10) years and to retain those documents for a five-year period. Part V mandates that the company make available to the FTC information or subsequent compliance reports, as requested.

Part VI is a provision "sun-setting" 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

EMPIRISTAT, INC.

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

Docket No. C-4701; File No. 182 3195
Complaint, January 13, 2020 – Decision, January 13, 2020

This consent order addresses EmpiriStat, Inc.'s violation of Section 5 of the Federal Trade Commission Act by stating it participated in the EU-U.S. Privacy Shield framework after its Privacy Shield certification had lapsed in February 2018. The complaint alleges that Respondent obtained Privacy Shield certification in February 2017 which lapsed one year later. After allowing its certification to lapse, Respondent continued to claim that it participated in the EU-U.S. Privacy Shield framework. Under the order Respondent must not misrepresent the extent to which Respondent participates in any privacy or security program sponsored by a government or any self-regulatory or standard-setting organization.

Participants

For the *Commission*: *Monique F. Einhorn* and *Robin Wetherill.*

For the *Respondents*: *Kelly E. Lynch* and *Paul D. Rose, Miles & Stockbridge P.C.*

COMPLAINT

The Federal Trade Commission ("FTC"), having reason to believe that EmpiriStat, 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 EmpiriStat, Inc. is a Delaware corporation with its principal office or place of business at 327 East Ridgeville Boulevard #122, Mount Airy, MD 21771.

2. Respondent provides statistical analysis and clinical trial support services.

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, http://www.empiristat.com/uploads/files/EU_US-Privacy-Shield-Policy_Dec2016.pdf privacy policies and statements about its practices, including statements related to its participation in the EU-U.S. Privacy Shield framework agreed upon by the U.S. government and the European Commission.

Privacy Shield

5. The EU-U.S. Privacy Shield framework ("Privacy Shield") was designed by the U.S. Department of Commerce ("Commerce") and the European Commission to provide a mechanism for U.S. companies to transfer personal data outside of the EU that is consistent with

the requirements of the European Union Directive on Data Protection. Enacted in 1995, the Directive sets forth EU requirements for privacy and the protection of personal data. Among other things, it requires EU Member States to implement legislation that prohibits the transfer of personal data outside the EU, with exceptions, unless the European Commission 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, Commerce and the European Commission negotiated the EU-U.S. Privacy Shield framework, which went into effect in July 2016. The EU-U.S. Privacy Shield framework allows companies to transfer personal data lawfully from the EU to the United States. To join the EU-U.S. Privacy Shield framework, a company must self-certify to Commerce that it complies with the Privacy Shield Principles and related requirements that have been deemed to meet the EU's adequacy standard. Any company that voluntarily withdraws or lets its self-certification lapse must take steps to affirm to Commerce that it is continuing to protect the personal information it received while it participated in the program.

7. Companies under the jurisdiction of the FTC, as well as the U.S. Department of Transportation, are eligible to join the EU-U.S. Privacy Shield framework. A company under the FTC's jurisdiction that claims it has self-certified to the Privacy Shield Principles, but failed to self-certify to Commerce, or failed to comply with the Privacy Shield Principles, 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, https://www.privacyshield.gov/welcome, where it posts the names of companies that have self-certified to the EU-U.S. Privacy Shield framework. The listing of companies, https://www.privacyshield.gov/list, indicates whether the company's self-certification is current.

9. Respondent has disseminated or caused to be disseminated privacy policies and statements on the http://www.empiristat.com/uploads/files/EU_US-Privacy-Shield-Policy_Dec2016.pdf website, including, but not limited to, the following statements:

> **EU-U.S. Privacy Policy**
> EmpiriStat, Inc. ("EmpiriStat") complies with the EU-U.S. Privacy Shield Framework as set forth by the U.S. Department of Commerce regarding the collection, use, and retention of personal information transferred from the European Union to the United States. EmpiriStat has certified to the Department of Commerce that it adheres to the Privacy Shield Principles. If there is any conflict between the terms in this privacy policy and the Privacy Shield Principles, the Privacy Shield Principles shall govern. To learn more about the Privacy Shield program, and to view our certification, please visit https://www.privacyshield.gov/.
>
> This Privacy Shield Policy sets forth EmpiriStat, Inc.'s practices with respect to personal data it receives in the United States from the European Union in reliance on the Privacy Shield Framework. To view EmpiriStat [sic] certification, you can view the Privacy Shield List at https://www.privacyshield.gov/list.

10. Although Respondent obtained Privacy Shield certification in February 2017, that certification lapsed one year later, in 2018.

11. Respondent initiated an application for recertification to Commerce in January 2018 but did not complete the steps necessary to recertify. After working with Respondent to address deficiencies in its recertification application, Commerce warned the company to take down its claims that it participated in Privacy Shield unless and until such time as it completed the recertification process. Respondent did not do so, nor did it withdraw and affirm its commitment to protect any personal information it had acquired while in the program.

12. After allowing its certification to lapse, Respondent continued to claim, as indicated in paragraph 9, that it participated in the EU-U.S. Privacy Shield framework.

13. The Privacy Shield Principles include Supplemental Principle 7, which requires any company that participates in Privacy Shield to verify, at least once a year, through self-assessment or outside compliance review, that the assertions it makes about its Privacy Shield privacy practices are true and that those privacy practices have been implemented. The verification statement must be signed by a corporate officer or the outside reviewer and is required to be made available on request to the FTC or Department of Transportation, whoever has unfair and deceptive practices jurisdiction over the company.

14. Respondent is under the jurisdiction of the FTC. During the 2017-18 period that Respondent was certified to participate in Privacy Shield, Respondent failed to comply with the requirement to obtain, through self-assessment or outside compliance review, an attested verification statement that the assertions it had made about its Privacy Shield privacy practices during the time it participated in the program were true and that those privacy practices had been implemented. Respondent failed to provide its attested verification statement to the FTC.

Count 1-Privacy Misrepresentation

15. As described in Paragraph 9, Respondent represents, directly or indirectly, expressly or by implication, that it is a current participant in the EU-U.S Privacy Shield framework.

16. In fact, as described in Paragraphs 10-12, Respondent is not a current participant in the EU-U.S. Privacy Shield framework. Respondent's certification lapsed in 2018, and it was not renewed. Therefore, the representation set forth in Paragraph 15 is false or misleading.

Count 2-Misrepresentation Regarding Verification

17. As described in Paragraph 9, Respondent represented that it complied with the EU-U.S. Privacy Shield framework principles.

18. In fact, as described in Paragraphs 13-14, Respondent did not comply with the EU-U.S. Privacy Shield framework principles. In particular, it failed to comply with the verification requirement in Privacy Shield Supplemental Principle 7. Therefore, the representation set forth in Paragraph 17 is false or misleading.

Count 3-Misrepresentation Regarding Continuing Obligations

19. As described in Paragraph 9, Respondent represented that it complied with the EU-U.S. Privacy Shield framework principles. These principles include a requirement that if it ceased to participate in the EU-U.S. Privacy Shield framework, it must affirm to Commerce that it will continue to apply the principles to personal information that it received during the time it participated in the program.

20. In fact, as described in Paragraph 11, Respondent has not affirmed to Commerce that it will continue to apply the principles to personal information that it received during the time it participated in the program. Therefore, the representation set forth in Paragraph 19 is false or misleading.

Violations of Section 5 of the FTC Act

21. 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 thirteenth day of January 2020, has issued this complaint against Respondent.

By the Commission.

DECISION

The Federal Trade Commission ("Commission") initiated an investigation of certain acts and practices of the Respondent named above in the caption. The Commission's Bureau of Consumer Protection ("BCP") prepared and furnished to Respondent a draft Complaint. BCP proposed to present the draft Complaint to the Commission for its consideration. If issued by the Commission, the draft Complaint would charge Respondent with violation of the Federal Trade Commission Act.

Respondent and BCP thereafter executed an Agreement Containing Consent Order ("Consent Agreement"). The Consent Agreement includes: 1) statements by Respondent that it neither admits nor denies any of the allegations in the Complaint, except as specifically stated in

this Decision and Order, and that only for purposes of this action, it admits the facts necessary to establish jurisdiction; and 2) waivers and other provisions as required by the Commission's Rules.

The Commission considered the matter and determined that it had reason to believe that Respondent has violated the Federal Trade Commission Act, and that a Complaint should issue stating its charges in that respect. The Commission accepted the executed Consent Agreement and placed it 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 Rule 2.34, the Commission issues its Complaint, makes the following Findings, and issues the following Order:

Findings

1. Respondent EmpiriStat, Inc. is a Delaware corporation with its principal office or place of business at 327 East Ridgeville Boulevard #122, Mount Airy, MD 21771.

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

ORDER

Definitions

For purposes of this Order, the following definition applies:

A. "Respondent" means EmpiriStat, Inc., a corporation, and its successors and assigns.

Provisions

I. Prohibition against Misrepresentations about Participation in or Compliance with Privacy Programs

IT IS ORDERED that Respondent and its officers, agents, 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 the advertising, marketing, promotion, offering for sale, or sale of any product or service must 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 a government or any self-regulatory or standard-setting organization, including but not limited to the EU-U.S. Privacy Shield framework and the Swiss-U.S. Privacy Shield framework.

II. Requirement to Meet Continuing Obligations Under Privacy Shield

IT IS ORDERED that Respondent and its officers, agents, 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 the advertising, marketing, promotion, offering for sale, or sale of any product or service, must:

A. affirm to the Department of Commerce, within ten (10) days after the effective date of this Order and on an annual basis thereafter for as long as it retains such information, that it will

1. continue to apply the EU-U.S. Privacy Shield framework principles to the personal information it received while it participated in the Privacy Shield; or

2. protect the information by another means authorized under EU (for the EU-U.S. Privacy Shield framework) or Swiss (for the Swiss-U.S. Privacy Shield framework) law, including by using a binding corporate rule or a contract that fully reflects the requirements of the relevant standard contractual clauses adopted by the European Commission; or

B. return or delete the information within ten (10) days after the effective date of this Order.

III. Acknowledgments of the Order

IT IS FURTHER ORDERED that Respondent obtain acknowledgments of receipt of this Order:

A. Respondent, within ten (10) days after the effective date of this Order, must submit to the Commission an acknowledgment of receipt of this Order.

B. For ten (10) years after the issuance date of this Order, Respondent must deliver a copy of this Order to: (1) all principals, officers, directors, and LLC managers and members; (2) all employees having managerial responsibilities for conduct related to the subject matter of the Order and all agents and representatives who participate in conduct related to the subject matter of the Order; and (3) any business entity resulting from any change in structure as set forth in the Provision titled Compliance Report and Notices. Delivery must occur within ten (10) days after the effective date of this Order for current personnel. For all others, delivery must occur before they assume their responsibilities.

C. From each individual or entity to which Respondent delivered a copy of this Order, Respondent must obtain, within thirty (30) days, a signed and dated acknowledgment of receipt of this Order.

IV. Compliance Report and Notices

IT IS FURTHER ORDERED that Respondent make timely submissions to the Commission:

A. Sixty (60) days after the issuance date of this Order, Respondent must submit a compliance report, sworn under penalty of perjury, in which Respondent must: (a) identify the primary physical, postal, and email address and telephone number, as designated points of contact, which representatives of the Commission, may use to communicate with Respondent; (b) identify all of Respondent's businesses by all of their names, telephone numbers, and physical, postal, email, and Internet addresses; (c) describe the activities of each business; (d) describe in detail whether and how Respondent is in compliance with each Provision of this Order; and (e) provide a copy of each Acknowledgment of the Order obtained pursuant to this Order, unless previously submitted to the Commission.

B. Respondent must submit a compliance notice, sworn under penalty of perjury, within fourteen (14) days of any change in the following: (1) any designated point of contact; or (2) the structure of Respondent or any entity that Respondent has any ownership interest in or controls directly or indirectly that may affect compliance obligations arising under this Order, including: creation, merger, sale, or dissolution of the entity or any subsidiary, parent, or affiliate that engages in any acts or practices subject to this Order.

C. Respondent must submit notice of the filing of any bankruptcy petition, insolvency proceeding, or similar proceeding by or against Respondent within fourteen (14) days of its filing.

D. Any submission to the Commission required by this Order to be sworn under penalty of perjury must be true and accurate and comply with 28 U.S.C. § 1746, such as by concluding: "I declare under penalty of perjury under the laws of the United States of America that the foregoing is true and correct. Executed on: _____" and supplying the date, signatory's full name, title (if applicable), and signature.

E. Unless otherwise directed by a Commission representative in writing, all submissions to the Commission pursuant to this Order must 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 *EmpiriStat, Inc*., FTC File No. 1823195, Docket No. C-4701.

V. Recordkeeping

IT IS FURTHER ORDERED that Respondent must create certain records for ten (10) years after the issuance date of the Order, and retain each such record for five (5) years. Specifically, Respondent must create and retain the following records:

A. accounting records showing the revenues from all goods or services sold;

B. personnel records showing, for each person providing services, whether as an employee or otherwise, that person's: name; addresses; telephone numbers; job title or position; dates of service; and (if applicable) the reason for termination;

C. all records necessary to demonstrate full compliance with each provision of this Order, including all submissions to the Commission; and

D. a copy of each widely disseminated representation by Respondent making any representation subject to this Order, and all materials that were relied upon in making the representation.

VI. Compliance Monitoring

IT IS FURTHER ORDERED that, for the purpose of monitoring Respondent's compliance with this Order:

A. Within ten (10) days of receipt of a written request from a representative of the Commission, Respondent must: submit additional compliance reports or other requested information, which must be sworn under penalty of perjury, and produce records for inspection and copying.

B. For matters concerning this Order, representatives of the Commission are authorized to communicate directly with Respondent. Respondent must permit representatives of the Commission to interview anyone affiliated with Respondent who has agreed to such an interview. The interviewee may have counsel present.

C. The Commission may use all other lawful means, including posing through its representatives as consumers, suppliers, or other individuals or entities, to Respondent or any individual or entity affiliated with Respondent, without the necessity of identification or prior notice. Nothing in this Order limits the Commission's lawful use of compulsory process, pursuant to Sections 9 and 20 of the FTC Act, 15 U.S.C. §§ 49, 57b-1.

VII. Order Effective Dates

IT IS FURTHER ORDERED that this Order is final and effective upon the date of its publication on the Commission's website (ftc.gov) as a final order. This Order will terminate on January 13, 2040, or twenty (20) years from the most recent date that the United States or the

Commission files a complaint (with or without an accompanying settlement) 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 Provision 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 Provision.

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 Provision as though the complaint had never been filed, except that the Order will not terminate between the date such complaint is filed and the later of the deadline for appealing such dismissal or ruling and the date such dismissal or ruling is upheld on appeal.

By the Commission.

ANALYSIS OF CONSENT ORDER TO AID PUBLIC COMMENT

The Federal Trade Commission ("Commission") has accepted, subject to final approval, an agreement containing a consent order from EmpiriStat, Inc. ("EmpiriStat" or "Respondent").

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

This matter concerns alleged false or misleading representations that EmpiriStat made concerning its participation in and compliance with the Privacy Shield framework agreed upon by the U.S. and the European Union ("EU"). The Privacy Shield framework allows U.S. companies to receive personal data transferred from the EU without violating EU. The frameworks consist of a set of principles and related requirements that have been deemed by the European Commission as providing "adequate" privacy protection. The principles include notice; choice; accountability for onward transfer; security; data integrity and purpose limitation; access; and recourse, enforcement, and liability. The related requirements include, for example, securing an independent

recourse mechanism to handle any disputes about how the company handles information about EU citizens.

To participate in the frameworks, a company must comply with the Privacy Shield principles and self-certify that compliance to the U.S. Department of Commerce ("Commerce"). Commerce reviews companies' self-certification applications and maintains a public website, https://www.privacyshield.gov/list, where it posts the names of companies who have completed the requirements for certification. Companies are required to recertify every year in order to continue benefitting from Privacy Shield.

EmpiriStat provides statistical analysis and clinical trial support services. According to the Commission's complaint, EmpiriStat published on its website, http://www.empiristat.com, a privacy policy containing statements related to its participation in Privacy Shield.

The Commission's proposed three-count complaint alleges that Respondent violated Section 5(a) of the Federal Trade Commission Act. Specifically, the proposed complaint alleges that Respondent engaged in a deceptive act or practice by falsely representing that it was a certified participant in the EU-U.S. and Swiss-U.S. Privacy Shield frameworks. The proposed complaint further alleges that Respondent engaged in deceptive acts or practices by representing that it complied with those frameworks when in fact it had failed to comply with certain Privacy Shield requirements.

Part I of the proposed order prohibits the company 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 EU-U.S. Privacy Shield framework and the Swiss-U.S. Privacy Shield framework.

Part II of the proposed order requires that the company affirm to Commerce that it will either continue to apply the Privacy Shield framework principles to any data it received pursuant to frameworks or will delete or return such data.

Parts III through VI of the proposed order are reporting and compliance provisions. Part III requires acknowledgement of the order and 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 and mandates that the company submit an initial compliance report to the FTC. Part V requires the company to create certain documents relating to its compliance with the order for ten (10) years and to retain those documents for a five-year period. Part VI mandates that the company make available to the FTC information or subsequent compliance reports, as requested.

Part VII is a provision "sun-setting" 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.

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

THRU, INC.

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

Docket No. C-4702; File No.182 3196
Complaint, January 13, 2020 – Decision, January 13, 2020

This consent order addresses Thru, Inc.'s violation of Section 5 of the Federal Trade Commission Act by stating it complied with the EU-U.S. Privacy Shield Framework and Swiss-U.S. Privacy Shield Framework when it did not participate in either. The complaint alleges that Respondent disseminated false and misleading privacy policies and statements on its compliance with the EU-U.S. Privacy Shield and Swiss-U.S. Privacy Shield frameworks. Respondent did initiate an application for Privacy Shield certification in June 2017, but did not complete the steps necessary to participate. Under the order respondent must not misrepresent the extent to which Respondent participates in any privacy or security program sponsored by a government or any self-regulatory or standard-setting organization.

Participants

For the *Commission*: *Monique F. Einhorn* and *Robin Wetherill.*

For the *Respondents*: *Joshua A. James* and *David Zetoony, Bryan Cave Leighton Paisner LLP.*

COMPLAINT

The Federal Trade Commission ("FTC"), having reason to believe that Thru, 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 Thru, Inc. is a Delaware corporation with its principal office or place of business at 909 Lake Carolyn Parkway, Irving, Texas 75039.

2. Respondent provides cloud-based file transfer software.

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, https://www.thruinc.com/privacy-policy/, privacy policies and statements about its practices, including statements related to its participation in the EU-U.S. and the Swiss-U.S. Privacy Shield frameworks agreed upon by the U.S. government and the European Commission.

5. In fact, Respondent has not been certified to participate in either the EU-U.S. or the Swiss-U.S. Privacy Shield frameworks.

Privacy Shield

6. The EU-U.S. Privacy Shield framework ("Privacy Shield") was designed by the U.S. Department of Commerce ("Commerce") and the European Commission to provide a mechanism for U.S. companies to transfer personal data outside of the EU that is consistent with the requirements of the European Union Directive on Data Protection. Enacted in 1995, the Directive sets forth EU requirements for privacy and the protection of personal data. Among other things, it requires EU Member States to implement legislation that prohibits the transfer of personal data outside the EU, with exceptions, unless the European Commission 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.

7. To satisfy the EU adequacy standard for certain commercial transfers, Commerce and the European Commission negotiated the EU-U.S. Privacy Shield framework, which went into effect in July 2016. The EU-U.S. Privacy Shield framework allows companies to transfer personal data lawfully from the EU to the United States. To join the EU-U.S. Privacy Shield framework, a company must self-certify to Commerce that it complies with the Privacy Shield Principles and related requirements that have been deemed to meet the EU's adequacy standard.

8. Companies under the jurisdiction of the FTC, as well as the U.S. Department of Transportation, are eligible to join the EU-U.S. Privacy Shield framework. A company under the FTC's jurisdiction that claims it has self-certified to the Privacy Shield 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.

9. The Swiss-U.S. Privacy Shield framework is identical to the EU-U.S. Privacy Shield framework and is consistent with the requirements of the Swiss Federal Act on Data Protection.

10. Commerce maintains a public website, https://www.privacyshield.gov/welcome, where it posts the names of companies that have self-certified to the EU-U.S. and/or the Swiss-U.S.Privacy Shield frameworks. The listing of companies, https://www.privacyshield.gov/list, indicates whether the company's self-certification is current.

11. Respondent has disseminated or caused to be disseminated privacy policies and statements on the https://www.thruinc.com/privacy-policy/ website, including, but not limited to, the following statements:

> **EU-U.S.**
> Thru Inc., complies with the EU-U.S. Privacy Shield Framework and Swiss-U.S. Privacy Shield Framework as set forth by the U.S. Department of Commerce regarding the collection, use, and retention of personal information transferred from the European Union and Switzerland to the United States. To learn more about the Privacy Shield program, please visit https://www.privacyshield.gov/.

12. Although Respondent initiated an application to Commerce for Privacy Shield certification in June 2017, it did not complete the steps necessary to participate in either the EU-U.S. or the Swiss-U.S. Privacy Shield frameworks and continued to make the statements described in Paragraph 11 in its privacy policy. Therefore, the representation set forth in Paragraph 11 is false and misleading.

Count 1-Privacy Misrepresentation

13. As described in Paragraph 11, Respondent represents, directly or indirectly, expressly or by implication, that it is a participant in the EU-U.S and the Swiss-U.S. Privacy Shield frameworks.

14. In fact, as described in Paragraph 12, Respondent was never certified to participate in either the EU-U.S. or the Swiss-U.S. Privacy Shield frameworks. Therefore, the representation set forth in Paragraph 11 is false or misleading.

Violations of Section 5 of the FTC Act

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 thirteenth day of January 2020, has issued this complaint against Respondent.

By the Commission.

DECISION

The Federal Trade Commission ("Commission") initiated an investigation of certain acts and practices of the Respondent named above in the caption. The Commission's Bureau of Consumer Protection ("BCP") prepared and furnished to Respondent a draft Complaint. BCP proposed to present the draft Complaint to the Commission for its consideration. If issued by the Commission, the draft Complaint would charge Respondent with violation of the Federal Trade Commission Act.

Respondent and BCP thereafter executed an Agreement Containing Consent Order ("Consent Agreement"). The Consent Agreement includes: 1) statements by Respondent that it neither admits nor denies any of the allegations in the Complaint, except as specifically stated in this Decision and Order, and that only for purposes of this action, it admits the facts necessary to establish jurisdiction; and 2) waivers and other provisions as required by the Commission's Rules.

The Commission considered the matter and determined that it had reason to believe that Respondent has violated the Federal Trade Commission Act, and that a Complaint should issue stating its charges in that respect. The Commission accepted the executed Consent Agreement and placed it 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 Rule 2.34, the Commission issues its Complaint, makes the following Findings, and issues the following Order:

Findings

1. Respondent Thru, Inc. is a Delaware corporation with its principal office or place of business at 909 Lake Carolyn ParkwaY, Irving, Texas 75039.

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

ORDER

Definitions

For purposes of this Order, the following definition applies:

A. "Respondent" means Thru, Inc., a corporation, and its successors and assigns.

Provisions

I. Prohibition against Misrepresentations about Participation in or Compliance with Privacy Programs

IT IS ORDERED that Respondent and its officers, agents, 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 the advertising, marketing, promotion, offering for sale, or sale of any product or service must 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 a government or any self-regulatory or standard-setting organization, including but not limited to the EU-U.S. Privacy Shield framework and the Swiss-U.S. Privacy Shield framework.

II. Acknowledgments of the Order

IT IS FURTHER ORDERED that Respondent obtain acknowledgments of receipt of this Order:

A. Respondent, within ten (10) days after the effective date of this Order, must submit to the Commission an acknowledgment of receipt of this Order.

B. For twenty (20) years after the issuance date of this Order, Respondent must deliver a copy of this Order to: (1) all principals, officers, directors, and LLC managers and members; (2) all employees having managerial responsibilities for conduct related to the subject matter of the Order and all agents and representatives who participate in conduct related to the subject matter of the Order; and (3) any business entity resulting from any change in structure as set forth in the Provision titled Compliance Report and Notices. Delivery must occur within ten (10) days after the effective date of this Order for current personnel. For all others, delivery must occur before they assume their responsibilities.

C. From each individual or entity to which Respondent delivered a copy of this Order, Respondent must obtain, within thirty (30) days, a signed and dated acknowledgment of receipt of this Order.

III. Compliance Report and Notices

IT IS FURTHER ORDERED that Respondent make timely submissions to the Commission:

A. Sixty (60) days after the issuance date of this Order, Respondent must submit a compliance report, sworn under penalty of perjury, in which Respondent must: (a) identify the primary physical, postal, and email address and telephone number, as designated points of contact, which representatives of the Commission, may use to communicate with Respondent; (b) identify all of Respondent's businesses by all of their names, telephone numbers, and physical, postal, email, and Internet addresses; (c) describe the activities of each business; (d) describe in detail whether and how Respondent is in compliance with each Provision of this Order; and (e) provide a copy of each Acknowledgment of the Order obtained pursuant to this Order, unless previously submitted to the Commission.

B. Respondent must submit a compliance notice, sworn under penalty of perjury, within fourteen (14) days of any change in the following: (1) any designated point of contact; or (2) the structure of Respondent or any entity that Respondent has any ownership interest in or controls directly or indirectly that may affect compliance obligations arising under this Order, including: creation, merger, sale, or dissolution of the entity or any subsidiary, parent, or affiliate that engages in any acts or practices subject to this Order.

C. Respondent must submit notice of the filing of any bankruptcy petition, insolvency proceeding, or similar proceeding by or against Respondent within fourteen (14) days of its filing.

D. Any submission to the Commission required by this Order to be sworn under penalty of perjury must be true and accurate and comply with 28 U.S.C. § 1746, such as by concluding: "I declare under penalty of perjury under the laws of the United States of America that the foregoing is true and correct. Executed on: _____" and supplying the date, signatory's full name, title (if applicable), and signature.

E. Unless otherwise directed by a Commission representative in writing, all submissions to the Commission pursuant to this Order must 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 *Thru, Inc*., FTC File No. 1823196, Docket No. C-4702.

IV. Recordkeeping

IT IS FURTHER ORDERED that Respondent must create certain records for twenty (20) years after the issuance date of the Order, and retain each such record for five (5) years. Specifically, Respondent must create and retain the following records:

A. accounting records showing the revenues from all goods or services sold;

B. personnel records showing, for each person providing services, whether as an employee or otherwise, that person's: name; addresses; telephone numbers; job title or position; dates of service; and (if applicable) the reason for termination;

C. all records necessary to demonstrate full compliance with each provision of this Order, including all submissions to the Commission; and

D. a copy of each widely disseminated representation by Respondent making any representation subject to this Order, and all materials that were relied upon in making the representation.

V. Compliance Monitoring

IT IS FURTHER ORDERED that, for the purpose of monitoring Respondent's compliance with this Order:

A. Within ten (10) days of receipt of a written request from a representative of the Commission, Respondent must: submit additional compliance reports or other requested information, which must be sworn under penalty of perjury, and produce records for inspection and copying.

B. For matters concerning this Order, representatives of the Commission are authorized to communicate directly with Respondent. Respondent must permit

representatives of the Commission to interview anyone affiliated with Respondent who has agreed to such an interview. The interviewee may have counsel present.

C. The Commission may use all other lawful means, including posing through its representatives as consumers, suppliers, or other individuals or entities, to Respondent or any individual or entity affiliated with Respondent, without the necessity of identification or prior notice. Nothing in this Order limits the Commission's lawful use of compulsory process, pursuant to Sections 9 and 20 of the FTC Act, 15 U.S.C. §§ 49, 57b-1.

VI. Order Effective Dates

IT IS FURTHER ORDERED that this Order is final and effective upon the date of its publication on the Commission's website (ftc.gov) as a final order. This Order will terminate on January 13, 2040, or twenty (20) years from the most recent date that the United States or the Commission files a complaint (with or without an accompanying settlement) 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 Provision 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 Provision.

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 Provision as though the complaint had never been filed, except that the Order will not terminate between the date such complaint is filed and the later of the deadline for appealing such dismissal or ruling and the date such dismissal or ruling is upheld on appeal.

By the Commission.

ANALYSIS OF CONSENT ORDER TO AID PUBLIC COMMENT

The Federal Trade Commission ("Commission") has accepted, subject to final approval, an agreement containing a consent order from Thru, Inc. ("Thru" or "Respondent").

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

This matter concerns alleged false or misleading representations that Turn made concerning its participation in the Privacy Shield frameworks agreed upon by the U.S. and, respectively, the European Union ("EU") and the Swiss Federation. The Privacy Shield frameworks allow U.S. companies to receive personal data transferred from the EU and Switzerland without violating EU or Swiss law. The frameworks consist of a set of principles and related requirements that have been deemed by the European Commission and the Swiss authorities as providing "adequate" privacy protection. The principles include notice; choice; accountability for onward transfer; security; data integrity and purpose limitation; access; and recourse, enforcement, and liability. The related requirements include, for example, securing an independent recourse mechanism to handle any disputes about how the company handles information about EU citizens.

To participate in the frameworks, a company must comply with the Privacy Shield principles and self-certify that compliance to the U.S. Department of Commerce ("Commerce"). Commerce reviews companies' self-certification applications and maintains a public website, https://www.privacyshield.gov/list, where it posts the names of companies who have completed the requirements for certification. Companies are required to recertify every year in order to continue benefitting from Privacy Shield.

Thru provides cloud-based file transfer software. According to the Commission's complaint, Thru published on its website, http://www.thruinc.com, a privacy policy containing statements related to its participation in Privacy Shield.

The Commission's proposed one-count complaint alleges that Respondent violated Section 5(a) of the Federal Trade Commission Act. Specifically, the proposed complaint alleges that Respondent engaged in a deceptive act or practice by falsely representing that it was a certified participant in the EU-U.S. and Swiss-U.S. Privacy Shield Frameworks.

Part I of the proposed order prohibits the company 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 EU-U.S. Privacy Shield framework and the Swiss-U.S. Privacy Shield framework.

Parts II through V of the proposed order are reporting and compliance provisions. Part II requires acknowledgement of the order and dissemination of the order now and in the future to

persons with responsibilities relating to the subject matter of the order. Part III ensures notification to the FTC of changes in corporate status and mandates that the company submit an initial compliance report to the FTC. Part IV requires the company to create certain documents relating to its compliance with the order for twenty (20) years and to retain those documents for a five-year period. Part V mandates that the company make available to the FTC information or subsequent compliance reports, as requested.

Part VI is a provision "sun-setting" 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

POST HOLDINGS, INC.
AND
TREEHOUSE FOODS, 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. 9388; File No. 191 0128
Complaint, December 19, 2019 – Decision, January 16, 2020

This case addresses the [redacted] acquisition by Post Holdings, Inc. of certain assets of TreeHouse Foods, Inc. The complaint alleges that the acquisition, if consummated, would violate Section 7 of the Clayton Act and Section 5 of the Federal Trade Commission Act by substantially lessening competition in the market for private label ready-to-eat cereal in the United States. On January 14, 2020, Complaint Counsel and Respondents Post Holdings, Inc. and TreeHouse Foods, Inc. jointly moved to dismiss the complaint because they are abandoning the proposed acquisition and Respondents withdrew their Hart-Scott-Rodino Notification and Report Forms that had been filed. The Commission dismissed the Complaint without prejudice..

Participants

For the *Commission*: *Stephanie Cummings, Henry Hauser, Karen Hunt, Rohan Pai, Ryan Quillian, Amy Ritchie, Harris Rothman,* and *Anthony Saunders.*

For the *Respondents*: *Jeremy Calsyn, Patrick Kibbe,* and *Kenneth Reinker, Cleary Gottlieb Steen & Hamilton LLP; Richard Walsh, Lewis Rice LLC; William Diaz, Katherine O'Connor, Michelle Lowery, Steven Wu, and Raymond Jacobsen, McDermott Will & Emery, LLP.*

COMPLAINT

Pursuant to the provisions of the Federal Trade Commission Act ("FTC Act"), and by the virtue of the authority vested in it by the FTC Act, the Federal Trade Commission ("Commission"), having reason to believe that Respondents Post Holdings, Inc. ("Post") and TreeHouse Foods, Inc. ("TreeHouse") have executed an asset 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:

NATURE OF THE CASE

1. Post and TreeHouse are two of only three significant manufacturers and distributors of private label ready-to-eat ("RTE") cereal in the United States. Pursuant to an Asset Purchase Agreement, Post plans to acquire TreeHouse's RTE cereal assets for [redacted] ("the Proposed Acquisition").

2. Respondents compete vigorously today. Respondents' own internal business documents show that the effect of the Proposed Acquisition "may be substantially to lessen competition, or to tend to create a monopoly" in violation of the Clayton Act, and harm U.S. consumers. In internal business documents, both Post and TreeHouse recognize each other as close competitors for private label RTE cereal business. Post historically has acknowledged that TreeHouse is the "market leader" in the private label RTE cereal category and recognizes that it has grown its own private label share by "stealing" volume primarily from TreeHouse. TreeHouse describes itself as the "#1 U.S. Private Label RTE Cereal Manufacturer." TreeHouse correspondingly describes Post as its "largest private label competitor" and a "major threat" to take away private label RTE cereal business.

3. Respondents are often retailers' two best options for private label RTE cereal. Retailers play Post and TreeHouse off each other to obtain lower pricing, better service, and other contract terms. Indeed, Post and TreeHouse frequently lower their prices and make other concessions to take business away from each other and to avoid losing business to each other. The Proposed Acquisition would eliminate this head-to-head competition and would give Post the power and incentive to increase prices and decrease services for private label RTE cereal for U.S. retailers and their customers post-acquisition.

4. Under the 2010 U.S. Department of Justice and Federal Trade Commission Horizontal Merger Guidelines ("Merger Guidelines"), a post-acquisition market-concentration level above 2,500 points, as measured by the Herfindahl-Hirschman Index ("HHI"), and an increase in market concentration of more than 200 points, renders an acquisition presumptively anticompetitive. Based on volume of sales, the Proposed Acquisition would significantly increase concentration in an already highly concentrated market for the sale of private label RTE cereal to U.S. retailers, well beyond the thresholds set forth in the Merger Guidelines. Thus, under the Merger Guidelines, the Proposed Acquisition is presumptively anticompetitive.

5. New entry or expansion by current market participants would not be timely, likely, or sufficient to deter or counteract the likely anticompetitive effects of the Proposed Acquisition.

6. Respondents cannot demonstrate cognizable and merger-specific efficiencies that rebut the strong presumption and other evidence that the Proposed Acquisition likely would substantially lessen competition in the relevant market.

II.

JURISDICTION

7. 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.

8. The Proposed Acquisition constitutes an acquisition subject to Section 7 of the Clayton Act, 15 U.S.C. § 18.

III.

RESPONDENTS

9. Respondent Post, headquartered in St. Louis, Missouri, is a publicly traded corporation organized under the laws of Missouri. Post has offerings in the center-of-the-store, foodservice, food ingredient, refrigerated, active nutrition, and private brand food categories. Through its Post Consumer Brands unit, Post manufactures, markets, and sells a broad portfolio of well-known national RTE cereal brands, including Honey Bunches of Oats, Pebbles, and Grape-Nuts, as well as a variety of private label RTE cereal products. Post produces approximately 28 formulations of private label RTE cereal and offers retailers natural, organic, and clean label private label RTE cereal products. In fiscal year 2018, Post Consumer Brands' retail sales of private label RTE cereal were approximately [redacted].

10. Respondent TreeHouse, headquartered in Oak Brook, Illinois, is a publicly traded corporation organized under the laws of Delaware. TreeHouse is a leading manufacturer of private label food and beverage products across multiple categories, with total annual revenues of approximately $5.8 billion in fiscal year 2018. TreeHouse is the largest manufacturer of private label RTE cereal in the United States through its TreeHouse Private Brands, Inc. subsidiary. In fiscal year 2018, TreeHouse's retail sales of private label RTE cereal were [redacted].

IV.

THE PROPOSED ACQUISITION

11. On May 1, 2019, Post and TreeHouse signed an Asset Sale Agreement pursuant to which Post will acquire TreeHouse's private label RTE cereal business, including TreeHouse's RTE cereal product formulations and manufacturing plants. Post eventually plans to integrate TreeHouse's private label RTE cereal business into Post's existing private label RTE cereal business. The total consideration for the Proposed Acquisition is approximately [redacted].

V.

RELEVANT MARKETS

12. The relevant market in which to evaluate the effects of the Proposed Acquisition is no broader than the sale of private label RTE cereal to retailers in the United States.

A. Relevant Product Market

13. The sale of private label RTE cereal to retailers is the relevant product market.

14. Post and TreeHouse each manufacture and sell RTE cereal. RTE cereal (or cold cereal) is food made from processed grains like wheat, rice, and oats that requires no preparation and no heating before consumption. RTE cereal is dry and sold in a variety of packaging (*e.g.*, boxes, bags, and cups) and can be consumed dry or with milk. RTE cereal is a popular food: the category as a whole enjoys a household penetration rate over 90 percent, although consumption has gradually declined over time.

15. Respondents do not sell their RTE cereal products to end consumers. Instead, both Respondents compete to sell their RTE cereal to U.S. retailers, including conventional grocery stores (such as Kroger), discount supermarkets (such as Aldi), and mass merchants (such as Walmart). Some retailers purchase RTE cereal as part of a Purchasing Cooperative (such as Topco). The retailers then sell these RTE cereal products under the retailer's proprietary trade names (*i.e.*, private labels) to their in-store customers, the end consumers.

16. Many retailers offer private label RTE cereal, among other private label products, in their stores. Private label products provide a lower-cost alternative to the national brands—due to lower advertising and marketing costs—while offering customers similar quality. Each retailer's private label brand is available only at that retailer's locations. For example, Walmart's "Great Value" private label RTE cereal product is only available at Walmart.

17. Typically, private label RTE cereals are "emulations" of popular RTE cereal national brands; they are also referred to as "National Brand Equivalents" or "NBEs." For example, Kroger may offer Kroger's private label Honey Nut Toasted Oats cereal, which emulates General Mills' Honey Nut Cheerios.

18. While there may be some taste, appearance, or quality differences between the branded RTE cereal and the private label emulations, the primary differences are the wholesale and retail prices. Branded RTE cereal prices are substantially higher than private label RTE cereal prices because they incur most of the costs of advertising or promotional efforts for their products. By contrast, there is very little, if any, advertising or promotional spend by private label suppliers. Therefore, there is usually a gap between the retail prices of branded and private label RTE cereal products. This price gap will vary across retailers and across emulations, but is typically between 20 and 30 percent.

19. Generally, U.S. retailers do not view branded RTE cereals as interchangeable with private label RTE cereal products. For several reasons, retailers derive a unique value from offering private label RTE cereal, which they could not replicate by simply switching private label RTE cereal inventory over to branded RTE cereal products. First, retailers find it profitable to sell private label RTE cereal products and may earn higher margins on sales of private label RTE cereal than they do on sales of branded RTE cereal. Second, retailers value having a private label RTE cereal offering because it allows them to offer a lower cost, but acceptable quality, option to

consumers. Third, a retailer's private label RTE cereal offering helps differentiate that retailer from its competitors, and thereby helps promote the retailer's brand and foster customer loyalty.

20. For these reasons, retailers would not switch their purchases of private label RTE cereals to branded RTE cereals in sufficient quantity or numbers to render unprofitable a small but significant non-transitory increase in price ("SSNIP") on private label RTE cereal.

21. The relevant market does not include private label "natural and organic" RTE cereal formulations. Retailers and end consumers do not view natural and organic cereals as substitutes for conventional cereals. Retailers typically source conventional (*i.e.*, non-natural/organic) cereals through separate processes, and many of the suppliers of natural and organic cereals are different than the suppliers for conventional RTE cereals. Natural and organic cereals tend to have healthier and more expensive inputs and are consequently priced significantly higher than their conventional counterparts. Thus, retailers could not effectively defeat a SSNIP on conventional private label RTE cereals by switching their purchases to natural and organic RTE cereals.

B. Relevant Geographic Market

22. The relevant geographic market in which to assess the competitive effects of the Proposed Acquisition is no broader than the United States. Customers based in the United States cannot arbitrage or substitute based on different prices offered to customers outside the United States.

23. Competition among private label RTE cereal suppliers occurs at the national level. Many large retailers have locations in multiple regions across the United States, generally select a single supplier for all locations, and sell the same nationally sourced private label RTE cereal products across their entire retail footprint. Post and TreeHouse have national distribution networks to transport their private label RTE cereal throughout the United States. Post and TreeHouse each produce most of the private label RTE cereal they sell to U.S. retailers within the United States.

VI.

MARKET STRUCTURE AND THE PROPOSED ACQUISITION'S PRESUMPTIVE ILLEGALITY

24. Post and TreeHouse are the two largest suppliers of private label RTE cereal to retailers in the United States.

25. There is only one other meaningful private label RTE supplier, Gilster-Mary Lee. Other private label RTE cereal suppliers are significantly smaller than Respondents are and have limited competitive significance. For example, the most prominent foreign manufacturer, Brüggen, accounts for less than one percent of private label RTE cereal sales in the United States.

26. Combined, Post and TreeHouse would account for over [redacted] of the market for the sale of private label RTE cereal to retailers in the United States. Based on Post's ordinary course documents, in 2018, TreeHouse held a [redacted] share of the private label RTE cereal market, followed by Post with [redacted], and Gilster-Mary Lee with [redacted]. The remainder is a mix of all other suppliers, accounting for about [redacted].

27. The Merger Guidelines and courts typically measure concentration using the HHI. The HHI is calculated by totaling the squares of the market shares of every firm in the relevant market. Under the Merger Guidelines, a merger is presumed likely to create or enhance market power—and is presumptively illegal—when the post-merger HHI exceeds 2,500 and the merger increases the HHI by more than 200 points.

28. Based on Post's ordinary course estimates of market shares, the Proposed Acquisition would result in a post-acquisition HHI exceeding 5,000, with an increase of more than 2,000, in a market for the sale of conventional private label RTE cereal to retailers in the United States. These concentration levels are well beyond what is necessary to establish a presumption of competitive harm.

29. Evidence showing that the Proposed Acquisition would substantially lessen competition and result in significant anticompetitive effects bolsters the presumption of competitive harm.

30. The Proposed Acquisition is presumptively illegal under relevant case law and the Merger Guidelines.

VII.

ANTICOMPETITIVE EFFECTS

31. The Proposed Acquisition would eliminate substantial direct competition between Post and TreeHouse, resulting in increased prices for retailers and end consumers.

A. The Proposed Acquisition Would Eliminate Vigorous Competition and Result in Higher Prices for Retailers and End Customers

32. Respondents are close competitors and two of only three meaningful suppliers of private label RTE cereal in the United States. TreeHouse and Post are the only two manufacturers viewed as alternatives by many retailers due to their scale, prices, breadth of product offerings, and quality. As a result, Respondents are the first and second choices for most retail customers, and predominantly compete against each other to be a retailer's private label producer.

33. Retail customers benefit from the competition between Respondents because they use this competition to secure lower prices for private label RTE cereal.

34. Private label competition can take place during a "request for proposal" ("RFP") process, or through informal negotiations, or some combination of the two. Typically, the private label supply process begins with an RFP in which the retailer sets forth its requirements in terms of desired private label RTE cereal product, desired nutritional requirements (*e.g.*, no artificial coloring), package size, and terms of delivery and payment. Private label suppliers submit bids and the retailer selects the winner, based on a variety of factors, including price, quality, and service. Retailers typically allow suppliers to improve upon their initial offers in order to solicit the best possible price and other contract terms.

35. The following are just a few of the examples of direct price competition between TreeHouse and Post for retail customers:

a. In March 2018, [redacted] and TreeHouse had a contract for private label RTE cereal that extended until October 2018. [redacted] inquired if Post could "[come] to the table with an aggressive box proposal" with the inducement of switching its business from TreeHouse to Post. Post noted that this would be an opportunity to "take volume from [redacted]." In an initial round of negotiations, Post offered to lower prices by [redacted] percent but this was insufficient to win [redacted] business away from TreeHouse. [redacted] subsequently opened its business up for bid and awarded [redacted] SKUs to Post from TreeHouse "based on competitive pricing."

b. In March 2018, [redacted] conducted an RFP process for [redacted] private label RTE cereal SKUs. At the time of the RFP, TreeHouse produced [redacted] for [redacted] and Post produced [redacted]. Following two rounds of bidding, [redacted] moved [redacted] from TreeHouse to Post due to better pricing by Post, generating annual savings of approximately $[redacted] million.

c. In 2018 and 2019, [redacted] issued an RFP to Post and TreeHouse for its [redacted], an emulation of Kellogg's branded [redacted]. TreeHouse was the incumbent supplier of this product. In the initial round of bidding, Post submitted a lower price than TreeHouse's opening offer in an attempt to win the business. TreeHouse responded "with a lower price, providing [redacted] with significant savings from its previous cost for [redacted]."

d. [redacted]

[redacted]

e. In 2018, TreeHouse attempted to increase prices to [redacted], which "prompted [redacted] to bring [Post] in to quote the business." [redacted] notified TreeHouse that Post provided competitive pricing on roughly [redacted] supplied by TreeHouse. Ultimately, [redacted] moved most of its business to Post, resulting in a total savings of $1.22 million relative to TreeHouse's pricing.

B. The Proposed Acquisition Would Eliminate Non-Price Competition Between the Respondents

36. Respondents also compete aggressively on non-price terms to win retail business by offering high-quality and innovative products. Both Post and TreeHouse seek to win business by establishing the quality of their formulations (taste, texture, consistency, etc.). In addition, retailers consider quality metrics when selecting their private label RTE cereal suppliers. For example, several retailers have sought to grow their private label sales and distinguish their private label RTE cereal offerings from those of competing retailers by offering "clean label" formulations, or formulations free of certain artificial ingredients and preservatives. Post and TreeHouse raced to develop new clean label formulas for [redacted], submitting their products to [redacted] for evaluation, and refining them until they were of very high quality.

37. The head-to-head competition between Respondents results in lower prices, higher quality, and more innovation in private label RTE cereal. By eliminating this competition, the Proposed Acquisition would harm retailer customers and end consumers.

C. Competition from Other Suppliers Will Not Replace the Competition Eliminated by the Proposed Acquisition

38. Competition from other private label RTE cereal suppliers would not replace the competition lost by the Proposed Acquisition. Only one other supplier, Gilster-Mary Lee, imposes any meaningful constraint on Post or TreeHouse today.

39. Numerous retailers have indicated that Post and TreeHouse offer greater innovation and manufacture higher quality private label RTE cereal products than Gilster-Mary Lee, which is why these retailers have shifted business away from Gilster-Mary Lee in favor of TreeHouse and Post. Respondents' own ordinary course documents confirm that they do not view Gilster-Mary Lee as an equal competitor, describing Gilster-Mary Lee as using "low quality inputs," offering "poor emulations" and having "sub-par" quality and service. Consequently, for many retailers, Gilster-Mary Lee may not be an adequate alternative to Post and TreeHouse, and would therefore not be a meaningful constraint on Post if the Proposed Acquisition were consummated.

40. Although there are other private label RTE cereal suppliers in the United States, their presence would not prevent a price increase post-acquisition. Collectively, all other private label suppliers account for approximately [redacted] percent of private label RTE cereal sales in the United States. These low sales figures reflect the fact that retailers do not see these other suppliers as equivalent to Post, Treehouse, or even Gilster-Mary Lee.

41. Competition by national brands will also be insufficient to constrain post-acquisition price increases. While competition from branded RTE cereal does impose some competitive constraint on private label RTE cereal prices generally, and on Post and TreeHouse prices in particular, a large part of what constrains Post and Treehouse prices is competition from each other. Removing this constraint will likely result in substantial harm to retailers and consumers.

VIII.

LACK OF COUNTERVAILING FACTORS

42. Neither entry by new market participants or expansion by current market participants would be timely, likely, and sufficient to deter or counteract the likely anticompetitive effects of the Proposed Acquisition.

43. Entry by a branded RTE cereal manufacturer in private label is unlikely; thus, branded manufacturers will not offset the lost competition between Respondents. [redacted] Thus, it is highly unlikely that branded RTE cereal manufacturers will begin producing private label RTE cereal.

44. Successful and timely entry or expansion by international suppliers is also unlikely. Retailers have a strong preference for sourcing private label RTE cereal products domestically, and international suppliers lack meaningful name recognition with U.S. retailers. Other RTE cereal companies, including co-manufacturers and ingredient suppliers, are also unlikely to replace successfully the competition lost due to the Proposed Acquisition. Co-manufacturers produce limited RTE cereal products on behalf of national brands and do not market directly to retailers.

45. Retailers are also unlikely to self-manufacture their own private label RTE cereals due to the significant costs and capital investment required to own and operate RTE cereal production facilities.

46. Respondents cannot demonstrate cognizable and merger-specific efficiencies that rebut the strong presumption and evidence that the Proposed Acquisition likely would substantially lessen competition in the relevant market.

47. Respondents also cannot establish that TreeHouse's private label RTE cereal business will fail and its assets will exit the market absent the Proposed Acquisition.

IX.

VIOLATION

COUNT I – ILLEGAL AGREEMENT

48. The allegations of Paragraphs 1 through 47 above are incorporated by reference as though fully set forth.

49. The Proposed Acquisition 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

50. The allegations of Paragraphs 1 through 47 above are incorporated by reference as though fully set forth.

51. The Proposed Acquisition, if consummated, may substantially lessen competition in the relevant market 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 twenty-seventh day of May, 2020, 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, DC, 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 this administrative proceeding shall be conducted as though the Commission, in an ancillary proceeding, has also filed a complaint in a United States District Court, seeking relief pursuant to Section 13(b) of the Federal Trade Commission Act, 15 U.S.C. 53(b), as provided by Commission Rule 3.11(b)(4), 16 CFR 3.11(b)(4). You are also 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 Proposed 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 Proposed 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 market, with the ability to offer such products and services as Post and TreeHouse were offering and planning to offer prior to the Proposed Acquisition.

2. A prohibition against any transaction between Post and TreeHouse that combines their businesses in the relevant market, except as may be approved by the Commission.

3. A requirement that, for a period of time, Post and TreeHouse provide prior notice to the Commission of acquisitions, mergers, consolidations, or any other combinations of their businesses in the relevant market with any other company operating in the relevant market.

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 TreeHouse as viable, independent competitor in the relevant market.

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 nineteenth day of December, 2019.

By the Commission.

ORDER DISMISSING COMPLAINT

This matter comes before the Commission on Complaint Counsel and Respondents' Joint Motion to Dismiss Complaint. Having considered the motion, it is hereby **ORDERED** that

The Joint Motion to Dismiss Complaint, dated January 14, 2020, is **GRANTED**; and The complaint is dismissed without prejudice.

By the Commission.

Complaint

IN THE MATTER OF

INCENTIVE SERVICES, INC.

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

Docket No. C-4703; File No. 192 3078
Complaint, January 23, 2020 – Decision, January 23, 2020

This consent order addresses Incentive Services, Inc.'s violation of Section 5 of the Federal Trade Commission Act by stating it participated in the EU-U.S. Privacy Shield and Safe Harbor Framework when it did not participate in either. The complaint alleges that Respondent represented it was a participant in the EU-U.S. and the Swiss-U.S. Privacy Shield frameworks when it had never certified to participate. The consent order requires Respondent must not misrepresent the extent to which it is a participant in any privacy or security program sponsored by a government or any self-regulatory or standard-setting organization.

Participants

For the *Commission*: *Megan Cox* and *Andy Hasty.*

For the *Respondents*: *Patrick Bradley, Bradley & Deike, P.A.*

COMPLAINT

The Federal Trade Commission ("FTC"), having reason to believe that Incentive Services, 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 Incentive Services, Inc. is a Minnesota corporation with its principal office or place of business at 7667 Cahill Road, Edina, Minnesota 55439.

2. Respondent works with organizations to improve performance of individual employees through service award programs (for work anniversaries, retirement, onboarding, etc.), performance incentives, and loyalty programs.

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, https://www.incentiveservices.com/, privacy policies and statements about its practices, including statements related to its participation in the EU-U.S. and the Swiss-U.S. Privacy Shield frameworks.

5. In fact, Respondent has not been certified to participate in either the EU-U.S. or the Swiss-U.S. Privacy Shield frameworks.

Privacy Shield

6. The EU-U.S. Privacy Shield framework ("Privacy Shield") was designed by the U.S. Department of Commerce ("Commerce") and the European Commission to provide a mechanism for U.S. companies to transfer personal data outside of the EU that is consistent with the requirements of European Union data protection legislation. The EU General Data Protection Regulation, passed in May 2016 and enforced since May 2018 (replacing the 1995 EU Data Protection Directive), sets forth EU requirements for privacy and the protection of personal data. Among other things, it requires EU Member States to implement legislation that prohibits the transfer of personal data outside the EU, with exceptions, unless the European Commission 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.

7. To satisfy the EU adequacy standard for certain commercial transfers, Commerce and the European Commission negotiated the EU-U.S. Privacy Shield framework, which went into effect in July 2016. The EU-U.S. Privacy Shield framework allows companies to transfer personal data lawfully from the EU to the United States. To join the EU-U.S. Privacy Shield framework, a company must self-certify to Commerce that it complies with the Privacy Shield Principles and related requirements that have been deemed to meet the EU's adequacy standard.

8. Companies under the jurisdiction of the FTC, as well as the U.S. Department of Transportation, are eligible to join the EU-U.S. Privacy Shield framework. A company under the FTC's jurisdiction that claims it has self-certified to the Privacy Shield 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.

9. The Swiss-U.S. Privacy Shield framework is identical to the EU-U.S. Privacy Shield framework and is consistent with the requirements of the Swiss Federal Act on Data Protection.

10. Commerce maintains a public website, https://www.privacyshield.gov/welcome, where it posts the names of companies that have self-certified to the EU-U.S. and/or the Swiss-U.S. Privacy Shield frameworks. The listing of companies, https://www.privacyshield.gov/list, indicates whether the company's self-certification is current.

11. Respondent has disseminated or caused to be disseminated privacy policies and statements on the https://incentiveservices.com/privacy-policy/ website, including, but not limited to, the following statements:

> We regularly review our compliance with our Privacy Policy. We also adhere to several self-regulatory frameworks, including the EU-US and Swiss-US Privacy Shield Frameworks…

12. Although Respondent initiated an application to Commerce for Privacy Shield certification, it did not complete the steps necessary to participate in either the EU-U.S. or the Swiss-U.S. Privacy Shield frameworks and continued to make the statements described in

Paragraph 11 in its privacy policy. Therefore, the representation set forth in Paragraph 11 is false and misleading.

Count 1-Privacy Misrepresentation

13. As described in Paragraph 11, Respondent represented, directly or indirectly, expressly or by implication, that it was a participant in the EU-U.S and the Swiss-U.S. Privacy Shield frameworks.

14. In fact, as described in Paragraph 12, Respondent was never certified to participate in either the EU-U.S. or the Swiss-U.S. Privacy Shield frameworks. Therefore, the representation set forth in Paragraph 13 is false or misleading.

Violations of Section 5 of the FTC Act

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 twenty-third day of January 2020, has issued this complaint against Respondent.

By the Commission.

DECISION

The Federal Trade Commission ("Commission") initiated an investigation of certain acts and practices of the Respondent named above in the caption. The Commission's Bureau of Consumer Protection ("BCP") prepared and furnished to Respondent a draft Complaint. BCP proposed to present the draft Complaint to the Commission for its consideration. If issued by the Commission, the draft Complaint would charge Respondent with violation of the Federal Trade Commission Act.

Respondent and BCP thereafter executed an Agreement Containing Consent Order ("Consent Agreement"). The Consent Agreement includes: 1) statements by Respondent that it neither admits nor denies any of the allegations in the Complaint, except as specifically stated in this Decision and Order, and that only for purposes of this action, it admits the facts necessary to establish jurisdiction; and 2) waivers and other provisions as required by the Commission's Rules.

The Commission considered the matter and determined that it had reason to believe that Respondent has violated the Federal Trade Commission Act, and that a Complaint should issue stating its charges in that respect. The Commission accepted the executed Consent Agreement and placed it 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 Rule 2.34, the Commission issues its Complaint, makes the following Findings, and issues the following Order:

Findings

1. Respondent Incentive Services, Inc. is a Minnesota corporation with its principal office or place of business at 7667 Cahill Road, Edina, Minnesota 55439.

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

ORDER

Definitions

For purposes of this Order, the following definition applies:

A. "Respondent" means Incentive Services, Inc., a corporation, and its successors and assigns.

Provisions

I. Prohibition against Misrepresentations about Participation in or Compliance with Privacy Programs

IT IS ORDERED that Respondent and its officers, agents, 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 the advertising, marketing, promotion, offering for sale, or sale of any product or service must 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 a government or any self-regulatory or standard-setting organization, including but not limited to the EU-U.S. Privacy Shield framework, the Swiss-U.S. Privacy Shield framework, and the APEC Cross-Border Privacy Rules.

II. Acknowledgments of the Order

IT IS FURTHER ORDERED that Respondent obtain acknowledgments of receipt of this Order:

A. Respondent, within ten (10) days after the effective date of this Order, must submit to the Commission an acknowledgment of receipt of this Order.

B. For twenty (20) years after the issuance date of this Order, Respondent must deliver a copy of this Order to: (1) all principals, officers, directors, and LLC managers and members; (2) all employees having managerial responsibilities for conduct related to the subject matter of the Order and all agents and representatives who participate in conduct related to the subject matter of the Order; and (3) any business entity resulting from any change in structure as set forth in the Provision titled Compliance Report and Notices. Delivery must occur within ten (10) days after the effective date of this Order for current personnel. For all others, delivery must occur before they assume their responsibilities.

C. From each individual or entity to which Respondent delivered a copy of this Order, Respondent must obtain, within thirty (30) days, a signed and dated acknowledgment of receipt of this Order.

III. Compliance Report and Notices

IT IS FURTHER ORDERED that Respondent make timely submissions to the Commission:

A. Sixty (60) days after the issuance date of this Order, Respondent must submit a compliance report, sworn under penalty of perjury, in which Respondent must: (a) identify the primary physical, postal, and email address and telephone number, as designated points of contact, which representatives of the Commission, may use to communicate with Respondent; (b) identify all of Respondent's businesses by all of their names, telephone numbers, and physical, postal, email, and Internet addresses; (c) describe the activities of each business; (d) describe in detail whether and how Respondent is in compliance with each Provision of this Order; and (e) provide a copy of each Acknowledgment of the Order obtained pursuant to this Order, unless previously submitted to the Commission.

B. Respondent must submit a compliance notice, sworn under penalty of perjury, within fourteen (14) days of any change in the following: (1) any designated point of contact; or (2) the structure of Respondent or any entity that Respondent has any ownership interest in or controls directly or indirectly that may affect compliance obligations arising under this Order, including: creation, merger, sale, or dissolution of the entity or any subsidiary, parent, or affiliate that engages in any acts or practices subject to this Order.

C. Respondent must submit notice of the filing of any bankruptcy petition, insolvency proceeding, or similar proceeding by or against Respondent within fourteen (14) days of its filing.

D. Any submission to the Commission required by this Order to be sworn under penalty of perjury must be true and accurate and comply with 28 U.S.C. § 1746, such as by concluding: "I declare under penalty of perjury under the laws of the

United States of America that the foregoing is true and correct. Executed on: _____" and supplying the date, signatory's full name, title (if applicable), and signature.

E. Unless otherwise directed by a Commission representative in writing, all submissions to the Commission pursuant to this Order must 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 *Incentive Services, Inc*., FTC File No. 192 3078, Docket No. C-4703.

IV. Recordkeeping

IT IS FURTHER ORDERED that Respondent must create certain records for twenty (20) years after the issuance date of the Order, and retain each such record for five (5) years. Specifically, Respondent must create and retain the following records:

A. accounting records showing the revenues from all goods or services sold;

B. personnel records showing, for each person providing services, whether as an employee or otherwise, that person's: name; addresses; telephone numbers; job title or position; dates of service; and (if applicable) the reason for termination;

C. all records necessary to demonstrate full compliance with each provision of this Order, including all submissions to the Commission; and

D. a copy of each widely disseminated representation by Respondent making any representation subject to this Order, and all materials that were relied upon in making the representation.

V. Compliance Monitoring

IT IS FURTHER ORDERED that, for the purpose of monitoring Respondent's compliance with this Order:

A. Within ten (10) days of receipt of a written request from a representative of the Commission, Respondent must: submit additional compliance reports or other requested information, which must be sworn under penalty of perjury, and produce records for inspection and copying.

B. For matters concerning this Order, representatives of the Commission are authorized to communicate directly with Respondent. Respondent must permit representatives of the Commission to interview anyone affiliated with Respondent who has agreed to such an interview. The interviewee may have counsel present.

C. The Commission may use all other lawful means, including posing through its representatives as consumers, suppliers, or other individuals or entities, to Respondent or any individual or entity affiliated with Respondent, without the necessity of identification or prior notice. Nothing in this Order limits the Commission's lawful use of compulsory process, pursuant to Sections 9 and 20 of the FTC Act, 15 U.S.C. §§ 49, 57b-1.

VI. Order Effective Dates

IT IS FURTHER ORDERED that this Order is final and effective upon the date of its publication on the Commission's website (ftc.gov) as a final order. This Order will terminate on January 23, 2040, or twenty (20) years from the most recent date that the United States or the Commission files a complaint (with or without an accompanying settlement) 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 Provision 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 Provision.

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 Provision as though the complaint had never been filed, except that the Order will not terminate between the date such complaint is filed and the later of the deadline for appealing such dismissal or ruling and the date such dismissal or ruling is upheld on appeal.

By the Commission.

ANALYSIS OF CONSENT ORDER TO AID PUBLIC COMMENT

The Federal Trade Commission ("Commission") has accepted, subject to final approval, an agreement containing a consent order from Incentive Services, Inc. ("Incentive Services" or "Respondent").

The proposed consent order ("proposed order") has been placed on the public record for thirty (30) days for receipt of comments by interested persons. Comments received during this

period will become part of the public record. After thirty (30) days, the Commission will again review the agreement and the comments received, and will decide whether it should withdraw from the agreement and take appropriate action or make final the agreement's proposed order.

This matter concerns alleged false or misleading representations that Incentive Services made concerning its participation in the Privacy Shield framework agreed upon by the U.S. and the European Union ("EU"). The Privacy Shield framework allows for the lawful transfer of personal data from the EU to participating companies in the U.S. The framework consists of a set of principles and related requirements that have been deemed by the European Commission as providing "adequate" privacy protection. The principles include notice; choice; accountability for onward transfer; security; data integrity and purpose limitation; access; and recourse, enforcement, and liability. The related requirements include, for example, securing an independent recourse mechanism to handle any disputes about how the company handles information about EU citizens.

To participate in the framework, a company must comply with the Privacy Shield principles and self-certify that compliance to the U.S. Department of Commerce ("Commerce"). Commerce reviews companies' self-certification applications and maintains a public website, https://www.privacyshield.gov/list, where it posts the names of companies who have completed the requirements for certification. Companies are required to recertify every year in order to continue benefitting from Privacy Shield.

Incentive Services is a company that works with organizations to improve performance of individual employees through service award programs, performance incentives, and loyalty programs. According to the Commission's complaint, Incentive Services published on its website, https://www.incentiveservices.com/, a privacy policy containing statements related to its participation in Privacy Shield. However it only initiated an application to Commerce for Privacy Shield certification, and did not complete the steps necessary to participate in the framework.

The Commission's proposed one-count complaint alleges that Respondent violated Section 5(a) of the Federal Trade Commission Act. Specifically, the proposed complaint alleges that Respondent engaged in a deceptive act or practice by falsely representing that it was a certified participant in the EU-U.S. and the Swiss-U.S. Privacy Shield frameworks.

Part I of the proposed order prohibits the company 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 EU-U.S. Privacy Shield framework, the Swiss-U.S. Privacy Shield framework, and the APEC Cross-Border Privacy Rules.

Parts II through V of the proposed order are reporting and compliance provisions. Part II requires acknowledgement of the order and dissemination of the order now and in the future to persons with responsibilities relating to the subject matter of the order. Part III ensures notification to the FTC of changes in corporate status and mandates that the company submit an initial compliance report to the FTC. Part IV requires the company to create certain documents relating to its compliance with the order for twenty years and to retain those documents for a five-year

period. Part V mandates that the company make available to the FTC information or subsequent compliance reports, as requested.

Part VI is a provision "sun-setting" 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

TDARX, INC.

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

Docket No. C-4704; File No. 192 3084
Complaint, January 23, 2020 – Decision, January 23, 2020

This consent order addresses TDARX, Inc.'s violation of Section 5 of the Federal Trade Commission Act by claiming it had self-certified to the EU-U.S. Privacy Shield framework when it failed to self-certify to the Department of Commerce or failed to comply with the Privacy Shield Principles. The complaint alleges that Respondent disseminated privacy policies and statements that it complied with the Privacy Shield Principles after its certification lapsed in 2018. The consent order requires Respondent must not misrepresent the extent to which Respondent participates in any privacy or security program sponsored by a government or any self-regulatory or standard-setting organization.

Participants

For the *Commission*: *Megan Cox* and *Andy Hasty.*

For the *Respondents*: *Adam Goldblatt, Forrest Firm, P.C.*

COMPLAINT

The Federal Trade Commission ("FTC"), having reason to believe that TDARX, 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 TDARX, Inc. is a Delaware corporation with its principal office or place of business at 4000 Brownsboro Rd, Winston Salem, North Carolina 27106.

2. Respondent provides IT management and security services through the websites https://www.tdarx.com and http://www.nocdoc.com.

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

4. Respondent had set forth on its website, http://www.nocdoc.com/pdf/privacy_policy.pdf, privacy policies and statements about its practices, including statements related to its participation in the EU-U.S. Privacy Shield framework agreed upon by the U.S. government and the European Commission.

Privacy Shield

5. The EU-U.S. Privacy Shield framework ("Privacy Shield") was designed by the U.S. Department of Commerce ("Commerce") and the European Commission to provide a mechanism for U.S. companies to transfer personal data outside of the EU that is consistent with

the requirements of the European Union data protection legislation. The EU General Data Protection Regulation, passed in May 2016 and enforced since May 2018 (replacing the 1995 EU Data Protection Directive), sets forth EU requirements for privacy and the protection of personal data. Among other things, it requires EU Member States to implement legislation that prohibits the transfer of personal data outside the EU, with exceptions, unless the European Commission 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. Any company that voluntarily withdraws or lets its self-certification lapse must take steps to affirm to Commerce that it is continuing to protect the personal information it received while it participated in the program.

6. To satisfy the EU adequacy standard for certain commercial transfers, Commerce and the European Commission negotiated the EU-U.S. Privacy Shield framework, which went into effect in July 2016. The EU-U.S. Privacy Shield framework allows companies to transfer personal data lawfully from the EU to the United States. To join the EU-U.S. Privacy Shield framework, a company must self-certify to Commerce that it complies with the Privacy Shield Principles and related requirements that have been deemed to meet the EU's adequacy standard. Any company that participates in Privacy Shield must verify, at least once a year, through self-assessment or outside compliance review, that the assertions it makes about its Privacy Shield privacy practices are true and that those privacy practices have been implemented.

7. Companies under the jurisdiction of the FTC, as well as the U.S. Department of Transportation, are eligible to join the EU-U.S. Privacy Shield framework. A company under the FTC's jurisdiction that claims it has self-certified to the Privacy Shield Principles, but failed to self-certify to Commerce or failed to comply with the Privacy Shield Principles, 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, https://www.privacyshield.gov/welcome, where it posts the names of companies that have self-certified to the EU-U.S. Privacy Shield framework. The listing of companies, https://www.privacyshield.gov/list, indicates whether the company's self-certification is current.

9. Respondent has disseminated or caused to be disseminated privacy policies and statements on the http://www.nocdoc.com/pdf/privacy_policy.pdf website, including, but not limited to, the following statements:

> **Recourse Mechanism for Privacy Shield Complaints**
>
> In compliance with the Privacy Shield Principles, NOCDOC commits to resolve complaints about our collection or use of your personal information. EU individuals with inquiries or complaints regarding our Private Shield policy should first contact NOCDOC at: CustomerCare@nocdoc.com or fill out a form at http://www.nocdoc.com/contact.aspx

> NOCDOC has further committed to cooperate with EU data protection authorities (DPAs) with regard to unresolved Privacy Shield complaints concerning human resources data transferred from the EU in the context of the employment relationship.

10. Although Respondent obtained Privacy Shield certification in 2017, that certification lapsed one year later, in 2018.

11. Commerce warned the company to take down its claims that it participated in Privacy Shield unless and until such time as it completed the steps necessary to renew its participation in the EU-U.S. Privacy Shield framework. Respondent did not do so timely, nor did it withdraw and affirm its commitment to protect any personal information it had acquired while in the program.

12. After its certification lapsed, Respondent continued to claim, as indicated in paragraph 9, that it participated in the EU-U.S. Privacy Shield framework.

13. The Privacy Shield Principles include Supplemental Principle 7, which requires any company that participates in Privacy Shield to verify, at least once a year, through self-assessment or outside compliance review, that the assertions it makes about its Privacy Shield privacy practices are true and that those privacy practices have been implemented. The verification statement must be signed by a corporate officer or the outside reviewer and is required to be made available on request to the FTC or Department of Transportation, whoever has unfair and deceptive practices jurisdiction over the company.

14. Respondent is under the jurisdiction of the FTC. During the 2017-18 period that Respondent was certified to participate in Privacy Shield, Respondent failed to comply with the requirement to obtain, through self-assessment or outside compliance review, an attested verification statement that the assertions it had made about its Privacy Shield privacy practices during the time it participated in the program were true and that those privacy practices had been implemented.

Count 1-Privacy Misrepresentation

15. As described in Paragraph 9, Respondent represented, directly or indirectly, expressly or by implication, that it was a current participant in the EU-U.S Privacy Shield framework.

16. In fact, as described in Paragraphs 10-12, after its certification lapsed, Respondent was not a current participant in the EU-U.S. Privacy Shield framework. Therefore, the representation set forth in Paragraph 15 is false or misleading.

Count 2-Misrepresentation Regarding Verification

17. As described in Paragraph 9, Respondent represented that it complied with the EU-U.S. Privacy Shield principles.

18. In fact, as described in Paragraphs 13-14, Respondent failed to comply with the verification requirement during the time it participated in the program. Therefore, the representation set forth in Paragraph 17 is false or misleading.

Count 3-Misrepresentation Regarding Continuing Obligations

19. As described in Paragraph 9, Respondent represented that it complied with the EU-U.S. Privacy Shield framework principles. These principles include a requirement that if it ceased to participate in the EU-U.S. Privacy Shield framework, it must affirm to Commerce that it will continue to apply the principles to personal information that it received during the time it participated in the program.

20. In fact, as described in Paragraph 10, Respondent did not affirm to Commerce that it will continue to apply the principles to personal information that it received during the time it participated in the program. Therefore, the representation set forth in Paragraph 19 is false or misleading.

Violations of Section 5 of the FTC Act

21. 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 twenty-third day of January 2020, has issued this complaint against Respondent.

By the Commission.

DECISION

The Federal Trade Commission ("Commission") initiated an investigation of certain acts and practices of the Respondent named above in the caption. The Commission's Bureau of Consumer Protection ("BCP") prepared and furnished to Respondent a draft Complaint. BCP proposed to present the draft Complaint to the Commission for its consideration. If issued by the Commission, the draft Complaint would charge Respondent with violation of the Federal Trade Commission Act.

Respondent and BCP thereafter executed an Agreement Containing Consent Order ("Consent Agreement"). The Consent Agreement includes: 1) statements by Respondent that it neither admits nor denies any of the allegations in the Complaint, except as specifically stated in

this Decision and Order, and that only for purposes of this action, it admits the facts necessary to establish jurisdiction; and 2) waivers and other provisions as required by the Commission's Rules.

The Commission considered the matter and determined that it had reason to believe that Respondent has violated the Federal Trade Commission Act, and that a Complaint should issue stating its charges in that respect. The Commission accepted the executed Consent Agreement and placed it 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 Rule 2.34, the Commission issues its Complaint, makes the following Findings, and issues the following Order:

Findings

1. Respondent TDARX, Inc. is a North Carolina corporation with its principal office or place of business at 4000 Brownsboro Rd, Winston Salem, North Carolina 27106.

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

ORDER

Definitions

For purposes of this Order, the following definition applies:

A. "Respondent" means TDARX, Inc., a corporation, and its successors and assigns.

Provisions

I. Prohibition against Misrepresentations about Participation in or Compliance with Privacy Programs

IT IS ORDERED that Respondent and its officers, agents, 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 the advertising, marketing, promotion, offering for sale, or sale of any product or service must 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 a government or any self-regulatory or standard-setting organization, including but not limited to the EU-U.S. Privacy Shield framework, the Swiss-U.S. Privacy Shield framework, and the APEC Cross-Border Privacy Rules.

II. Requirement to Meet Continuing Obligations Under Privacy Shield

IT IS ORDERED that Respondent and its officers, agents, 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 the advertising, marketing, promotion, offering for sale, or sale of any product or service, must:

A. affirm to the Department of Commerce, within ten (10) days after the effective date of this Order and on an annual basis thereafter for as long as it retains such information, that it will

1. continue to apply the EU-U.S. Privacy Shield framework principles to the personal information it received while it participated in the Privacy Shield; or

2. protect the information by another means authorized under EU law, including by using a binding corporate rule or a contract that fully reflects the requirements of the relevant standard contractual clauses adopted by the European Commission; or

B. return or delete the information within ten (10) days after the effective date of this Order.

III. Acknowledgments of the Order

IT IS FURTHER ORDERED that Respondent obtain acknowledgments of receipt of this Order:

A. Respondent, within ten (10) days after the effective date of this Order, must submit to the Commission an acknowledgment of receipt of this Order.

B. For ten (10) years after the issuance date of this Order, Respondent must deliver a copy of this Order to: (1) all principals, officers, directors, and LLC managers and members; (2) all employees having managerial responsibilities for conduct related to the subject matter of the Order and all agents and representatives who participate in conduct related to the subject matter of the Order; and (3) any business entity resulting from any change in structure as set forth in the Provision titled Compliance Report and Notices. Delivery must occur within ten (10) days after the effective date of this Order for current personnel. For all others, delivery must occur before they assume their responsibilities.

C. From each individual or entity to which Respondent delivered a copy of this Order, Respondent must obtain, within thirty (30) days, a signed and dated acknowledgment of receipt of this Order.

IV. Compliance Report and Notices

IT IS FURTHER ORDERED that Respondent make timely submissions to the Commission:

A. Sixty (60) days after the issuance date of this Order, Respondent must submit a compliance report, sworn under penalty of perjury, in which Respondent must: (a) identify the primary physical, postal, and email address and telephone number, as designated points of contact, which representatives of the Commission, may use to communicate with Respondent; (b) identify all of Respondent's businesses by all of their names, telephone numbers, and physical, postal, email, and Internet addresses; (c) describe the activities of each business; (d) describe in detail whether and how Respondent is in compliance with each Provision of this Order; and (e) provide a copy of each Acknowledgment of the Order obtained pursuant to this Order, unless previously submitted to the Commission.

B. Respondent must submit a compliance notice, sworn under penalty of perjury, within fourteen (14) days of any change in the following: (1) any designated point of contact; or (2) the structure of Respondent or any entity that Respondent has any ownership interest in or controls directly or indirectly that may affect compliance obligations arising under this Order, including: creation, merger, sale, or dissolution of the entity or any subsidiary, parent, or affiliate that engages in any acts or practices subject to this Order.

C. Respondent must submit notice of the filing of any bankruptcy petition, insolvency proceeding, or similar proceeding by or against Respondent within fourteen (14) days of its filing.

D. Any submission to the Commission required by this Order to be sworn under penalty of perjury must be true and accurate and comply with 28 U.S.C. § 1746, such as by concluding: "I declare under penalty of perjury under the laws of the United States of America that the foregoing is true and correct. Executed on: _____" and supplying the date, signatory's full name, title (if applicable), and signature.

E. Unless otherwise directed by a Commission representative in writing, all submissions to the Commission pursuant to this Order must 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 *TDARX, Inc.*, FTC File No. 192 3084, Docket No. C-4704.

V. Recordkeeping

IT IS FURTHER ORDERED that Respondent must create certain records for ten (10) years after the issuance date of the Order, and retain each such record for five (5) years. Specifically, Respondent must create and retain the following records:

A. accounting records showing the revenues from all goods or services sold;

B. personnel records showing, for each person providing services, whether as an employee or otherwise, that person's: name; addresses; telephone numbers; job title or position; dates of service; and (if applicable) the reason for termination;

C. all records necessary to demonstrate full compliance with each provision of this Order, including all submissions to the Commission; and

D. a copy of each widely disseminated representation by Respondent making any representation subject to this Order, and all materials that were relied upon in making the representation.

VI. Compliance Monitoring

IT IS FURTHER ORDERED that, for the purpose of monitoring Respondent's compliance with this Order:

A. Within ten (10) days of receipt of a written request from a representative of the Commission, Respondent must: submit additional compliance reports or other requested information, which must be sworn under penalty of perjury, and produce records for inspection and copying.

B. For matters concerning this Order, representatives of the Commission are authorized to communicate directly with Respondent. Respondent must permit representatives of the Commission to interview anyone affiliated with Respondent who has agreed to such an interview. The interviewee may have counsel present.

C. The Commission may use all other lawful means, including posing through its representatives as consumers, suppliers, or other individuals or entities, to Respondent or any individual or entity affiliated with Respondent, without the necessity of identification or prior notice. Nothing in this Order limits the Commission's lawful use of compulsory process, pursuant to Sections 9 and 20 of the FTC Act, 15 U.S.C. §§ 49, 57b-1.

VII. Order Effective Dates

IT IS FURTHER ORDERED that this Order is final and effective upon the date of its publication on the Commission's website (ftc.gov) as a final order. This Order will terminate on January 23, 2040, or twenty (20) years from the most recent date that the United States or the Commission files a complaint (with or without an accompanying settlement) 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 Provision 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 Provision.

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 Provision as though the complaint had never been filed, except that the Order will not terminate between the date such complaint is filed and the later of the deadline for appealing such dismissal or ruling and the date such dismissal or ruling is upheld on appeal.

By the Commission.

ANALYSIS OF CONSENT ORDER TO AID PUBLIC COMMENT

The Federal Trade Commission ("Commission") has accepted, subject to final approval, an agreement containing a consent order from TDARX, Inc. ("TDARX" or "Respondent").

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

This matter concerns alleged false or misleading representations that TDARX made concerning its participation in the Privacy Shield framework agreed upon by the U.S. and the European Union ("EU"). The Privacy Shield framework allows for the lawful transfer of personal data from the EU to participating companies in the U.S. The framework consists of a set of principles and related requirements that have been deemed by the European Commission as providing "adequate" privacy protection. The principles include notice; choice; accountability for onward transfer; security; data integrity and purpose limitation; access; and recourse, enforcement, and liability. The related requirements include, for example, securing an independent recourse mechanism to handle any disputes about how the company handles information about EU citizens.

To participate in the framework, a company must comply with the Privacy Shield principles and self-certify that compliance to the U.S. Department of Commerce ("Commerce"). Commerce reviews companies' self-certification applications and maintains a public website, https://www.privacyshield.gov/list, where it posts the names of companies who have completed the requirements for certification. Companies are required to recertify every year in order to continue benefitting from Privacy Shield.

Analysis to Aid Public Comment

TDARX provides IT management and security services through the websites https://www.tdarx.comandhttp://www.nocdoc.com. According to the Commission's complaint, TDARX published on its website, http://www.nocdoc.com/pdf/privacy_policy.pdf, privacy policies containing statements related to its participation in Privacy Shield. However, TDARX allowed its certification to lapse and continued to claim it participated in the Privacy Shield framework.

The Commission's proposed three-count complaint alleges that Respondent violated Section 5(a) of the Federal Trade Commission Act. Specifically, the proposed complaint alleges that Respondent engaged in a deceptive act or practice by falsely representing that it was a certified participant in the EU-U.S. Privacy Shield Framework. The proposed complaint further alleges that Respondent engaged in deceptive acts or practices by representing that it complied with the framework when in fact it had failed to comply with certain Privacy Shield requirements.

Part I of the proposed order prohibits the company 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 EU-U.S. Privacy Shield framework, the Swiss-U.S. Privacy Shield framework, and the APEC Cross-Border Privacy Rules.

Part II of the proposed order requires that the company affirm to Commerce that it will either continue to apply the Privacy Shield framework principles to any data it received pursuant to frameworks or will delete or return such data.

Parts III through VI of the proposed order are reporting and compliance provisions. Part III requires acknowledgement of the order and 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 and mandates that the company submit an initial compliance report to the FTC. Part V requires the company to create certain documents relating to its compliance with the order for ten years and to retain those documents for a five-year period. Part VI mandates that the company make available to the FTC information or subsequent compliance reports, as requested.

Part VII is a provision "sun-setting" 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

CLICK LABS, INC.

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

Docket No. C-4705; File No. 192 3090
Complaint, January 23, 2020 – Decision, January 23, 2020

This consent order addresses Click Labs, Inc.'s violation of Section 5 of the Federal Trade Commission Act by stating it complied with the EU-U.S. and Swiss-U.S. Privacy Shield Framework when it did not. The complaint alleges that Respondent disseminated privacy policies and statements that it adhered to the Privacy Shield Principles when it was never certified to participate in either Privacy Shield frameworks. The consent order requires Respondent must not misrepresent the extent to which Respondent participates in any privacy or security program sponsored by a government or any self-regulatory or standard-setting organization.

Participants

For the *Commission*: *Megan Cox* and *Andy Hasty.*

For the *Respondents*: *Samar Singla – Director, pro se.*

COMPLAINT

The Federal Trade Commission ("FTC"), having reason to believe that Click Labs, 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 Click Labs, Inc. is a Florida corporation with its principal office or place of business at 600 1st Avenue, Suite 114, Seattle, WA 98104.

2. Respondent provides website and mobile app development and support through the website www.jungleworks.com.

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

4. Respondent has set forth on its website, https://jungleworks.com/privacy-policy/ privacy policies and statements about its practices, including statements related to its participation in the EU-U.S. and the Swiss-U.S. Privacy Shield frameworks.

5. In fact, Respondent has not been certified to participate in either the EU-U.S. or the Swiss-U.S. Privacy Shield frameworks.

Privacy Shield

6. The EU-U.S. Privacy Shield framework ("Privacy Shield") was designed by the U.S. Department of Commerce ("Commerce") and the European Commission to provide a mechanism for U.S. companies to transfer personal data outside of the EU that is consistent with the requirements of European Union data protection legislation. The EU General Data Protection Regulation, passed in May 2016 and enforced since May 2018 (replacing the 1995 EU Data Protection Directive), sets forth EU requirements for privacy and the protection of personal data. Among other things, it requires EU Member States to implement legislation that prohibits the transfer of personal data outside the EU, with exceptions, unless the European Commission 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.

7. To satisfy the EU adequacy standard for certain commercial transfers, Commerce and the European Commission negotiated the EU-U.S. Privacy Shield framework, which went into effect in July 2016. The EU-U.S. Privacy Shield framework allows companies to transfer personal data lawfully from the EU to the United States. To join the EU-U.S. Privacy Shield framework, a company must self-certify to Commerce that it complies with the Privacy Shield Principles and related requirements that have been deemed to meet the EU's adequacy standard.

8. Companies under the jurisdiction of the FTC, as well as the U.S. Department of Transportation, are eligible to join the EU-U.S. Privacy Shield framework. A company under the FTC's jurisdiction that claims it has self-certified to the Privacy Shield 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.

9. The Swiss-U.S. Privacy Shield framework is identical to the EU-U.S. Privacy Shield framework and is consistent with the requirements of the Swiss Federal Act on Data Protection.

10. Commerce maintains a public website, https://www.privacyshield.gov/welcome, where it posts the names of companies that have self-certified to the EU-U.S. and/or the Swiss-U.S. Privacy Shield frameworks. The listing of companies, https://www.privacyshield.gov/list, indicates whether the company's self-certification is current.

11. Respondent has disseminated or caused to be disseminated privacy policies and statements on the https://jungleworks.com/privacy-policy/ website, including, but not limited to, the following statements:

> **7.5** We agree to adhere to the Privacy Shield Principles, which were identified in our organization's self-certification submission under "Other Covered Entities".
>
> 7.6 We shall comply with the EU-U.S. Privacy Shield Framework and Swiss-U.S. Privacy Shield Framework as set forth by the U.S. Department of Commerce regarding the collection, use, and retention of personal information transferred from

the European Union and Switzerland to the United States. Jungleworks has certified to the Department of Commerce that it adheres to the Privacy Shield Principles.

12. Although Respondent initiated an application to Commerce for Privacy Shield certification, it did not complete the steps necessary to participate in either the EU-U.S. or the Swiss-U.S. Privacy Shield frameworks and continued to make the statements described in Paragraph 11 in its privacy policy.

Count 1-Privacy Misrepresentation

13. As described in Paragraph 11, Respondent represented, directly or indirectly, expressly or by implication, that it was a participant in the EU-U.S and the Swiss-U.S. Privacy Shield frameworks.

14. In fact, as described in Paragraph 12, Respondent was never certified to participate in either the EU-U.S. or the Swiss-U.S. Privacy Shield frameworks. Therefore, the representation set forth in Paragraph 13 is false or misleading.

Violations of Section 5 of the FTC Act

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 twenty-third day of January 2020, has issued this complaint against Respondent.

By the Commission.

DECISION

The Federal Trade Commission ("Commission") initiated an investigation of certain acts and practices of the Respondent named above in the caption. The Commission's Bureau of Consumer Protection ("BCP") prepared and furnished to Respondent a draft Complaint. BCP proposed to present the draft Complaint to the Commission for its consideration. If issued by the Commission, the draft Complaint would charge Respondent with violation of the Federal Trade Commission Act.

Respondent and BCP thereafter executed an Agreement Containing Consent Order ("Consent Agreement"). The Consent Agreement includes: 1) statements by Respondent that it neither admits nor denies any of the allegations in the Complaint, except as specifically stated in

this Decision and Order, and that only for purposes of this action, it admits the facts necessary to establish jurisdiction; and 2) waivers and other provisions as required by the Commission's Rules.

The Commission considered the matter and determined that it had reason to believe that Respondent has violated the Federal Trade Commission Act, and that a Complaint should issue stating its charges in that respect. The Commission accepted the executed Consent Agreement and placed it 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 Rule 2.34, the Commission issues its Complaint, makes the following Findings, and issues the following Order:

Findings

1. Respondent Click Labs, Inc. is a Florida corporation with its principal office or place of business at 600 1st Avenue, Suite 114, Seattle, WA 98104.

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

ORDER

Definitions

For purposes of this Order, the following definition applies:

A. "Respondent" means Click Labs, Inc., a corporation, and its successors and assigns.

Provisions

I. Prohibition against Misrepresentations about Participation in or Compliance with Privacy Programs

IT IS ORDERED that Respondent and its officers, agents, 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 the advertising, marketing, promotion, offering for sale, or sale of any product or service must 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 a government or any self-regulatory or standard-setting organization, including but not limited to the EU-U.S. Privacy Shield framework, the Swiss-U.S. Privacy Shield framework, and the APEC Cross-Border Privacy Rules.

II. Acknowledgments of the Order

IT IS FURTHER ORDERED that Respondent obtain acknowledgments of receipt of this Order:

A. Respondent, within ten (10) days after the effective date of this Order, must submit to the Commission an acknowledgment of receipt of this Order.

B. For twenty (20) years after the issuance date of this Order, Respondent must deliver a copy of this Order to: (1) all principals, officers, directors, and LLC managers and members; (2) all employees having managerial responsibilities for conduct related to the subject matter of the Order and all agents and representatives who participate in conduct related to the subject matter of the Order; and (3) any business entity resulting from any change in structure as set forth in the Provision titled Compliance Report and Notices. Delivery must occur within ten (10) days after the effective date of this Order for current personnel. For all others, delivery must occur before they assume their responsibilities.

C. From each individual or entity to which Respondent delivered a copy of this Order, Respondent must obtain, within thirty (30) days, a signed and dated acknowledgment of receipt of this Order.

III. Compliance Report and Notices

IT IS FURTHER ORDERED that Respondent make timely submissions to the Commission:

A. Sixty (60) days after the issuance date of this Order, Respondent must submit a compliance report, sworn under penalty of perjury, in which Respondent must: (a) identify the primary physical, postal, and email address and telephone number, as designated points of contact, which representatives of the Commission, may use to communicate with Respondent; (b) identify all of Respondent's businesses by all of their names, telephone numbers, and physical, postal, email, and Internet addresses; (c) describe the activities of each business; (d) describe in detail whether and how Respondent is in compliance with each Provision of this Order; and (e) provide a copy of each Acknowledgment of the Order obtained pursuant to this Order, unless previously submitted to the Commission.

B. Respondent must submit a compliance notice, sworn under penalty of perjury, within fourteen (14) days of any change in the following: (1) any designated point of contact; or (2) the structure of Respondent or any entity that Respondent has any ownership interest in or controls directly or indirectly that may affect compliance obligations arising under this Order, including: creation, merger, sale, or dissolution of the entity or any subsidiary, parent, or affiliate that engages in any acts or practices subject to this Order.

C. Respondent must submit notice of the filing of any bankruptcy petition, insolvency proceeding, or similar proceeding by or against Respondent within fourteen (14) days of its filing.

D. Any submission to the Commission required by this Order to be sworn under penalty of perjury must be true and accurate and comply with 28 U.S.C. § 1746, such as by concluding: "I declare under penalty of perjury under the laws of the United States of America that the foregoing is true and correct. Executed on: _____" and supplying the date, signatory's full name, title (if applicable), and signature.

E. Unless otherwise directed by a Commission representative in writing, all submissions to the Commission pursuant to this Order must 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 *Click Labs, Inc*., FTC File No. 192 3090, Docket No. C-4705.

IV. Recordkeeping

IT IS FURTHER ORDERED that Respondent must create certain records for twenty (20) years after the issuance date of the Order, and retain each such record for five (5) years. Specifically, Respondent must create and retain the following records:

A. accounting records showing the revenues from all goods or services sold;

B. personnel records showing, for each person providing services, whether as an employee or otherwise, that person's: name; addresses; telephone numbers; job title or position; dates of service; and (if applicable) the reason for termination;

C. all records necessary to demonstrate full compliance with each provision of this Order, including all submissions to the Commission; and

D. a copy of each widely disseminated representation by Respondent making any representation subject to this Order, and all materials that were relied upon in making the representation.

V. Compliance Monitoring

IT IS FURTHER ORDERED that, for the purpose of monitoring Respondent's compliance with this Order:

A. Within ten (10) days of receipt of a written request from a representative of the Commission, Respondent must: submit additional compliance reports or other

requested information, which must be sworn under penalty of perjury, and produce records for inspection and copying.

B. For matters concerning this Order, representatives of the Commission are authorized to communicate directly with Respondent. Respondent must permit representatives of the Commission to interview anyone affiliated with Respondent who has agreed to such an interview. The interviewee may have counsel present.

C. The Commission may use all other lawful means, including posing through its representatives as consumers, suppliers, or other individuals or entities, to Respondent or any individual or entity affiliated with Respondent, without the necessity of identification or prior notice. Nothing in this Order limits the Commission's lawful use of compulsory process, pursuant to Sections 9 and 20 of the FTC Act, 15 U.S.C. §§ 49, 57b-1.

VI. Order Effective Dates

IT IS FURTHER ORDERED that this Order is final and effective upon the date of its publication on the Commission's website (ftc.gov) as a final order. This Order will terminate on January 23, 2040, or twenty (20) years from the most recent date that the United States or the Commission files a complaint (with or without an accompanying settlement) 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 Provision 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 Provision.

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 Provision as though the complaint had never been filed, except that the Order will not terminate between the date such complaint is filed and the later of the deadline for appealing such dismissal or ruling and the date such dismissal or ruling is upheld on appeal.

By the Commission.

ANALYSIS OF CONSENT ORDER TO AID PUBLIC COMMENT

The Federal Trade Commission ("Commission") has accepted, subject to final approval, an agreement containing a consent order from Click Labs, Inc. ("Click Labs" or "Respondent").

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

This matter concerns alleged false or misleading representations that Click Labs made concerning its participation in the Privacy Shield framework agreed upon by the U.S. and the European Union ("EU"). The Privacy Shield framework allows for the lawful transfer of personal data from the EU to participating companies in the U.S. The framework consists of a set of principles and related requirements that have been deemed by the European Commission as providing "adequate" privacy protection. The principles include notice; choice; accountability for onward transfer; security; data integrity and purpose limitation; access; and recourse, enforcement, and liability. The related requirements include, for example, securing an independent recourse mechanism to handle any disputes about how the company handles information about EU citizens.

To participate in the framework, a company must comply with the Privacy Shield principles and self-certify that compliance to the U.S. Department of Commerce ("Commerce"). Commerce reviews companies' self-certification applications and maintains a public website, https://www.privacyshiekl.gov/list, where it posts the names of companies who have completed the requirements for certification. Companies are required to recertify every year in order to continue benefitting from Privacy Shield.

Click Labs provides website and mobile app development and support through the website http://www.jungleworks.com. According to the Commission's complaint, Click Labs published on its website, https://jungleworks.com/privacy-policy/, a privacy policy containing statements related to its participation in Privacy Shield. However it only initiated an application to Commerce for Privacy Shield certification, and did not complete the steps necessary to participate in the framework.

The Commission's proposed one-count complaint alleges that Respondent violated Section 5(a) of the Federal Trade Commission Act. Specifically, the proposed complaint alleges that Respondent engaged in a deceptive act or practice by falsely representing that it was a certified participant in the EU-U.S. and the Swiss-U.S. Privacy Shield frameworks.

Part I of the proposed order prohibits the company 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 EU-U.S. Privacy Shield framework, the Swiss-U.S. Privacy Shield framework, and the APEC Cross-Border Privacy Rules.

Parts II through V of the proposed order are reporting and compliance provisions. Part II requires acknowledgement of the order and dissemination of the order now and in the future to persons with responsibilities relating to the subject matter of the order. Part III ensures notification to the FTC of changes in corporate status and mandates that the company submit an initial compliance report to the FTC. Part IV requires the company to create certain documents relating to its compliance with the order for twenty years and to retain those documents for a five-year period. Part V mandates that the company make available to the FTC information or subsequent compliance reports, as requested.

Part VI is a provision "sun-setting" 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

GLOBAL DATA VAULT, LLC

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

Docket No. C-4706; File No. 192 3093
Complaint, January 23, 2020 – Decision, January 23, 2020

This consent order addresses Global Data Vault, LLC's violation of Section 5 of the Federal Trade Commission Act by stating that it complied with the EU-U.S. Privacy Shield Framework after its certification expired. The complaint alleges that Respondent obtained Privacy Shield certification in June 2017, but did not complete the necessary steps to renew its participation after the certification expired one year later. After allowing its certification to lapse, Respondent continued to claim that it participated in the EU-U.S. Privacy Shield framework. The consent order requires Respondent must not misrepresent the extent to which Respondent participates in any privacy or security program sponsored by a government or any self-regulatory or standard-setting organization.

Participants

For the *Commission*: *Megan Cox* and *Robert McGruer.*

For the *Respondents*: *Craig Harris, Munsch Hardt Kopf & Har, P.C.*

COMPLAINT

The Federal Trade Commission ("FTC"), having reason to believe that Global Data Vault, LLC, a limited liability 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 Global Data Vault, LLC is a Texas limited liability corporation with its principal office or place of business at 900 Jackson Street, Suite 220, Dallas, Texas 75202.

2. Respondent provides data storage and recovery services.

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 previously set forth on its website, https://www.globaldatavault.com/privacy-policy/, privacy policies and statements about its practices, including statements related to its participation in the EU-U.S. Privacy Shield framework agreed upon by the U.S. government and the European Commission, from July 1, 2018, through May 2, 2019.

Privacy Shield

5. The EU-U.S. Privacy Shield framework ("Privacy Shield") was designed by the U.S. Department of Commerce ("Commerce") and the European Commission to provide a mechanism for U.S. companies to transfer personal data outside of the EU that is consistent with the requirements of the European Union data protection legislation. The EU General Data Protection Regulation, passed in May 2016 and enforced since May 2018 (replacing the 1995 EU Data Protection Directive), sets forth EU requirements for privacy and the protection of personal data. Among other things, it requires EU Member States to implement legislation that prohibits the transfer of personal data outside the EU, with exceptions, unless the European Commission 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. Any company that voluntarily withdraws or lets its self-certification lapse must take steps to affirm to Commerce that it is continuing to protect the personal information it received while it participated in the program.

6. To satisfy the EU adequacy standard for certain commercial transfers, Commerce and the European Commission negotiated the EU-U.S. Privacy Shield framework, which went into effect in July 2016. The EU-U.S. Privacy Shield framework allows companies to transfer personal data lawfully from the EU to the United States. To join the EU-U.S. Privacy Shield framework, a company must self-certify to Commerce that it complies with the Privacy Shield Principles and related requirements that have been deemed to meet the EU's adequacy standard. Any company that participates in Privacy Shield must verify, at least once a year, through self-assessment or outside compliance review, that the assertions it makes about its Privacy Shield privacy practices are true and that those privacy practices have been implemented.

7. Companies under the jurisdiction of the FTC, as well as the U.S. Department of Transportation, are eligible to join the EU-U.S. Privacy Shield framework. A company under the FTC's jurisdiction that claims it has self-certified to the Privacy Shield Principles, but failed to self-certify to Commerce or failed to comply with the Privacy Shield Principles, 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, https://www.privacyshield.gov/welcome, where it posts the names of companies that have self-certified to the EU-U.S. Privacy Shield framework. The listing of companies, https://www.privacyshield.gov/list, indicates whether the company's self-certification is current.

9. Respondent previously disseminated or caused to be disseminated privacy policies and statements on the https://www.globaldatavault.com/privacy-policy/ website, including, but not limited to, the following statements, from July 1, 2018, through May 2, 2019:

> **EU-U.S. Privacy Shield Framework**
> GDV complies with the EU-U.S. Privacy Shield Framework as set forth by the U.S. Department of Commerce regarding the collection, use, and retention of personal information from European Union to the United States. GDV has certified to the Department of Commerce that it adheres to the Privacy Shield Principles and

accordingly is subject to the investigatory and enforcement powers of the U.S. Federal Trade Commission (FTC).

10. Although Respondent obtained Privacy Shield certification in June 2017, it did not complete the steps necessary to renew its participation in the EU-U.S. Privacy Shield after that certification expired one year later, in 2018, nor did it withdraw and affirm its commitment to protect any personal information it had acquired while in the program.

11. Commerce warned the company to take down its claims that it participated in Privacy Shield unless and until such time as it completed the steps necessary to renew its participation in the EU-U.S. Privacy Shield framework. Respondent did not do so.

12. After allowing its certification to lapse, Respondent continued to claim, as indicated in paragraph 9, that it participated in the EU-U.S. Privacy Shield framework.

13. The Privacy Shield Principles include Supplemental Principle 7, which requires any company that participates in Privacy Shield to verify, at least once a year, through self-assessment or outside compliance review, that the assertions it makes about its Privacy Shield privacy practices are true and that those privacy practices have been implemented. The verification statement must be signed by a corporate officer or the outside reviewer and is required to be made available on request to the FTC or Department of Transportation, whoever has unfair and deceptive practices jurisdiction over the company.

14. Respondent is under the jurisdiction of the FTC. During the 2017-18 period that Respondent was certified to participate in Privacy Shield, Respondent failed to comply with the requirement to obtain, through self-assessment or outside compliance review, an attested verification statement that the assertions it had made about its Privacy Shield privacy practices during the time it participated in the program were true and that those privacy practices had been implemented.

Count 1-Privacy Misrepresentation

15. As described in Paragraph 9, Respondent represented, directly or indirectly, expressly or by implication, that it was a current participant in the EU-U.S Privacy Shield framework.

16. In fact, as described in Paragraphs 10-12, after its certification lapsed, Respondent was not a current participant in the EU-U.S. Privacy Shield framework. Therefore, the representation set forth in Paragraph 15 is false or misleading.

Count 2-Misrepresentation Regarding Verification

17. As described in Paragraph 9, Respondent represented that it complied with the EU-U.S. Privacy Shield principles.

18. In fact, as described in Paragraphs 13-14, Respondent failed to comply with the verification requirement during the time it participated in the program. Therefore, the representation set forth in Paragraph 17 is false or misleading.

Count 3-Misrepresentation Regarding Continuing Obligations

19. As described in Paragraph 9, Respondent represented that it complied with the EU-U.S. Privacy Shield framework principles. These principles include a requirement that if it ceased to participate in the EU-U.S. Privacy Shield framework, it must affirm to Commerce that it will continue to apply the principles to personal information that it received during the time it participated in the program.

20. In fact, as described in Paragraph 10, Respondent did not affirm to Commerce that it will continue to apply the principles to personal information that it received during the time it participated in the program. Therefore, the representation set forth in Paragraph 19 is false or misleading.

Violations of Section 5 of the FTC Act

21. 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 twenty-third day of January 2020, has issued this complaint against Respondent.

By the Commission.

DECISION

The Federal Trade Commission ("Commission") initiated an investigation of certain acts and practices of the Respondent named above in the caption. The Commission's Bureau of Consumer Protection ("BCP") prepared and furnished to Respondent a draft Complaint. BCP proposed to present the draft Complaint to the Commission for its consideration. If issued by the Commission, the draft Complaint would charge Respondent with violation of the Federal Trade Commission Act.

Respondent and BCP thereafter executed an Agreement Containing Consent Order ("Consent Agreement"). The Consent Agreement includes: 1) statements by Respondent that it neither admits nor denies any of the allegations in the Complaint, except as specifically stated in

this Decision and Order, and that only for purposes of this action, it admits the facts necessary to establish jurisdiction; and 2) waivers and other provisions as required by the Commission's Rules.

The Commission considered the matter and determined that it had reason to believe that Respondent has violated the Federal Trade Commission Act, and that a Complaint should issue stating its charges in that respect. The Commission accepted the executed Consent Agreement and placed it 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 Rule 2.34, the Commission issues its Complaint, makes the following Findings, and issues the following Order:

Findings

1. Respondent Global Data Vault, LLC is a Texas limited liability corporation with its principal office or place of business at 900 Jackson Street, Suite 220, Dallas, Texas 75202.

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

ORDER

Definitions

For purposes of this Order, the following definition applies:

A. "Respondent" means Global Data Vault, LLC, a limited liability corporation, and its successors and assigns.

Provisions

I. Prohibition against Misrepresentations about Participation in or Compliance with Privacy Programs

IT IS ORDERED that Respondent and its officers, agents, 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 the advertising, marketing, promotion, offering for sale, or sale of any product or service must 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 a government or any self-regulatory or standard-setting organization, including but not limited to the EU-U.S. Privacy Shield framework, the Swiss-U.S. Privacy Shield framework, and the APEC Cross-Border Privacy Rules.

II. Requirement to Meet Continuing Obligations Under Privacy Shield

IT IS ORDERED that Respondent and its officers, agents, 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 the advertising, marketing, promotion, offering for sale, or sale of any product or service, must:

A. affirm to the Department of Commerce, within ten (10) days after the effective date of this Order and on an annual basis thereafter for as long as it retains such information, that it will

1. continue to apply the EU-U.S. Privacy Shield framework principles to the personal information it received while it participated in the Privacy Shield; or

2. protect the information by another means authorized under EU law, including by using a binding corporate rule or a contract that fully reflects the requirements of the relevant standard contractual clauses adopted by the European Commission; or

B. return or delete the information within ten (10) days after the effective date of this Order.

III. Acknowledgments of the Order

IT IS FURTHER ORDERED that Respondent obtain acknowledgments of receipt of this Order:

A. Respondent, within ten (10) days after the effective date of this Order, must submit to the Commission an acknowledgment of receipt of this Order.

B. For ten (10) years after the issuance date of this Order, Respondent must deliver a copy of this Order to: (1) all principals, officers, directors, and LLC managers and members; (2) all employees having managerial responsibilities for conduct related to the subject matter of the Order and all agents and representatives who participate in conduct related to the subject matter of the Order; and (3) any business entity resulting from any change in structure as set forth in the Provision titled Compliance Report and Notices. Delivery must occur within ten (10) days after the effective date of this Order for current personnel. For all others, delivery must occur before they assume their responsibilities.

C. From each individual or entity to which Respondent delivered a copy of this Order, Respondent must obtain, within thirty (30) days, a signed and dated acknowledgment of receipt of this Order.

IV. Compliance Report and Notices

IT IS FURTHER ORDERED that Respondent make timely submissions to the Commission:

A. Sixty (60) days after the issuance date of this Order, Respondent must submit a compliance report, sworn under penalty of perjury, in which Respondent must: (a) identify the primary physical, postal, and email address and telephone number, as designated points of contact, which representatives of the Commission, may use to communicate with Respondent; (b) identify all of Respondent's businesses by all of their names, telephone numbers, and physical, postal, email, and Internet addresses; (c) describe the activities of each business; (d) describe in detail whether and how Respondent is in compliance with each Provision of this Order; and (e) provide a copy of each Acknowledgment of the Order obtained pursuant to this Order, unless previously submitted to the Commission.

B. Respondent must submit a compliance notice, sworn under penalty of perjury, within fourteen (14) days of any change in the following: (1) any designated point of contact; or (2) the structure of Respondent or any entity that Respondent has any ownership interest in or controls directly or indirectly that may affect compliance obligations arising under this Order, including: creation, merger, sale, or dissolution of the entity or any subsidiary, parent, or affiliate that engages in any acts or practices subject to this Order.

C. Respondent must submit notice of the filing of any bankruptcy petition, insolvency proceeding, or similar proceeding by or against Respondent within fourteen (14) days of its filing.

D. Any submission to the Commission required by this Order to be sworn under penalty of perjury must be true and accurate and comply with 28 U.S.C. § 1746, such as by concluding: "I declare under penalty of perjury under the laws of the United States of America that the foregoing is true and correct. Executed on: _____" and supplying the date, signatory's full name, title (if applicable), and signature.

E. Unless otherwise directed by a Commission representative in writing, all submissions to the Commission pursuant to this Order must 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 *Global Data Vault, LLC*, FTC File No. 192 3093, Docket No. C-4706.

V. Recordkeeping

IT IS FURTHER ORDERED that Respondent must create certain records for ten (10) years after the issuance date of the Order, and retain each such record for five (5) years. Specifically, Respondent must create and retain the following records:

A. accounting records showing the revenues from all goods or services sold;

B. personnel records showing, for each person providing services, whether as an employee or otherwise, that person's: name; addresses; telephone numbers; job title or position; dates of service; and (if applicable) the reason for termination;

C. all records necessary to demonstrate full compliance with each provision of this Order, including all submissions to the Commission; and

D. a copy of each widely disseminated representation by Respondent making any representation subject to this Order, and all materials that were relied upon in making the representation.

VI. Compliance Monitoring

IT IS FURTHER ORDERED that, for the purpose of monitoring Respondent's compliance with this Order:

A. Within ten (10) days of receipt of a written request from a representative of the Commission, Respondent must: submit additional compliance reports or other requested information, which must be sworn under penalty of perjury, and produce records for inspection and copying.

B. For matters concerning this Order, representatives of the Commission are authorized to communicate directly with Respondent. Respondent must permit representatives of the Commission to interview anyone affiliated with Respondent who has agreed to such an interview. The interviewee may have counsel present.

C. The Commission may use all other lawful means, including posing through its representatives as consumers, suppliers, or other individuals or entities, to Respondent or any individual or entity affiliated with Respondent, without the necessity of identification or prior notice. Nothing in this Order limits the Commission's lawful use of compulsory process, pursuant to Sections 9 and 20 of the FTC Act, 15 U.S.C. §§ 49, 57b-1.

VII. Order Effective Dates

IT IS FURTHER ORDERED that this Order is final and effective upon the date of its publication on the Commission's website (ftc.gov) as a final order. This Order will terminate on January 23, 2040, or twenty (20) years from the most recent date that the United States or the

Commission files a complaint (with or without an accompanying settlement) 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 Provision 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 Provision.

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 Provision as though the complaint had never been filed, except that the Order will not terminate between the date such complaint is filed and the later of the deadline for appealing such dismissal or ruling and the date such dismissal or ruling is upheld on appeal.

By the Commission.

ANALYSIS OF CONSENT ORDER TO AID PUBLIC COMMENT

The Federal Trade Commission ("Commission") has accepted, subject to final approval, an agreement containing a consent order from Global Data Vault, LLC ("Global Data Vault" or "Respondent").

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

This matter concerns alleged false or misleading representations that Global Data Vault made concerning its participation in the Privacy Shield framework agreed upon by the U.S. and the European Union ("EU"). The Privacy Shield framework allows for the lawful transfer of personal data from the EU to participating companies in the U.S. The framework consists of a set of principles and related requirements that have been deemed by the European Commission as providing "adequate" privacy protection. The principles include notice; choice; accountability for onward transfer; security; data integrity and purpose limitation; access; and recourse, enforcement,

and liability. The related requirements include, for example, securing an independent recourse mechanism to handle any disputes about how the company handles information about EU citizens.

To participate in the framework, a company must comply with the Privacy Shield principles and self-certify that compliance to the U.S. Department of Commerce ("Commerce"). Commerce reviews companies' self-certification applications and maintains a public website, bttps://www.privacyshield.gov/list, where it posts the names of companies who have completed the requirements for certification. Companies are required to recertify every year in order to continue benefitting from Privacy Shield.

Global Data Vault provides data storage and recovery services. According to the Commission's complaint, Global Data Vault published on its website, https://www.globaldatavault.com/privacypolicy/, a privacy policy containing statements related to its participation in Privacy Shield. However, Global Data Vault allowed its certification to lapse and continued to claim it participated in the Privacy Shield framework.

The Commission's proposed three-count complaint alleges that Respondent violated Section 5(a) of the Federal Trade Commission Act. Specifically, the proposed complaint alleges that Respondent engaged in a deceptive act or practice by falsely representing that it was a certified participant in the EU-U.S. Privacy Shield Framework. The proposed complaint further alleges that Respondent engaged in deceptive acts or practices by representing that it complied with the framework when in fact it had failed to comply with certain Privacy Shield requirements.

Part I of the proposed order prohibits the company 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 EU-U.S. Privacy Shield framework, the Swiss-U.S. Privacy Shield framework, and the APEC Cross-Border Privacy Rules.

Part II of the proposed order requires that the company affirm to Commerce that it will either continue to apply the Privacy Shield framework principles to any data it received pursuant to frameworks or will delete or return such data.

Parts III through VI of the proposed order are reporting and compliance provisions. Part III requires acknowledgement of the order and 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 and mandates that the company submit an initial compliance report to the FTC. Part V requires the company to create certain documents relating to its compliance with the order for ten years and to retain those documents for a five-year period. Part VI mandates that the company make available to the FTC information or subsequent compliance reports, as requested.

Part VII is a provision "sun-setting" 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

EDGEWELL PERSONAL CARE COMPANY,
AND
HARRY'S, 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. 9390; File No. 191 0147
Complaint, February 2, 2020 – Decision, February 25, 2020

This case addresses the $1.37 billion acquisition by Edgewell Personal Care Company of certain assets of Harry's, Inc. The complaint alleges that the acquisition, if consummated, would violate Section 7 of the Clayton Act, and Section 5 of the Federal Trade Commission Act by substantially lessening competition in the market for disposable and systems razors sold in the United States. On February 19, 2020, Complaint Counsel moved to dismiss the complaint citing Edgewell Personal Care Company's termination of the Agreement and Plan of Merger and withdrawn its Hart-Scott-Rodino Notification and Report Forms filed for the proposed acquisition. The Commission dismissed the Complaint without prejudice.

Participants

For the *Commission*: *Nicholas Bush, Shane Bryan, Keitha Clopper, Kelly Fabian, Karen Goff, Kurt Herrera-Heintz, Jessica Moy, Marc W. Schneider,* and *Erika Wodinsky.*

For the *Respondents*: *Joseph Larson* and *Lori S. Sherman, Wachtell, Lipton, Rosen & Katz; Courtney Byrd* and *Courtney Dyer, O'Melveny & Myers LLP;* and *Karen Kazmerzak, Sidley Austin.*

COMPLAINT

Pursuant to the provisions of the Federal Trade Commission Act ("FTC Act"), and by virtue of the authority vested in it by the FTC Act, the Federal Trade Commission ("Commission"), having reason to believe that Respondents Edgewell Personal Care Company ("Edgewell") and Harry's, Inc. ("Harry's") have executed a merger 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:

NATURE OF THE CASE

1. On May 9, 2019, [redacted], Edgewell signed an agreement to purchase Harry's, a rival manufacturer and seller of razors. Harry's successful 2016 leap from online, direct-to-consumer sales into brick-and-mortar retail stores interrupted over a decade of routine price increases by a once-stable duopoly. This interruption has led to lower

prices and new product offerings for razor consumers. The Proposed Acquisition would neutralize "one of the most successful challenger brands ever built," eliminating head-to-head competition between Harry's and Edgewell, and removing the independent competitor that disrupted Edgewell and P&G's longstanding and stable duopoly.

2. Historically, P&G's Gillette brand and Edgewell's Schick brand have dominated the system razors and disposable razors ("wet shave razors") industry. Throughout the years of their shared dominance, Gillette led price increases [redacted] P&G and Edgewell rolled out new and fancier products. Razor manufacturers enjoyed exceptionally high margins, while consumers suffered.

3. As the 2010s progressed, P&G and Edgewell raised their prices ever higher. Purchasers of razors were, as Harry's founders put it, tired of "overpaying for overdesigned razors." Harry's saw an opening: a market ripe for disruption and an untapped platform—the Internet—on which to disrupt. Harry's founders correctly recognized that the market was looking for a no-frills, value-priced system razor product that delivered "a great shave at a fair price." Seizing this opportunity, Harry's, like fellow start-up Dollar Shave Club, launched an Internet-based business to market and sell men's razors directly to consumers at a lower price point than the most comparable razors then available in brick-and-mortar retail stores.

4. Harry's and Dollar Shave Club quickly succeeded in—and largely filled—the previously untapped online space. But the successful entry by Harry's and Dollar Shave Club with their online Direct to Consumer ("DTC") models did not stop the price increases by P&G and Edgewell, both of which sold their products primarily through brick-and-mortar retailers.

5. Significant change came when Harry's made the first—and, to date, only—successful jump from an online DTC platform into brick-and-mortar retail. In August 2016, Harry's launched exclusively at Target with suggested retail prices several dollars below the most comparable Schick and Gillette products, a significant discount. Harry's arrival in Target made a substantial impact, with Harry's immediately winning customers from Edgewell and P&G. Edgewell described Harry's trajectory as one of "[redacted]" and observed that Harry's took "[redacted]."

6. Harry's entry at Target ended the long-standing practice of reciprocal price increases by Gillette and Edgewell. Shortly after Harry's successful launch at Target, P&G implemented a "[redacted]" [redacted] price reduction across its portfolio of razors, reversing course on its practice of leading yearly price increases. Edgewell changed course as well, abandoning its strategy of being a "[redacted]" of Gillette's pricing actions. Rather than match Gillette's [redacted] price decrease, Edgewell began tracking Harry's growth and increased promotional spend (funding for discounts and other promotions) [redacted]. Edgewell hoped that this effort would [redacted]

7. But Harry's continued its competitive advance. In May 2018, Harry's launched at Walmart—again, successfully stealing shelf space and customers from Edgewell and Gillette.

8. Harry's successful launch at Walmart, coupled with Harry's ongoing success at Target, "[redacted]." Bowing to this competitive pressure, Edgewell implemented its own significant price decrease, lowering the prices on its razors by as much as [redacted]. Edgewell also [redacted] with a variety of other competitive initiatives [redacted], competing on price and non-price attributes, including creating "[redacted]" razors: [redacted].

9. Head-to-head competition between Harry's and Edgewell further intensified when, in October 2018, Harry's launched its first women's razor under the Flamingo brand. Edgewell preemptively reduced prices on its Hydro Silk women's razors and ran aggressive promotions [redacted] in anticipation of, [redacted], Flamingo's entry into Target. Again, Edgewell's efforts did not stop Harry's, although they may have slowed its momentum. Flamingo has taken significant market share from both Edgewell and Gillette at Target, and Target made room on its shelves for Flamingo at [redacted] expense.

10. Harry's significant entry into brick-and-mortar retail transformed the wet shave razor market from a comfortable duopoly to a competitive battleground. Edgewell, in particular, has found itself fighting the threat that Harry's poses to both its branded products and its private label offerings (i.e., razors manufactured by Edgewell for a retailer partner, to be sold under the retailer's brand). Consumers benefited from the resulting price discounts and the introduction of additional Edgewell branded and private label choices.

11. The Proposed Acquisition is likely to result in significant harm by eliminating competition between important head-to-head competitors. The Proposed Acquisition also will harm competition by removing a particularly disruptive competitor from the marketplace at a time when that competitor is currently expanding into additional retailers.

12. The Proposed Acquisition would significantly increase concentration in relevant markets that are already highly concentrated today. As a result, the Proposed Acquisition is presumptively anticompetitive. Current market share statistics and concentration measures understate Harry's future competitive significance, however, because Harry's continues to expand into additional retailers with its men's and women's products.

13. Both Edgewell and P&G have publicly recognized that the Proposed Acquisition is likely to benefit them rather than consumers. Edgewell's CEO, who spent more than a decade at P&G before coming to Edgewell, recently explained on a quarterly earnings call that Edgewell is "not interested" in escalating price competition once the Proposed Acquisition is complete, or in "lead[ing] a new round . . . of value destruction"—that is, in lowering prices. On a recent quarterly earnings call, P&G's CEO explained that the Proposed Acquisition does not create a significant competitive threat to P&G's Gillette brand; to the contrary, "Edgewell's [sic] going to have to make money. They bought a company. . . . And to me, that's not a bad thing for the overall value-creation opportunities in the industry."

14. Respondents cannot show that the Proposed Acquisition will induce new entry that would be timely, likely, or sufficient to counteract the anticompetitive effects of the Proposed Acquisition. Significant barriers exist for potential new entrants into the manufacture and sale of

wet shave razors, including substantial capital investment in a manufacturing facility; significant intellectual property rights and trade secret protections; the time and difficulty of attracting a broad customer base to secure placement on retailer shelves; and the fact that the market gaps in wet shave in brick-and-mortar and online that Harry's successfully exploited have been largely filled. These barriers make entry difficult and unlikely to constrain the merged entity. Nor is the Proposed Acquisition likely to induce the remaining razor manufacturers to expand or reposition to offset the Proposed Acquisition's likely anticompetitive effects.

15. Respondents cannot show cognizable, merger-specific efficiencies that would offset the likely and substantial competitive harm resulting from the Proposed Acquisition.

JURISDICTION

16. Respondents are, and at all relevant times have been, engaged in activities in or 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.

17. The Acquisition constitutes a merger subject to Section 7 of the Clayton Act, 15 U.S.C. § 18.

RESPONDENTS

18. Edgewell is a consumer products company based in Chesterfield, Missouri, with a diversified portfolio of over 25 established brand names, including multiple razor brands, such as Schick, Intuition, Hydro Silk, Skintimate, Bulldog, American Safety Razor, and Jack Black. Edgewell also offers private label razor manufacturing for retailers and razor companies selling throughout North America, including [redacted]. In 2018, Edgewell's total branded razor sales were approximately [redacted], broken down as follows: men's system razors ([redacted]), women's system razors ([redacted]), and disposable razors ([redacted]). Additionally, Edgewell's total sales in 2018 for its private label business were approximately [redacted], broken down as follows: men's system razors ([redacted]), women's system razors ([redacted]), and disposable razors ([redacted]).

19. Harry's, based in New York, New York, manufactures wet shave system razors and sells them through its DTC platform, online retailers, and brick-and-mortar retailers under the Harry's and Flamingo brands. Harry's total branded razor sales in 2018 were approximately [redacted]. Harry's also manufactures private label system razors [redacted], and has annual private label revenue of approximately [redacted]. In addition to wet shave razors, Harry's sells a variety of other personal care items such as face wash, shave creams, and body wash.

THE ACQUISITION

20. On May 9, 2019, Edgewell and Harry's signed an Agreement and Plan of Merger, pursuant to which Edgewell would acquire Harry's. Total consideration for the Acquisition is approximately $1.37 billion in stock and cash.

RELEVANT MARKETS

21. The relevant market in which to evaluate the effects of the Proposed Acquisition is no broader than the manufacture and sale of wet shave system razors and disposable razors ("wet shave razors") sold in the United States.

22. It is also appropriate to analyze the effects of the Proposed Acquisition in narrower relevant markets within the wet shave razor market. The razor industry recognizes several distinct segments within the wet shave razor market. The relevant market may be divided by gender lines into markets of men's and women's products. Additionally, the relevant market may be separated into markets for system razors and disposable razors. Finally, the relevant market may be divided by channel of sale, resulting in separate markets for brick-and-mortar sales and online sales. Analyzing the Proposed Acquisition in these segments individually would focus attention on specific narrower markets where the harm is most acute—for example, a market for men's system razors sold in brick-and-mortar retailers. Given consumer preferences for particular retailers or retail categories, relevant markets may even be defined as narrowly as a single retailer or a cluster of retailers in which competitive conditions are similar, such as brick-and-mortar retailers where Harry's is currently available.

A. Relevant Product Markets

23. The relevant product market is no broader than the manufacture and sale of wet shave razors, which includes system razors and disposables.

24. System razors consist of a reusable handle and a detachable razor cartridge. Consumers are able to replace the razor cartridge with refill cartridges sold by the same manufacturer without the need to replace the handle.

25. Disposable razors comprise a single assembly of handle with permanently affixed blade(s). Consumers throw away disposable razors once they are finished using them.

26. Other forms of hair removal, such as electric (or "dry") shaving razors and alternative hair removal products (*e.g.*, hair removal creams or waxes) are not close substitutes for wet shave razors. Industry participants and Respondents recognize that wet shave razors are distinct from dry shave razors and alternative hair removal products and sell these products at distinct price points to distinct consumers.

27. Customers would not switch from wet shave razors to dry shave razors or alternative hair removal products in sufficient numbers to defeat a small but significant non-transitory increase in price ("SSNIP") by a hypothetical monopolist of wet shave razors.

28. A relevant product market is the manufacture and sale of wet shave system razors and disposable razors.

29. Industry participants also recognize narrower product markets divided along gender lines (men's versus women's), by product type (system or disposable), and by channel of sale

(brick-and-mortar versus online). Industry participants recognize each segment as distinct from others, and conduct their business accordingly.

30. The Proposed Acquisition would produce anticompetitive effects within multiple narrower relevant markets, in addition to producing anticompetitive effects in the broader wet shave razor market. The Proposed Acquisition would harm competition in narrower relevant markets for the sale of: (i) men's wet shave razors; (ii) women's wet shave razors; (iii) system razors (including both men's and women's); (iv) men's system razors; and (v) women's system razors.

31. The Proposed Acquisition would also harm competition in relevant markets for sales through brick-and-mortar retailers of: (i) wet shave razors (including both men's and women's); (ii) men's wet shave razors; (iii) women's wet shave razors; (iv) system razors (including both men's and women's); (v) men's system razors; and (vi) women's system razors.

32. In each of these narrower relevant markets, a hypothetical monopolist could profitably impose a SSNIP on purchasers of the relevant product.

B. Relevant Geographic Market

33. A relevant geographic market in which to analyze the Proposed Acquisition is the United States. Razor manufacturers negotiate distinct terms of sale with customers for different countries and, in some cases, offer distinct product assortments in different countries. Respondents and other industry participants generally do not make granular or distinctive purchasing decisions for smaller regions within the United States.

34. A hypothetical monopolist of wet shave razors in the United States profitably could impose a SSNIP on U.S. customers. Customers based in the United States cannot defeat a price increase in the United States via arbitrage or substitution.

MARKET PARTICIPANTS

35. Edgewell is the number two manufacturer of wet shave razors and **by far** the dominant supplier of private label razors in the United States. It manufactures and sells wet shave system and disposable razors for men and women. Edgewell's branded and private label products are available at many brick-and-mortar retailers and, in 2017, Edgewell launched a DTC website through which consumers may now purchase the Hydro Connect razor online directly from Edgewell. Edgewell owns over 25 consumer brands, including popular wet shave brands such as Schick, Intuition, Hydro Silk, Skintimate, Wilkinson Sword, Personna/American Safety Razor, Bulldog, and Jack Black.

36. Harry's launched in March 2013 as an online-only DTC men's system razor subscription service. Harry's does not manufacture or sell disposable razors. Harry's broke into brick-and-mortar retail in 2016 and has steadily expanded its retail distribution of men's wet shave razors since then. After launching exclusively in Target, Harry's expanded into Walmart in 2018 ([redacted]); and then in Hy-Vee, Meijer,

Wegmans, and Kroger in 2019. In addition to its men's system razor, Harry's launched a women's system razor under the brand name Flamingo in October 2018. Shortly thereafter, Flamingo launched exclusively at Target. Flamingo is expected to reach additional retailers' shelves in the near future. In addition to its branded men's and women's razors, Harry's also manufactures a private label system razor for [redacted]. Harry's owns and operates its own razor factory, Feintechnik, in Eisfeld, Germany.

37. P&G is the leading manufacturer and seller of branded system and disposable razors for men and women. P&G's razors are available for purchase online and in brick-and-mortar stores. P&G owns over 50 established brand names, including razor brands Gillette Venus, Gillette Fusion, Gillette Mach3, Gillette Skinguard, Joy, Bevel, and the Art of Shaving.

38. Société BiC ("BiC") manufactures and sells primarily disposable razors for men and women. BiC razors are available for purchase online and in brick-and-mortar stores.

39. Dollar Shave Club, Inc. ("Dollar Shave Club"), now owned by Unilever plc/Unilever N.V. ("Unilever"), sells system razors marketed primarily to men using an online, DTC model. Dollar Shave Club does not manufacture or sell disposable razors, and Dollar Shave Club razors are generally not available in brick-and-mortar retail stores. [redacted].

40. Dorco Company Ltd. ("Dorco") is a manufacturer and supplier of disposable and system razors for men and women. [redacted] Dorco-manufactured products are available at brick-and-mortar stores and online, [redacted].

THE PROPOSED ACQUISITION IS PRESUMPTIVELY ILLEGAL

41. The Proposed Acquisition would lead to significant increases in concentration in already highly concentrated markets for wet shave razors and in narrower relevant markets.

42. Under the 2010 U.S. Department of Justice and Federal Trade Commission Horizontal Merger Guidelines ("Merger Guidelines"), a post-acquisition market concentration level above 2,500 points, as measured by the Herfindahl-Hirschman Index ("HHI"), and an increase in HHI of more than 200 points renders an acquisition presumptively unlawful. Transactions in highly concentrated markets—markets with an HHI above 2,500 points—with an HHI increase of more than 100 points potentially raise significant competitive concerns and warrant scrutiny. The HHI is calculated by totaling the squares of the market shares of every firm in the relevant market pre- and post-acquisition.

43. The market for the manufacture and sale of wet shave razors in the United States is already highly concentrated, with an HHI of over 3,000. The Proposed Acquisition increases the concentration in this market by more than 200 points and is therefore presumptively illegal.

44. All narrower relevant markets are also highly concentrated, and the Proposed Acquisition would cause significant increases in concentration therein. For example, the manufacture and sale of wet shave system razors sold through brick-and-mortar retail in the United States is already highly concentrated, with an HHI of over 5,000. The Proposed Acquisition increases the concentration in this highly concentrated market by more than 350 points, and is therefore presumptively illegal. In the following narrower relevant markets, the Proposed Acquisition increases the HHI by more than 200 points and results in a post-merger HHI of more than 2,500, rendering the Proposed Acquisition presumptively illegal:

a. sale of wet shave razors at brick-and-mortar retailers;

b. sale of system razors;

c. sale of system razors at brick-and-mortar retailers;

d. sale of men's wet shave razors;

e. sale of men's wet shave razors at brick-and-mortar retailers;

f. sale of men's system razors;

g. sale of women's system razors;

h. sale of men's system razors at brick-and-mortar retailers;

i. sale of women's system razors at brick-and-mortar retailers; and

j. a cluster market composed of sales of wet shave razors at retailers where Harry's is currently available.

45. In the following narrower relevant markets, the Proposed Acquisition increases the HHI by more than 100 points and results in a post-merger HHI of more than 2,500, and potentially raises significant competitive concerns and warrants scrutiny:

a. sale of women's wet shave razors; and

b. sale of women's wet shave razors at brick-and-mortar retailers.

46. Changes in HHI based on current market shares understate the competitive significance of the Proposed Acquisition because Harry's continues to expand into additional brick-and-mortar retailers. Recognizing that the Proposed Acquisition will arrest Harry's independent expansion, it is appropriate to analyze Harry's competitive significance by using prior entry events to project future competitive significance. Moreover, current market shares especially understate the competitive significance of Harry's in markets that include sales of women's razors because Harry's Flamingo product launched very recently.

47. [redacted], the timing, scope, and competitive impact of that entry is speculative and likely would not counteract the Proposed Acquisition's competitive harm or presumptive illegality, especially when balanced against a fair projection of Harry's continued growth as a value razor product already established at retail.

ANTICOMPETITIVE EFFECTS

48. In the relevant market of wet shave razors, and in each narrower relevant market within that market, the Proposed Acquisition is likely to result in unilateral and coordinated competitive effects. The Proposed Acquisition would eliminate substantial head-to-head competition between Edgewell and Harry's, leading to higher prices for consumers—sufficient harm, on its own, to render the merger illegal. In addition, the Proposed Acquisition would also make an already susceptible market more vulnerable to coordination by eliminating a disruptive competitor.

49. P&G and Edgewell have dominated the wet shave razor market for decades, [redacted]. This effective duopoly was good for manufacturers and bad for consumers: Edgewell secured gross margins as high as [redacted] on its branded razors while Edgewell and Gillette focused their efforts on selling high-priced razors. Prices ratcheted up, [redacted].

50. By the early 2010s, the wet shave razor market was ripe for disruption. Harry's founders recognized that P&G and Edgewell were failing to offer consumers a quality, no-frills system razor at a value price point. In March 2013, Harry's used the Internet to launch a men's system razor that filled this market gap by selling directly to the consumer, avoiding the initial need for distribution through brick-and-mortar retailers. As Harry's website explains: "Our founders, Jeff and Andy, created Harry's because they were tired of overpaying for overdesigned razors, and of standing around waiting for the person in the drugstore to unlock the cases so they could actually buy them. When they asked around, they learned lots of guys were upset about the situation too, so they decided to do something about it." Harry's was not alone in seeing this opportunity: Dollar Shave Club launched its online DTC platform in 2011.

51. Harry's and Dollar Shave Club soon built an online customer base, but this did not stop Edgewell and P&G from continuing their annual price increases in brick-and-mortar retail stores. Edgewell's internal documents demonstrate that [redacted]. As Edgewell's then-CEO explained in an earnings call, "the jury's out" on shave clubs because they would have to "become more than a shave club to really survive."

52. Everything changed in August 2016, when Harry's expanded into brick-and-mortar retail. Harry's made Target the exclusive brick-and-mortar retailer for Harry's [redacted]. [redacted] taking shelf space away from Edgewell's Schick brands, among others.

53. Harry's entry into Target marked the beginning of meaningful head-to-head competition between Harry's and Edgewell. One of Harry's general objectives was to [redacted] and to "[redacted]," and, specifically, to "[redacted]" at Target.

54. Harry's launch at Target was successful. At the time of its launch, Harry's [redacted] retail prices were roughly $10 cheaper than P&G's Gillette and Edgewell's Schick five blade products. This pricing advantage, coupled with prime product placement, enabled Harry's to take share quickly from Edgewell and P&G.

55. Witnessing Harry's successful launch at Target, Edgewell [redacted] began tracking Harry's progress and started to respond competitively. Edgewell's first competitive strategy was to launch extensive promotional programming, such as [redacted]. Nonetheless, Edgewell lost share to Harry's.

56. In February 2017, months after Harry's successful launch at Target, P&G refrained from implementing its yearly price increase. Instead, P&G announced a significant [redacted] price reduction across its portfolio of wet shave razor products.

57. Edgewell decided not to follow the price cuts. Instead, Edgewell held its [redacted] prices steady while launching new products and offering temporary promotional programs. Because of these efforts, [redacted] despite Gillette's reduced prices. These efforts, however, did not prevent Edgewell from continuing to lose share to Harry's.

58. By early 2018, it was clear to an Edgewell senior executive that the industry had experienced "[redacted]," and it was "[redacted]" that Edgewell could count on "[redacted]."

59. In May 2018, Harry's products appeared on Walmart's shelves. Harry's [redacted] to secure distribution, and again took substantial shelf space and sales from Edgewell.

60. As Edgewell's CEO explained to investors, Harry's launch at Walmart represented "the most significant impact" on Edgewell's wet shave business in fiscal year 2018.

61. In the end, the competitive pressure generated by Harry's successful launches at Target and Walmart defeated Edgewell's plan to maintain [redacted] prices. By the end of 2018, Edgewell had reduced its [redacted] prices significantly, by as much as [redacted] on some razors. At the time, Edgewell's then-CEO [redacted] to explain the reason for the price cuts to his board. He wrote: "[redacted]."

62. Not only did the competitive pressure result in price cuts by Edgewell on existing products, it also forced Edgewell to innovate by [redacted]. Edgewell launched [redacted] razors—[redacted]—alone and in partnership with retailers.

63. On the heels of its men's system razor's growing success, Harry's launched a women's system razor under the Flamingo brand in late 2018. This time, Edgewell acted aggressively before Flamingo razors hit brick-and-mortar retail shelves, implementing preemptive price cuts on its women's system razors as part of the 2018 price reduction. Edgewell also developed a in response to news of Flamingo's impending entry. Despite Edgewell's efforts, Harry's gained at Edgewell's expense: Flamingo established a significant competitive foothold, and took shelf space from Edgewell products.

64. This head-to-head competition continues to the present day. Harry's, with its men's and women's products at value price points, continues to be a fierce competitor. Harry's recently expanded its brick-and-mortar footprint again, selling its products in Hy-Vee, Meijer, and Kroger. And Harry's products are likely to expand into additional retailers in the near term regardless of whether Harry's is acquired by Edgewell.

65. The Proposed Acquisition is anticompetitive because it will eliminate the growing competition between Harry's and Edgewell that has been highly beneficial to consumers. As a result of that competition, consumers today enjoy lower prices on many different types of wet shave razors, and they have a broader selection of razors at value price points.

66. Edgewell recognizes the many ways it can benefit at consumers' expense by acquiring Harry's. As Edgewell's CFO put it, the "." Edgewell's Vice President has discussed how : the combined company could offer "" Or, Edgewell could simply ""

67. In addition to the loss of important head-to-head competition between Harry's and Edgewell, the Proposed Acquisition would eliminate Harry's as a uniquely disruptive competitor that interrupted the P&G/Edgewell duopoly that Harry's founders and Edgewell's leaders variously called a "," a "," and "." Prior to Harry's entry into brick-and-mortar retail, each year Gillette raised prices; and each year Edgewell would do the same, . Edgewell maintained a "" strategy— , maintaining a consistent discount to the market leader.

68. On one occasion in 2010, Edgewell employees . As a result, Edgewell . Edgewell management was incensed: "" . Moreover, Edgewell immediately

[redacted]. Executives subsequently noted that they had [redacted]."

69. Competitive conditions for the sale of wet shave razors and narrower relevant markets display various features that make a market vulnerable to coordination as identified in the Merger Guidelines. For example, competitors can promptly and confidently observe the competitive initiatives of their rivals. And relatively few customers would switch to the deviating firm before rivals are able to respond, limiting the incentives to deviate from the terms of coordination.

70. As the above demonstrates, the Proposed Acquisition likely would result in both unilateral and coordinated competitive effects in the relevant market of wet shave razors. The anticompetitive effects alleged in paragraphs 48-69 are also illustrative of the type of harm likely to occur in each of the narrower relevant markets as a result of the Proposed Acquisition.

LACK OF COUNTERVAILING FACTORS

71. Respondents cannot show that the Proposed Acquisition will induce new entry or repositioning by existing razor manufacturers that would be timely, likely, or sufficient to counteract the anticompetitive effects of the Proposed Acquisition.

72. In particular, existing competitors for the manufacture and sale of wet shave razors P&G/Gillette, Dollar Shave Club, and BiC are unlikely to reposition in a way that would deter or counteract the anticompetitive effects of the Proposed Acquisition. P&G [redacted] lead yearly price increases before Harry's disrupted the market rather than to compete vigorously on price. [redacted]

73. The market for the manufacture and sale of wet shave razors, and narrower relevant markets within the wet shave category, have high barriers to entry that make timely, sufficient entry unlikely to occur.

74. In order to be a significant competitor, a razor company must be able to manufacture and sell its own blades: in other words, the razor company must build or buy a factory. Building a razor factory is expensive and can take years even with significant resources. Acquiring and running a factory may be even more costly, and few manufacturing facilities exist today.

75. Even having secured a razor factory, an entrant must navigate a thicket of intellectual property rights and trade secret protections to gain the necessary know-how to deploy its manufacturing capacity and equipment effectively. Among other things, it takes significant time, and significant investment, to develop a competitive razor blade.

76. Once the razor manufacturer has a competitive razor blade, the manufacturer must secure distribution and premier product placement at brick-and-mortar retail in order to scale. In order to secure brick-and-mortar distribution with premier shelf space, Harry's spent years establishing its brand online and then used a slow, staged rollout [redacted]. Replicating that process is likely to render entry or repositioning untimely, but failing to replicate that process decreases the likelihood of success.

77. Any aspiring de novo entrant seeking to follow in Harry's footsteps faces a much steeper path to scale than the one that Harry's trod. Harry's identified and exploited a market opportunity in the form of a previously unmet demand for a quality, no-frills system razor at a value price point. Harry's was successful in developing its brand through the then-nascent online market, using the Internet to sell directly to consumers. More importantly, Harry's was the first to place its product in brick-and-mortar, where it exploited a large gap in product offerings to reach a scale that allowed it to disrupt the industry giants. Any new entrant would lack Harry's early-mover advantage in the now-mature DTC space and on the now-crowded shelves of brick-and-mortar retailers. Because the size of the opportunity to be exploited is now smaller, entry is less profitable. In effect, Harry's has plucked the low-hanging fruit online and in stores.

78. Respondents cannot demonstrate cognizable and merger-specific efficiencies that would be sufficient to rebut the presumption and evidence of the Proposed Acquisition's likely anticompetitive effects.

VIOLATION

Count I – Illegal Agreement

79. The allegations of Paragraphs 1 through 78 above are incorporated by reference as though fully set forth.

80. The Merger 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

81. The allegations of Paragraphs 1 through 80 above are incorporated by reference as though fully set forth.

82. The Merger, 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 thirtieth day of June, 2020, 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 Merger 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 Merger 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 Edgewell and Harry's were offering and planning to offer prior to the Merger.

2. A prohibition against any transaction between Edgewell and Harry's 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, Harry's and Edgewell 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 Harry's 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 second day of February, 2020.

By the Commission.

ORDER DISMISSING COMPLAINT

This matter comes before the Commission on Complaint Counsel's Motion to Dismiss the Complaint. Having considered the motion, it is hereby

ORDERED that the Motion to Dismiss the Complaint, dated February 19, 2020, is **GRANTED**, and the complaint is **DISMISSED** without prejudice.

By the Commission.

Complaint

IN THE MATTER OF

T&M PROTECTION RESOURCES, LLC

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

Docket No. C-4709; File No. 192 3092
Complaint, March 16, 2020 – Decision, March 16, 2020

This consent order addresses T&M Protection Resources, LLC's violation of Section 5 of the Federal Trade Commission Act by disseminating privacy policies and statements claiming Respondent participated in the EU-U.S. Privacy Shield framework. The complaint alleges that Respondent obtained Privacy Shield certification in 2017, but did not renew its participation after the certification expired in 2018, nor did it withdraw and affirm its commitment to protect any personal information it had acquired. After its certification lapsed, Respondent continued to claim it participated in the EU-U.S. Privacy Shield framework. The consent order requires Respondent must not misrepresent the extent to which Respondent participates in any privacy or security program sponsored by a government or any self-regulatory or standard-setting organization.

Participants

For the *Commission*: *Megan Cox* and *Andy Hasty.*

For the *Respondents*: *Eddie Holman* and *Lydia Parnes, Wilson Sonsini Goodrich & Rosati.*

COMPLAINT

The Federal Trade Commission ("FTC"), having reason to believe that T&M Protection Resources, LLC, a limited liability 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 T&M Protection Resources, LLC is a Delaware limited liability corporation with its principal office or place of business at 230 Park Avenue, Suite 440, New York, New York 10169.

2. Respondent provides background check, security and investigative services. In connection with providing services relating to background checks, Respondent obtained personal data about individuals in the EU.

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, https://www.tmprotection.com/privacy-policy, privacy policies and statements about its practices, including statements related to its participation in the EU-U.S. Privacy Shield framework agreed upon by the U.S. government and the European Commission.

Privacy Shield

5. The EU-U.S. Privacy Shield framework ("Privacy Shield") was designed by the U.S. Department of Commerce ("Commerce") and the European Commission to provide a mechanism for U.S. companies to transfer personal data outside of the EU that is consistent with the requirements of the European Union data protection legislation. The EU General Data Protection Regulation, passed in May 2016 and enforced since May 2018 (replacing the 1995 EU Data Protection Directive), sets forth EU requirements for privacy and the protection of personal data. Among other things, it requires EU Member States to implement legislation that prohibits the transfer of personal data outside the EU, with exceptions, unless the European Commission 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. Any company that voluntarily withdraws or lets its self-certification lapse must take steps to affirm to Commerce that it is continuing to protect the personal information it received while it participated in the program.

6. To satisfy the EU adequacy standard for certain commercial transfers, Commerce and the European Commission negotiated the EU-U.S. Privacy Shield framework, which went into effect in July 2016. The EU-U.S. Privacy Shield framework allows companies to transfer personal data lawfully from the EU to the United States. To join the EU-U.S. Privacy Shield framework, a company must self-certify to Commerce that it complies with the Privacy Shield Principles and related requirements that have been deemed to meet the EU's adequacy standard. Any company that participates in Privacy Shield must verify, at least once a year, through self-assessment or outside compliance review, that the assertions it makes about its Privacy Shield privacy practices are true and that those privacy practices have been implemented.

7. Companies under the jurisdiction of the FTC, as well as the U.S. Department of Transportation, are eligible to join the EU-U.S. Privacy Shield framework. A company under the FTC's jurisdiction that claims it has self-certified to the Privacy Shield Principles, but failed to self-certify to Commerce or failed to comply with the Privacy Shield Principles, 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, https://www.privacyshield.gov/welcome, where it posts the names of companies that have self-certified to the EU-U.S. Privacy Shield framework. The listing of companies, https://www.privacyshield.gov/list, indicates whether the company's self-certification is current.

9. Respondent has disseminated or caused to be disseminated privacy policies and statements on the https://www.tmprotection.com/privacy-policy website, including, but not limited to, the following statements:

> **EU-U.S. Privacy Shield Framework**
>
> T&M Protection Resources, LLC complies with the EU-U.S. Privacy Shield Framework as set forth by the U.S. Department of Commerce regarding the collection, use, and retention of personal information transferred from the European

> Union to the United States. T&M Protection Resources, LLC has certified to the Department of Commerce that it adheres to the Privacy Shield Principles. If there is any conflict between the terms in this privacy policy and the Privacy Shield Principles, the Privacy Shield Principles shall govern…

10. Although Respondent obtained Privacy Shield certification in 2017 to support its background check services, it did not complete the steps necessary to renew its participation in the EU-U.S. Privacy Shield after that certification expired one year later, in 2018, nor did it withdraw and affirm its commitment to protect any personal information it had acquired while in the program.

11. Commerce warned the company to take down its claims that it participated in Privacy Shield unless and until such time as it completed the steps necessary to renew its participation in the EU.-U.S. Privacy Shield framework. Respondent did not do so.

12. After its certification lapsed, Respondent continued to claim, as indicated in paragraph 9, that it participated in the EU-U.S. Privacy Shield framework.

13. The Privacy Shield Principles include Supplemental Principle 7, which requires any company that participates in Privacy Shield to verify, at least once a year, through self-assessment or outside compliance review, that the assertions it makes about its Privacy Shield privacy practices are true and that those privacy practices have been implemented. The verification statement must be signed by a corporate officer or the outside reviewer and is required to be made available on request to the FTC or Department of Transportation, whoever has unfair and deceptive practices jurisdiction over the company.

14. Respondent is under the jurisdiction of the FTC. During the 2017-18 period that Respondent was certified to participate in Privacy Shield, Respondent failed to comply with the requirement to obtain, through self-assessment or outside compliance review, an attested verification statement that the assertions it had made about its Privacy Shield privacy practices during the time it participated in the program were true and that those privacy practices had been implemented.

Count 1-Privacy Misrepresentation

15. As described in Paragraph 9, Respondent represented, directly or indirectly, expressly or by implication, that it was a current participant in the EU-U.S Privacy Shield framework.

16. In fact, as described in Paragraphs 10-12, after its certification lapsed, Respondent was not a current participant in the EU-U.S. Privacy Shield framework. Therefore, the representation set forth in Paragraph 15 is false or misleading.

Count 2-Misrepresentation Regarding Verification

17. As described in Paragraph 9, Respondent represented that it complied with the EU-U.S. Privacy Shield principles.

18. In fact, as described in Paragraphs 13-14, Respondent failed to comply with the verification requirement during the time it participated in the program. Therefore, the representation set forth in Paragraph 17 is false or misleading.

Count 3-Misrepresentation Regarding Continuing Obligations

19. As described in Paragraph 9, Respondent represented that it complied with the EU-U.S. Privacy Shield framework principles. These principles include a requirement that if it ceased to participate in the EU-U.S. Privacy Shield framework, it must affirm to Commerce that it will continue to apply the principles to personal information that it received during the time it participated in the program.

20. In fact, as described in Paragraph 10, Respondent did not affirm to Commerce that it will continue to apply the principles to personal information that it received during the time it participated in the program. Therefore, the representation set forth in Paragraph 19 is false or misleading.

Violations of Section 5 of the FTC Act

21. 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 March 2020, has issued this complaint against Respondent.

By the Commission.

DECISION

The Federal Trade Commission ("Commission") initiated an investigation of certain acts and practices of the Respondent named above in the caption. The Commission's Bureau of Consumer Protection ("BCP") prepared and furnished to Respondent a draft Complaint. BCP proposed to present the draft Complaint to the Commission for its consideration. If issued by the Commission, the draft Complaint would charge Respondent with violation of the Federal Trade Commission Act.

Respondent and BCP thereafter executed an Agreement Containing Consent Order ("Consent Agreement"). The Consent Agreement includes: 1) statements by Respondent that it neither admits nor denies any of the allegations in the Complaint, except as specifically stated in this Decision and Order, and that only for purposes of this action, it admits the facts necessary to establish jurisdiction; and 2) waivers and other provisions as required by the Commission's Rules.

The Commission considered the matter and determined that it had reason to believe that Respondent has violated the Federal Trade Commission Act, and that a Complaint should issue stating its charges in that respect. The Commission accepted the executed Consent Agreement and placed it on the public record for a period of 30 days for the receipt and consideration of public comments. Now, in further conformity with the procedure prescribed in Rule 2.34, the Commission issues its Complaint, makes the following Findings, and issues the following Order:

Findings

1. Respondent T&M Protection Resources, LLC is a Delaware limited liability corporation with its principal office or place of business at 230 Park Avenue, Suite 440, New York, New York 10169.

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

ORDER

Definitions

For purposes of this Order, the following definition applies:

A. "Respondent" means T&M Protection Resources, LLC, a limited liability corporation, and its successors and assigns.

Provisions

I. Prohibition against Misrepresentations about Participation in or Compliance with Privacy Programs

IT IS ORDERED that Respondent and its officers, agents, 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 the advertising, marketing, promotion, offering for sale, or sale of any product or service must 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 a government or any self-regulatory or standard-setting organization, including but not limited to the EU-U.S. Privacy Shield framework, the Swiss-U.S. Privacy Shield framework, and the APEC Cross-Border Privacy Rules.

II. Requirement to Meet Continuing Obligations Under Privacy Shield

IT IS ORDERED that Respondent and its officers, agents, 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 the advertising, marketing, promotion, offering for sale, or sale of any product or service, must:

A. affirm to the Department of Commerce, within ten (10) days after the effective date of this Order and on an annual basis thereafter for as long as it retains such information, that it will

1. continue to apply the EU-U.S. Privacy Shield framework principles to the personal information it received while it participated in the Privacy Shield; or

2. protect the information by another means authorized under EU law, including by using a binding corporate rule or a contract that fully reflects the requirements of the relevant standard contractual clauses adopted by the European Commission; or

B. return or delete the information within ten (10) days after the effective date of this Order.

III. Acknowledgments of the Order

IT IS FURTHER ORDERED that Respondent obtain acknowledgments of receipt of this Order:

A. Respondent, within ten (10) days after the effective date of this Order, must submit to the Commission an acknowledgment of receipt of this Order.

B. For five (5) years after the issuance date of this Order, Respondent must deliver a copy of this Order to: (1) all principals, officers, directors, and LLC managers and members; (2) all employees having managerial responsibilities for conduct related to the subject matter of the Order and all agents and representatives who participate in conduct related to the subject matter of the Order; and (3) any business entity resulting from any change in structure as set forth in the Provision titled Compliance Report and Notices. Delivery must occur within ten (10) days after the effective date of this Order for current personnel. For all others, delivery must occur before they assume their responsibilities.

C. From each individual or entity to which Respondent delivered a copy of this Order, Respondent must obtain, within thirty (30) days, a signed and dated acknowledgment of receipt of this Order.

IV. Compliance Report and Notices

IT IS FURTHER ORDERED that Respondent make timely submissions to the Commission:

A. Sixty (60) days after the issuance date of this Order, Respondent must submit a compliance report, sworn under penalty of perjury, in which Respondent must: (a) identify the primary physical, postal, and email address and telephone number, as designated points of contact, which representatives of the Commission, may use to communicate with Respondent; (b) identify all of Respondent's businesses by all of their names, telephone numbers, and physical, postal, email, and Internet addresses; (c) describe the activities of each business; (d) describe in detail whether and how Respondent is in compliance with each Provision of this Order; and (e) provide a copy of each Acknowledgment of the Order obtained pursuant to this Order, unless previously submitted to the Commission.

B. Respondent must submit a compliance notice, sworn under penalty of perjury, within fourteen (14) days of any change in the following: (1) any designated point of contact; or (2) the structure of Respondent or any entity that Respondent has any ownership interest in or controls directly or indirectly that may affect compliance obligations arising under this Order, including: creation, merger, sale, or dissolution of the entity or any subsidiary, parent, or affiliate that engages in any acts or practices subject to this Order.

C. Respondent must submit notice of the filing of any bankruptcy petition, insolvency proceeding, or similar proceeding by or against Respondent within fourteen (14) days of its filing.

D. Any submission to the Commission required by this Order to be sworn under penalty of perjury must be true and accurate and comply with 28 U.S.C. § 1746, such as by concluding: "I declare under penalty of perjury under the laws of the United States of America that the foregoing is true and correct. Executed on: _____" and supplying the date, signatory's full name, title (if applicable), and signature.

E. Unless otherwise directed by a Commission representative in writing, all submissions to the Commission pursuant to this Order must 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 *T&M Protection Resources, LLC*, FTC File No. 192 3092, Docket No. C-4709.

V. Recordkeeping

IT IS FURTHER ORDERED that Respondent must create certain records for ten (10) years after the issuance date of the Order, and retain each such record for five (5) years. Specifically, Respondent must create and retain the following records:

A. accounting records showing the revenues from all goods or services sold;

B. personnel records showing, for each person providing services related to the subject matter of the Order, whether as an employee or otherwise, that person's: name; addresses; telephone numbers; job title or position; dates of service; and (if applicable) the reason for termination;

C. all records necessary to demonstrate full compliance with each provision of this Order, including all submissions to the Commission; and

D. a copy of each widely disseminated representation by Respondent making any representation subject to this Order, and all materials that were relied upon in making the representation.

VI. Compliance Monitoring

IT IS FURTHER ORDERED that, for the purpose of monitoring Respondent's compliance with this Order:

A. Within ten (10) days of receipt of a written request from a representative of the Commission, Respondent must: submit additional compliance reports or other requested information, which must be sworn under penalty of perjury, and produce records for inspection and copying.

B. For matters concerning this Order, representatives of the Commission are authorized to communicate directly with Respondent. Respondent must permit representatives of the Commission to interview anyone affiliated with Respondent who has agreed to such an interview. The interviewee may have counsel present.

C. The Commission may use all other lawful means, including posing through its representatives as consumers, suppliers, or other individuals or entities, to Respondent or any individual or entity affiliated with Respondent, without the necessity of identification or prior notice. Nothing in this Order limits the Commission's lawful use of compulsory process, pursuant to Sections 9 and 20 of the FTC Act, 15 U.S.C. §§ 49, 57b-1.

VII. Order Effective Dates

IT IS FURTHER ORDERED that this Order is final and effective upon the date of its publication on the Commission's website (ftc.gov) as a final order. This Order will terminate on

March 16, 2040, or twenty (20) years from the most recent date that the United States or the Commission files a complaint (with or without an accompanying settlement) 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 Provision 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 Provision.

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 Provision as though the complaint had never been filed, except that the Order will not terminate between the date such complaint is filed and the later of the deadline for appealing such dismissal or ruling and the date such dismissal or ruling is upheld on appeal.

By the Commission.

ANALYSIS OF CONSENT ORDER TO AID PUBLIC COMMENT

The Federal Trade Commission ("Commission") has accepted, subject to final approval, an agreement containing a consent order from T&M Protection Resources, LLC ("T&M" or "Respondent").

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

This matter concerns alleged false or misleading representations that T&M made concerning its participation in the Privacy Shield framework agreed upon by the U.S. and the European Union ("EU"). The Privacy Shield framework allows for the lawful transfer of personal data from the EU to participating companies in the U.S. The framework consists of a set of principles and related requirements that have been deemed by the European Commission as providing "adequate" privacy protection. The principles include notice; choice; accountability for onward transfer; security; data integrity and purpose limitation; access; and recourse, enforcement,

and liability. The related requirements include, for example, securing an independent recourse mechanism to handle any disputes about how the company handles information about EU citizens.

To participate in the framework, a company must comply with the Privacy Shield principles and self-certify that compliance to the U.S. Department of Commerce ("Commerce"). Commerce reviews companies' self-certification applications and maintains a public website, https://www.privacyshield.gov/list, where it posts the names of companies who have completed the requirements for certification. Companies are required to recertify every year in order to continue benefitting from Privacy Shield.

T&M provides background check, security and investigative services. In connection with providing services relating to background checks, T&M obtained personal data about individuals in the EU. According to the Commission's complaint, T&M published on its website, https://www.tmprotection.com/privacy-policy, a privacy policy containing statements related to its participation in Privacy Shield. However, T&M allowed its certification to lapse and continued to claim it participated in the Privacy Shield framework.

The Commission's proposed three-count complaint alleges that Respondent violated Section 5(a) of the Federal Trade Commission Act. Specifically, the proposed complaint alleges that Respondent engaged in a deceptive act or practice by falsely representing that it was a certified participant in the EU-U.S. Privacy Shield Framework. The proposed complaint further alleges that Respondent engaged in deceptive acts or practices by representing that it complied with the framework when in fact it had failed to comply with certain Privacy Shield requirements.

Part I of the proposed order prohibits the company from making misrepresentations about its membership or compliance with any privacy or security program sponsored by the government or any self-regulatory or standard-setting organization, including, but not limited to, the EU-U.S. Privacy Shield framework, the Swiss-U.S. Privacy Shield framework, and the APEC Cross-Border Privacy Rules.

Part II of the proposed order requires that the company affirm to Commerce that it will either continue to apply the Privacy Shield framework principles to any data it received pursuant to frameworks or protect the information by another means authorized under EU or Swiss law, or will delete or return such data within ten days after the effective date of the order.

Parts III through VI of the proposed order are reporting and compliance provisions. Part III requires acknowledgement of the order and 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 and mandates that the company submit an initial compliance report to the FTC. Part V requires the company to create certain documents relating to its compliance with the order for ten years and to retain those documents for a five-year period. Part VI mandates that the company make available to the FTC information or subsequent compliance reports, as requested.

Analysis to Aid Public Comment

Part VII is a provision "sun-setting" 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

RETINA-X STUDIOS, LLC
AND
JAMES N. JOHNS, JR.

CONSENT ORDER, ETC. IN REGARD TO ALLEGED VIOLATIONS OF SECTION 5 OF THE FEDERAL TRADE COMMISSION ACT AND THE CHILDREN'S ONLINE PRIVACY PROTECTION ACT

Docket No. C-4711; File No. 172 3118
Complaint, March 26, 2020 – Decision, March 26, 2020

This consent order addresses Retina-X Studios, LLC's, a limited liability company, and James N. Johns, Jr's., individually and as sole member of Retina-X Studios, LLC, violation of the Federal Trade Commission Act and the Children's Privacy Protection Rule. The complaint alleges that Respondents' mobile device monitoring products and services, MobileSpy, PhoneSheriff, and TeenShield, did not take any steps to ensure that purchasers would use the products and services to only monitor employees or children. The Respondents' monitoring products and services substantially injured device users by enabling purchasers to surreptitiously stalk them and obtain sensitive personal information without authorization. The consent order requires Respondents to restrain promoting, selling, or distributing a monitoring product or service unless Respondents comply with not requiring product or service functionality to circumvent security protections implemented by the mobile device operating system or manufacturer. Respondents must obtain the express written attestation, prior to sale or distribution, from the purchaser that it will use the monitoring product and service for legitimate and lawful purposes.

Participants

For the *Commission*: *Megan Cox, Jonah Fabricant,* and *Shameka Walker.*

For the *Respondents*: *Alexandra Megaris and Jami M. Vibbert, Venable LLP.*

COMPLAINT

The Federal Trade Commission, having reason to believe that Retina-X Studios, LLC, a limited liability company, and James N. Johns, Jr., individually and as sole member of Retina-X Studios, LLC (collectively, "Respondents"), have violated the provisions of the Federal Trade Commission Act ("FTC Act") and the Children's Privacy Protection Rule ("Rule" or "COPPA Rule"), and it appearing to the Commission that this proceeding is in the public interest, alleges:

1. Respondent Retina-X Studios, LLC ("Retina-X") is a Florida limited liability company with its principal place of business in 731 Duval Station Road, Suite 107, Box 203, Jacksonville, Florida 32218.

2. Respondent James N. Johns, Jr. ("Johns") is the registered agent and sole member of Retina-X. Individually or in the concert of others, he controlled or had the authority to control, or participated in that acts and practices of Retina-X, including the acts and practices alleged in this complaint. His principal office of place of business is the same as that of Retina-X.

3. The acts and practices of Respondents alleged in this complaint have been in or affecting commerce, as "commerce" is defined in Section 4 of the FTC Act.

RESPONDENTS' BUSINESS ACTIVITIES

4. As recently as April 2018, Respondents developed and sold various monitoring products and services, each with the means to allow a purchaser to monitor, often surreptitiously, another person's activities on that person's mobile device or computer (the "device user"). Respondents offered various monitoring products and services with varying capabilities and costs.

a. **MobileSpy:** Respondents' MobileSpy mobile device monitoring product and service ("MobileSpy") was marketed as a product to monitor children or employees. MobileSpy first became available in 2007, and Respondents sold more than 5,700 MobileSpy licenses. Once installed, MobileSpy captured and logged, among other things, the following: text messages; messages sent and received on various messaging services; call history; keys pressed; GPS locations; photos; contact list; screenshots; and browser history. MobileSpy's premium version also permitted monitoring consumers, from a remote online dashboard, to view the monitored mobile device's screen in real time.

b. **PhoneSheriff:** Respondents' PhoneSheriff mobile device monitoring product and service ("PhoneSheriff") was marketed as a product to monitor children. PhoneSheriff first became available in 2011, and Respondents sold more than 4,600 PhoneSheriff licenses. Once installed, PhoneSheriff captured and logged, among other things, the following: GPS locations; text messages; messages sent and received on various messaging services; call history; photos; contact list; browser history; notes; music files; calendar entries; applications installed; mobile usage summaries; email history; and screenshots of any activity using the Snapchat application.

c. **TeenShield:** Respondents' TeenShield mobile device monitoring product and service ("TeenShield") was marketed as a product to monitor children. TeenShield first became available in 2015, and Respondents sold more than 5,000 TeenShield licenses. As part of the TeenShield for iOS registration process, Respondents collected dates of birth of users being monitored. From February 2016 to October 2017, Respondents collected approximately 950 dates of birth, and about a third of those were for children under the age of 13. Once installed, TeenShield captured and logged, among other things, the following: GPS locations; text messages; messages sent and received on various messaging services; call history; photos; contact list; browser history; and email history.

5. Purchasers were often required to jailbreak or root (i.e., actions to bypass various restrictions implemented by the operating system on and/or the manufacturer of mobile devices) the device user's mobile device prior to installing Respondents' monitoring products and services. Jailbreaking or rooting a mobile device can expose a mobile device to various security vulnerabilities and likely invalidates any warranty that a mobile device manufacturer or carrier provides.

6. All of Respondents' monitoring products and services required that the purchaser have physical access to the device user's mobile device or computer to install the monitoring products and services. Once Respondents' monitoring products and services were installed, the purchaser did not need physical access to the mobile device or computer, and could remotely monitor the device user's activities from an online dashboard.

7. By default, Respondents' monitoring products and services disclosed to the device user that they were being monitored (e.g., an icon on a monitored mobile device). However, purchasers could turn off this feature so that the monitoring products and services could run surreptitiously, meaning that the device user was unaware that he or she was being monitored. Respondents provided purchasers with instructions on how to remove the icon that would confirm that monitoring products and services were installed on a particular mobile device.

8. Device users surreptitiously monitored by Respondents' monitoring products and services could not uninstall or remove Respondents' monitoring products and services because they did not know that they were being monitored. Even if a device user suspected that they were being surreptitiously monitored, they had no way of knowing that Respondents' monitoring products and services were being used on their phone by the purchaser.

9. Despite stating in their terms of services that their monitoring products and services were to be used for monitoring employees or children, Respondents did not take any steps to ensure that purchasers would use Respondents' monitoring products and services for such purposes.

10. Moreover, the purported use of the monitoring products and services for employment or child-monitoring purposes is a pretext. Employers or parents would not typically jailbreak or root phones to install Respondents' monitoring products and services, particularly when many other monitoring products are available in the marketplace that do not require jailbreaking or rooting.

INJURY

11. Respondents' monitoring products and services substantially injured device users by enabling purchasers to surreptitiously stalk them. Stalkers and abusers use mobile device monitoring software to obtain victims' sensitive personal information without authorization and surreptitiously monitor victims' physical movements and online activities. Stalkers and abusers then use the information obtained via monitoring to perpetuate stalking and abusive behaviors, which cause mental and emotional abuse, financial and social harm, and physical harm, including death.

12. Furthermore, victims of stalking experience financial loss both directly and indirectly. Directly, stalkers and abusers can use the information obtained through monitoring products and services to take over a victim's financial accounts, and redirect any (or all) funds to the abuser. Furthermore, victims suffer financial loss in the form of lost warranty coverage resulting from jailbreaking/rooting a mobile device and the purchase of a new mobile device to ensure that they are no longer subject to surreptitious monitoring. Indirectly, victims experience financial loss through the costs associated with therapy or counseling, and moving away from an abuser.

13. Even after stalking or domestic abuse ends, victims continue to experience substantial harms, including injury in the form of depression, anxiety, and safety fears.

14. The sale of Respondents' surreptitious monitoring products and services also substantially injured device users by undermining the mobile device security features provided by their operating system or manufacturer. Installation of Respondents' monitoring products and services required the purchaser to jailbreak or root a user's mobile device by bypassing various restrictions implemented by a mobile device operating system and/or manufacturer. Such jailbreaking or rooting may expose a mobile device to various security vulnerabilities, in part because a jailbroken/rooted phone may not receive security updates. With surreptitious monitoring products and services, these mobile device security risks are compounded by the fact that the device user is unaware that their mobile device has been jailbroken or rooted, and thus does not know that they should implement heightened safeguards to protect the security of their mobile device.

15. These harms were not reasonably avoidable by consumers, as users had no way to know that their mobile devices were being surreptitiously tracked using Respondents' monitoring products and services.

16. These harms are not outweighed by countervailing benefits to consumers or competition.

RESPONDENTS' DATA SECURITY PRACTICES

17. Even assuming Respondents believed that their monitoring products and services were being used for legitimate purposes, including the monitoring of children and employees, Respondents did not take steps to secure the personal information collected from purchasers and device users being monitored. As a result, the personal information collected from purchasers and device users was at risk of unauthorized disclosure and use.

18. Respondents outsourced most of their product development and maintenance to a service provider. The service provider developed Respondents' monitoring mobile applications, developed Respondents' websites (after 2005), managed Respondents' servers, managed Respondents' payment processing through a third party, provided marketing support for Respondents' monitoring products and services (until 2012), and ran customer support for Respondents' monitoring products and services (until 2016).

19. Respondents used a third party cloud storage provider to store photos collected from mobile devices being monitored using PhoneSheriff or TeenShield.

20. Respondents engaged in a number of practices that, taken together, failed to provide reasonable data security to protect the personal information collected from consumers. Among other things, Respondents failed to:

a. Adopt, implement, or maintain written information security standards, policies, procedures or practices;

b. Conduct security testing of mobile applications that could be exploited to gain unauthorized access to consumers' sensitive personal information for well-known and reasonably foreseeable vulnerabilities;

c. Contractually require their service providers to adopt and implement information security standards, policies, procedures or practices;

d. Perform adequate oversight of service providers; and

e. Adopt and implement written information security standards, policies, procedures, or practices that would apply to the oversight of their service providers.

21. In February 2017, a hacker found unencrypted credentials in the TeenShield Android Package Kit ("APK") for Respondents' cloud storage account. The hacker logged into this account, and once there, the hacker found a screenshot that included the username and password for Respondents' server. The hacker then used those server credentials to log into Respondents' server, where the hacker accessed data collected through the PhoneSheriff and TeenShield monitoring products and services. The data accessed included, among other things, login usernames, encrypted login passwords, text messages, GPS locations, contact lists, apps installed, browser history, and photos. The hacker erased the entire database.

22. Respondents only became aware that they had been breached two months later, in April 2017, when a journalist contacted Respondents. The hacker had contacted the journalist, and provided evidence to the journalist that the hacker had obtained users' data from Respondents.

23. One year later, in February 2018, a hacker again found the credentials for Respondents' cloud storage account, this time in the PhoneSheriff APK. This time, the account credentials were "obfuscated," according to terminology used by Respondents, but the hacker was nevertheless able to decrypt the credentials and access Respondents' cloud storage account.

24. The hacker was able to access photos collected by mobile devices being monitored using PhoneSheriff and TeenShield. The hacker erased Respondents' cloud storage account, deleting all photos contained therein.

25. MobileSpy, PhoneSheriff and TeenShield have not been available for purchase since April 2018. However, Respondents' websites for each of these monitoring products and services remain online.

RESPONDENTS' DATA SECURITY REPRESENTATIONS

26. Since April 2007 Respondents' privacy policy for Mobile Spy has stated (*see* Exhibit A):

> "It is company policy that our customer databases remain confidential and private…Your private information is safe with us."

27. Since April 2011 Respondents' privacy policy for PhoneSheriff has stated (*see* Exhibit B):

> "It is company policy that our customer databases remain confidential and private…Your private information is safe with us."

28. Since December 2015 Respondents' privacy policy for TeenShield has stated (*see* Exhibit C):

> "It is company policy that our customer databases remain confidential and private…Your private information is safe with us."

RESPONDENTS ARE SUBJECT TO THE COPPA RULE

29. The COPPA Rule applies to any operator of a commercial Web site or online service that has actual knowledge that it collects, uses, and/or discloses personal information from children. As described above, in Paragraph 4(c), Respondents collected user dates of birth during the TeenShield registration process, many of which indicated that the monitored user was a child under the age of 13. As a result, Respondents had actual knowledge that the TeenShield product was collecting, using, and/or disclosing personal information from children.

30. The COPPA Rule defines "personal information" to include, among other things, a first and last name; a home or other physical address including street name and name of a city or town; online contact information (i.e., an email address or other substantially similar identifier that permits direct contact with a person online, such as an instant messaging user identifiers, screen name, or user name); a persistent identifier such as an IP address that can be used to recognize a user over time and across different Web sites or online services; a photograph, video, or audio file where such file contains a child's image or voice; or information concerning the child or parents of that child that the operator collects online from the child and combines with an identifier described in this definition. Through TeenShield, Respondents collected personal information as

defined in the Rule, including the content of text messages and emails, email addresses or user names for a child that could be used to contact the child, and photographs and audio files containing a child's image or voice. Respondents also collected information from the child concerning the child that was combined with other identifiers, such as the name or photograph of the child.

31. Among other things, the Rule requires that an operator with actual knowledge, like Respondents as operators of TeenShield, meet specific requirements prior to collecting online, using, or disclosing personal information from children, including but not limited to, establishing and maintaining reasonable procedures to protect the confidentiality, security, and integrity of personal information collected from children.

VIOLATIONS OF THE FTC ACT

COUNT I – UNFAIRNESS

32. As described in Paragraphs 4 to 16, Respondents sold monitoring products and services that required circumventing certain security protections implemented by the Mobile Device operating system or manufacturer, and did so without taking reasonable steps to ensure that the monitoring products and services will be used only for legitimate and lawful purposes by the purchaser. Respondents' actions cause or are likely to cause substantial injury to consumers that consumers cannot reasonably avoid themselves and that is not outweighed by countervailing benefits to consumers or competition. This practice is an unfair act or practice.

COUNT II – DECEPTION (MOBILESPY)

33. As described in Paragraph 26, Respondents have represented, directly or indirectly, expressly or by implication, that consumers' personal information collected through the MobileSpy mobile device monitoring product and service, and stored in Respondents' databases, remains confidential, private, and safe.

34. In fact, as set forth in Paragraphs 20 through 24, consumers' personal information collected through the MobileSpy mobile device monitoring product and service, and stored in Respondents' databases, was not confidential, private, and safe. Therefore, the representations set forth in Paragraph 33 are false and misleading.

COUNT III – DECEPTION (PHONESHERIFF)

35. As described in Paragraph 27, Respondents have represented, directly or indirectly, expressly or by implication, that consumers' personal information collected through the PhoneSheriff mobile device monitoring product and service, and stored in Respondents' databases, remains confidential, private, and safe.

36. In fact, as set forth in Paragraphs 20 through 24, consumers' personal information collected through the PhoneSheriff mobile device monitoring product and service, and stored in Respondents' databases, was not confidential, private, and safe. Therefore, the representations set forth in Paragraph 35 are false and misleading.

COUNT IV- DECEPTION (TEENSHIELD)

37. As described in Paragraph 28, Respondents have represented, directly or indirectly, expressly or by implication, that consumers' personal information collected through the TeenShield mobile device monitoring product and service, and stored in Respondents' databases, remains confidential, private, and safe.

38. In fact, as set forth in Paragraphs 20 through 24, consumers' personal information collected through the TeenShield mobile device monitoring product and service, and stored in Respondents' databases, was not confidential, private, and safe. Therefore, the representations as described in Paragraph 37 are false and misleading.

VIOLATION OF THE COPPA RULE

COUNT V – COPPA (TEENSHIELD)

39. Respondents collected personal information from children under the age of 13 through the TeenShield product, which Respondents operated and had actual knowledge that children were being monitored using these online services.

40. In numerous instances, in connection with the acts and practices described above, Respondents collected, used, and/or disclosed personal information from children in violation of the Rule, including by failing to establish and maintain reasonable procedures to protect the confidentiality, security, and integrity of personal information collected from children, in violation of Section 312.8 of the Rule, 16 C.F.R. § 312.8.

41. Respondents' acts or practices, as described in Paragraph 40 above, violated the COPPA Rule, 16 C.F.R. Part 312.

42. Pursuant to Section 1303(c) of COPPA, 15 U.S.C. § 6502(c), and Section 18(d)(3) of the FTC Act, 15 U.S.C. § 57a(d)(3), a violation of the Rule constitutes an unfair or deceptive act or practice in or affecting commerce, in violation of Section 5(a) of the FTC Act, 15 U.S.C. § 45(a).

43. 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 FTC Act, 15 U.S.C. § 45(a).

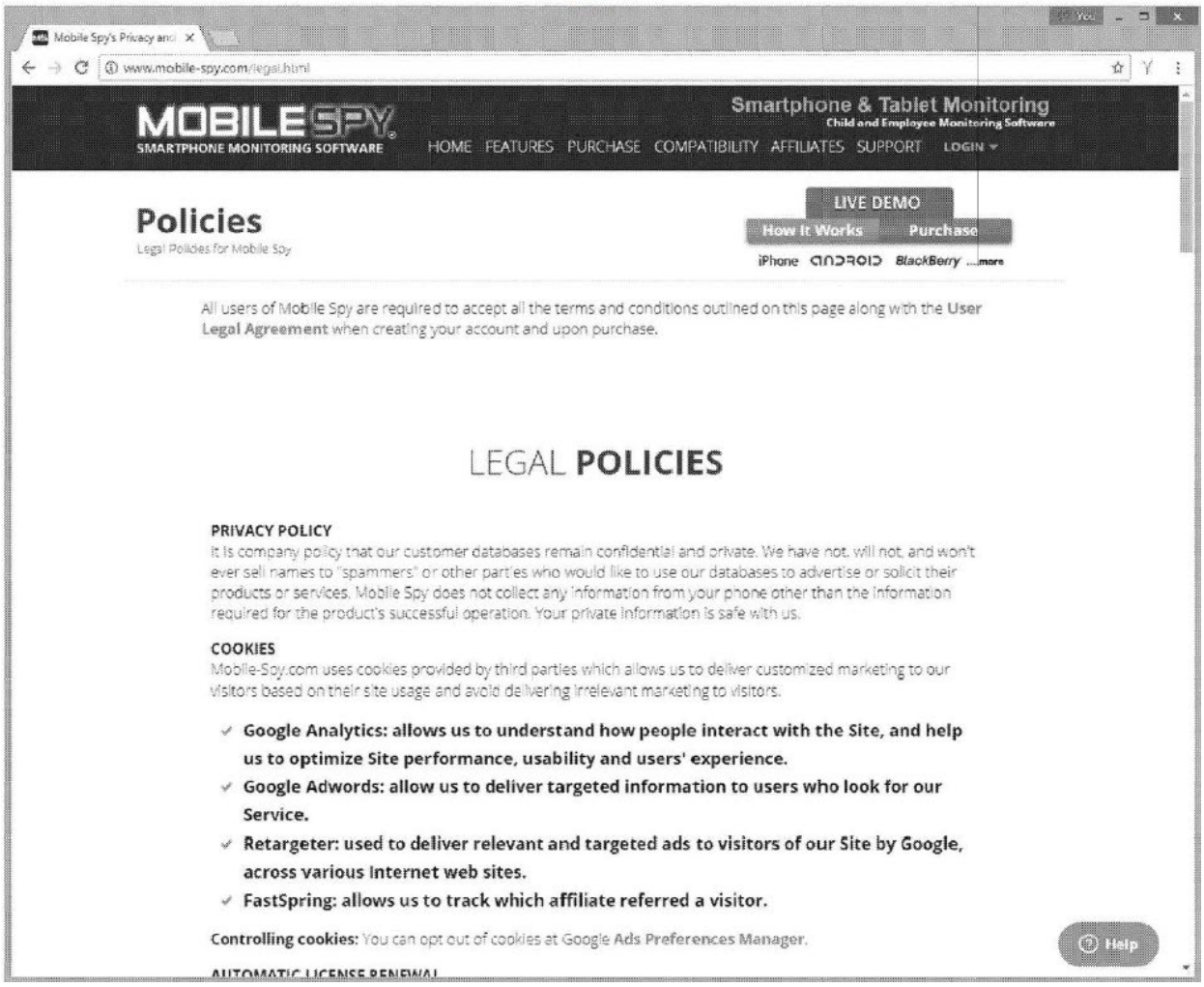
THEREFORE, the Federal Trade Commission this twenty-sixth day of March, 2020, has issued this Complaint against Respondents.

By the Commission.

Complaint

Exhibit A

EXHIBIT A



Complaint

EXHIBIT A

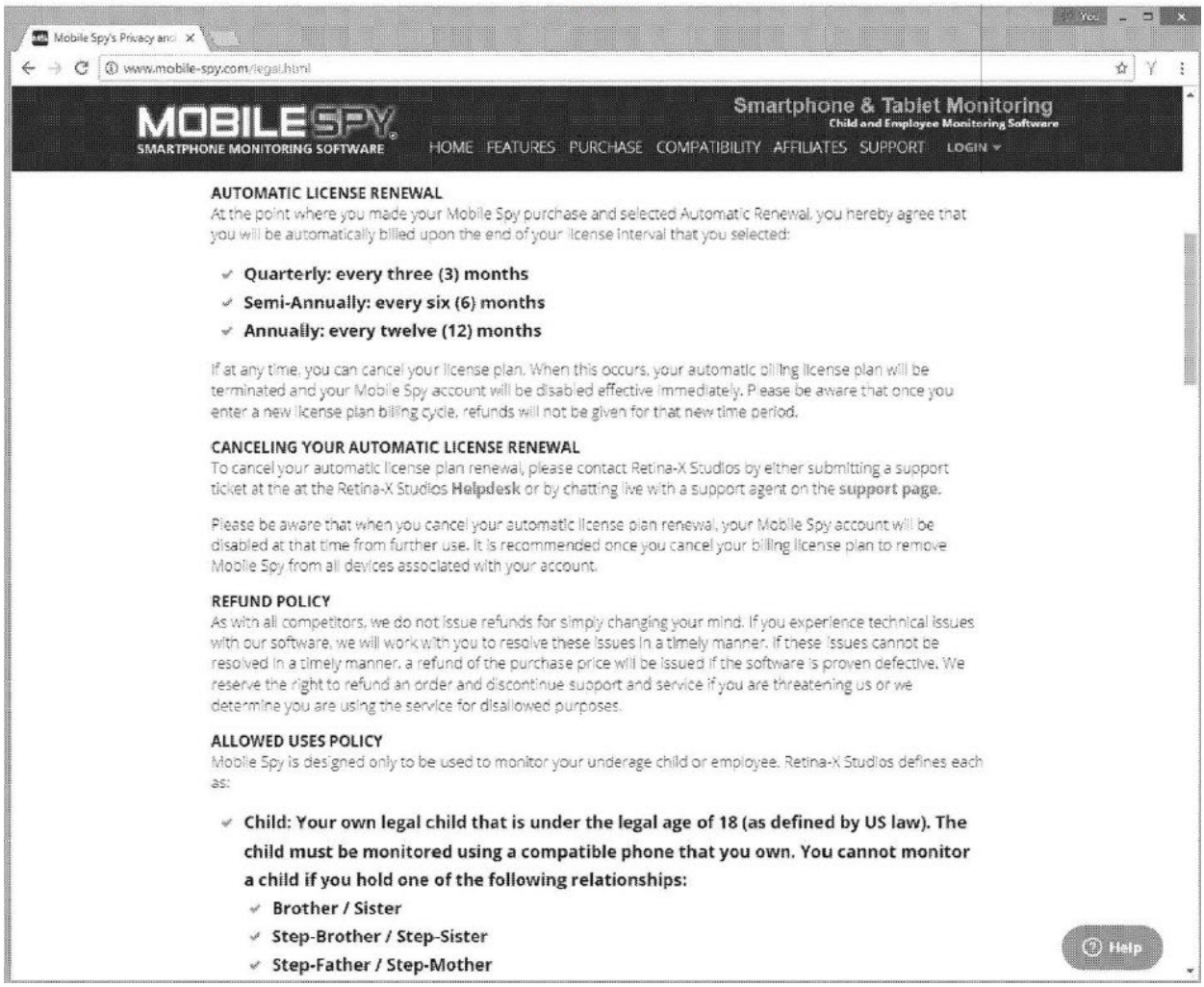
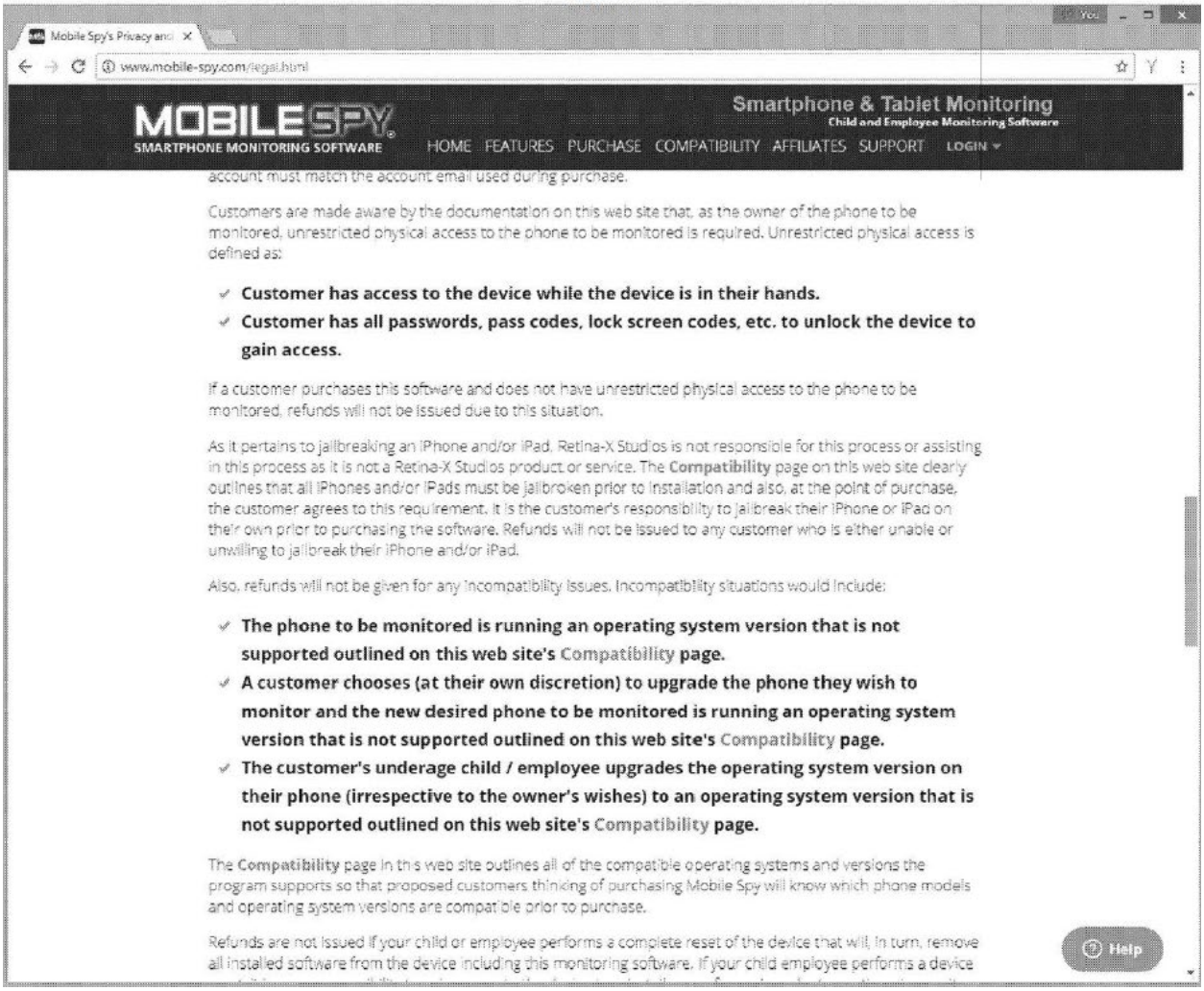


EXHIBIT A


Mobile Spy's Privacy and
www.mobile-spy.com/legal.html
MOBILE SPY
SMARTPHONE MONITORING SOFTWARE
Smartphone & Tablet Monitoring
Child and Employee Monitoring Software
HOME FEATURES PURCHASE COMPATIBILITY AFFILIATES SUPPORT LOGIN
Step-Father / Step-Mother
Aunt / Uncle Cousin / Nephew
Grandfather / Grandmother
Great-Grandfather / Great-Grandmother
Employee: Your employee at a company you own OR an employee at the same company as you and you have managerial responsibilities for. The employee must be monitored using a compatible phone owned by the company and issued to the employee under your company's policies regarding company phones. The employee must give consent and be notified they are being monitored before monitoring can begin.
Mobile Spy cannot be used to monitor any other individuals (such as a spouse, friend, significant other, parolee, probationer, etc.). This would violate the terms you agreed to at the point of purchase and be subject to immediate termination without reimbursement.
OTHER POLICIES
You agree that you will comply fully with all relevant export laws and regulations applicable to you, including, without limitation, the U.S. Export Administration Regulations if you are a resident of the United States (collectively referred herein as 'Export Controls'). Without limiting the generality of the foregoing, you will not, and you will require your representatives not to, export, direct or transfer the Software, or any direct product thereof, to any destination, person or entity restricted or prohibited by the Export Controls.
If you are entering into this Agreement on behalf of any agency or instrumentality of the United States Government, the Software is 'commercial computer software' and 'commercial computer software documentation' and pursuant to FAR 12.212 or DFARS 227.7202, and their successors, as applicable, use, reproduction, and disclosure of the Software are governed by the terms of this Agreement.
You agree that you will not (1) intercept, examine or otherwise observe any proprietary communications protocol used by the Software, whether through the use of a network analyzer, sniffer or other program or device; or (2) use any type of virus, clock, timer, counter, worm, bot, spider, software lock, drop dead device, Trojan-horse routing, trap door, time bomb or any other codes, instructions or third-party software that is designed to provide a means of surreptitious or unauthorized access to, or distort, delete, damage or disassemble, the Software.
You must be at least 18 years of age to purchase any of our products. You agree that you will not allow any other party to register your account, install or use the software or account login. The account email registered to the account must match the account email used during purchase.
Help

Complaint

EXHIBIT A



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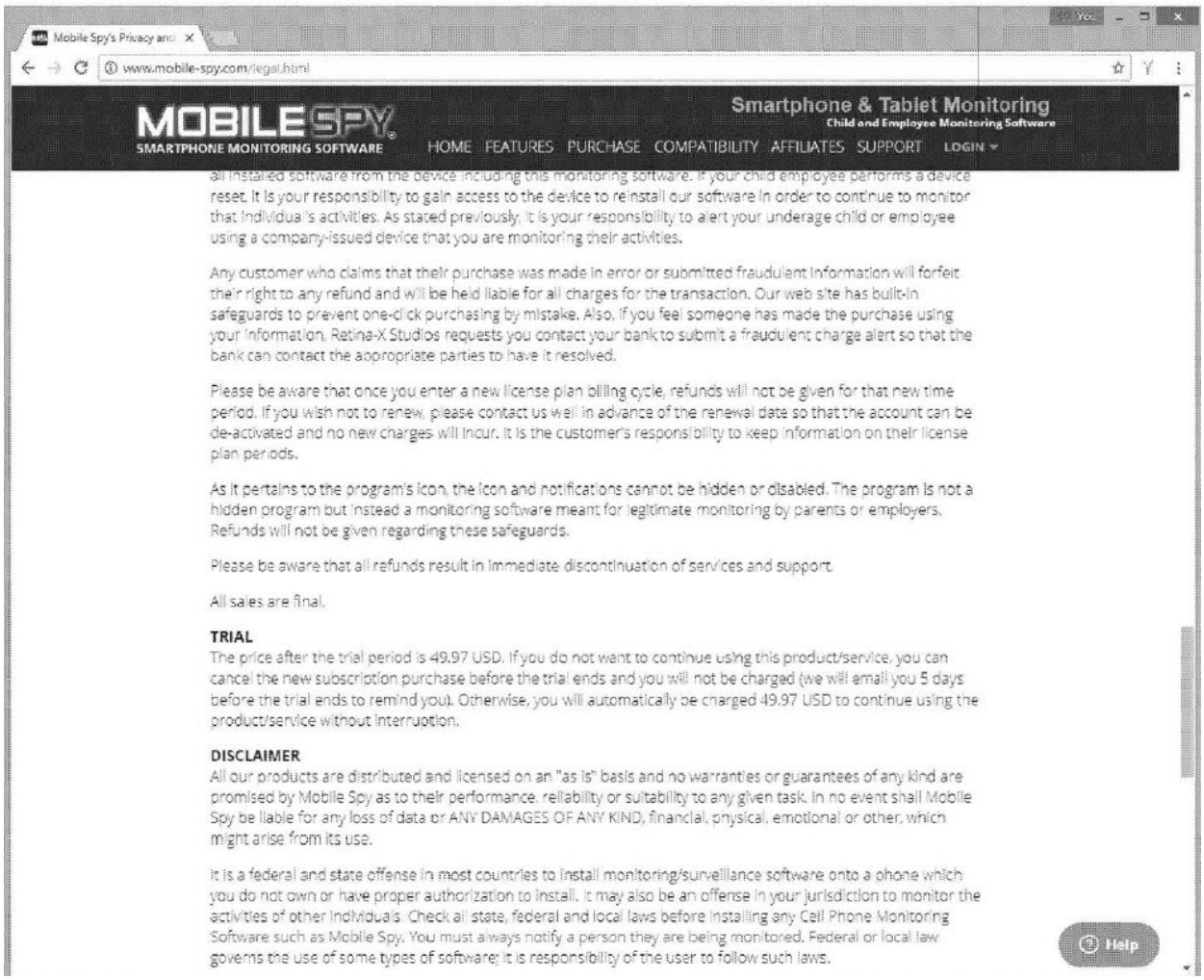

Mobile Spy's Privacy and

www.mobile-spy.com/legal.html

MOBILESPY
SMARTPHONE MONITORING SOFTWARE

Smartphone & Tablet Monitoring
Child and Employee Monitoring Software

HOME FEATURES PURCHASE COMPATIBILITY AFFILIATES SUPPORT LOGIN

all installed software from the device including this monitoring software. If your child employee performs a device reset, it is your responsibility to gain access to the device to reinstall our software in order to continue to monitor that individual's activities. As stated previously, it is your responsibility to alert your underage child or employee using a company-issued device that you are monitoring their activities.

Any customer who claims that their purchase was made in error or submitted fraudulent information will forfeit their right to any refund and will be held liable for all charges for the transaction. Our web site has built-in safeguards to prevent one-click purchasing by mistake. Also, if you feel someone has made the purchase using your information, Retina-X Studios requests you contact your bank to submit a fraudulent charge alert so that the bank can contact the appropriate parties to have it resolved.

Please be aware that once you enter a new license plan billing cycle, refunds will not be given for that new time period. If you wish not to renew, please contact us well in advance of the renewal date so that the account can be de-activated and no new charges will incur. It is the customer's responsibility to keep information on their license plan periods.

As it pertains to the program's icon, the icon and notifications cannot be hidden or disabled. The program is not a hidden program but instead a monitoring software meant for legitimate monitoring by parents or employers. Refunds will not be given regarding these safeguards.

Please be aware that all refunds result in immediate discontinuation of services and support.

All sales are final.

TRIAL
The price after the trial period is 49.97 USD. If you do not want to continue using this product/service, you can cancel the new subscription purchase before the trial ends and you will not be charged (we will email you 5 days before the trial ends to remind you). Otherwise, you will automatically be charged 49.97 USD to continue using the product/service without interruption.

DISCLAIMER
All our products are distributed and licensed on an "as is" basis and no warranties or guarantees of any kind are promised by Mobile Spy as to their performance, reliability or suitability to any given task. In no event shall Mobile Spy be liable for any loss of data or ANY DAMAGES OF ANY KIND, financial, physical, emotional or other, which might arise from its use.

It is a federal and state offense in most countries to install monitoring/surveillance software onto a phone which you do not own or have proper authorization to install. It may also be an offense in your jurisdiction to monitor the activities of other individuals. Check all state, federal and local laws before installing any Cell Phone Monitoring Software such as Mobile Spy. You must always notify a person they are being monitored. Federal or local law governs the use of some types of software; it is responsibility of the user to follow such laws.

Help

Complaint

EXHIBIT A

Mobile Spy's Privacy and

www.mobile-spy.com/legal.html

MOBILESPY
SMARTPHONE MONITORING SOFTWARE

Smartphone & Tablet Monitoring
Child and Employee Monitoring Software

HOME FEATURES PURCHASE COMPATIBILITY AFFILIATES SUPPORT LOGIN

governs the use of some types of software; it is responsibility of the user to follow such laws.

AGREEMENT

By installing, running, or using Mobile Spy you agree to the above Policies. In addition you agree that you will follow the Mobile Spy Policies at all times when using Mobile Spy. Failure to comply with our policies will result in the account being terminated without warning.

SOFTWARE END USER LICENSE AGREEMENT (EULA)

The smartphone/tablet software, artwork, music, and other components included in this product (collectively referred to herein as the "Software") are the copyrighted property of Retina-X Studios, LLC and its licensors (collectively referred to as "REX"). The Software is licensed (not sold) to you, and REX owns all copyright, trade secret, patent and other proprietary rights in the Software. You may use the Software on a single smartphone. You may not: (1) copy (other than once for back-up purposes), distribute, rent, lease or sublicense all or any portion of the Software; (2) modify or prepare derivative works of the Software; (3) transmit the Software over a network, by telephone or electronically using any means, except in the course of your network multi player play of the Software over authorized networks; (4) reverse engineer, decompile or disassemble the Software. You may transfer the Software, but only if the recipient agrees to accept the terms and conditions of this Agreement. If you transfer the Software, you must transfer all components and documentation and erase any copies residing on computer equipment. Your license is automatically terminated if you transfer the Software.

You expressly acknowledge and agree that use of the Software is at your sole risk. Except for the limited ninety (90) day warranty on the media set forth below, it is the user's responsibility to stop programs which might block Mobile Spy on the phone, should this situation arise. Due to the fact that the software is a digital good and registration information can not be reclaimed, we do not give refunds for simply changing your mind. All sales are final. License period starts at time of purchase. Logs older than thirty days are subject to automatic deletion.

REX warrants to the original consumer purchaser that the digital media furnished in this product will be free from defects in materials and workmanship under normal use for a period of ninety (90) days from the date of purchase (as evidenced by your receipt). If the digital media furnished in this product proves to be defective, and provided that the original consumer purchaser returns the media to REX in accordance with the instructions in this paragraph, REX will replace the defective digital media free of charge to the consumer purchaser. If the digital media proves to be defective within the ninety (90) day period following the date of purchase.

Terms are subject to change at any time.

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DEVICE REQUIREMENTS
Any compatible Android, iPhone or BlackBerry based smartphone or tablet including many models by Apple, Samsung, HTC, more

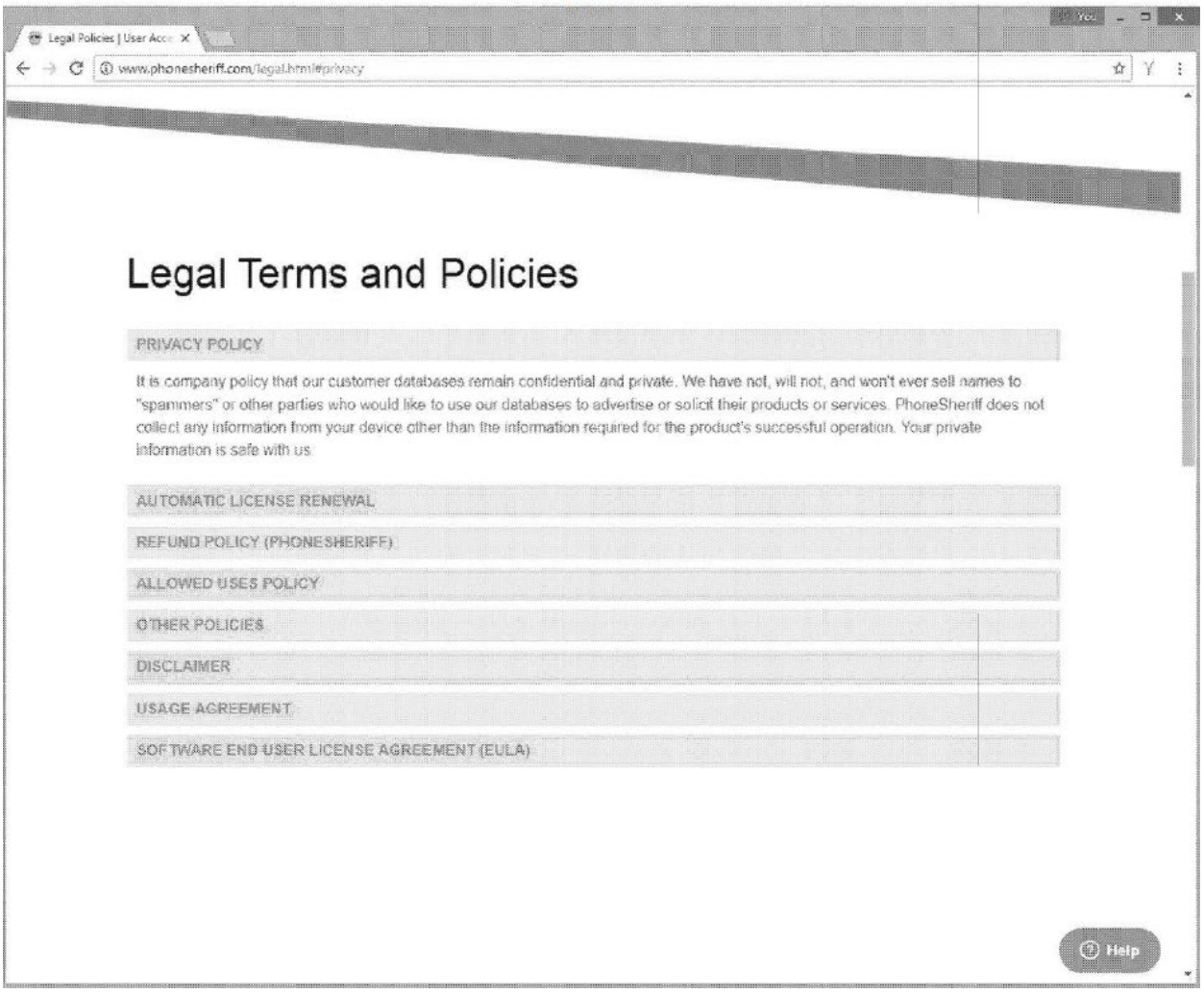
3 Months
$ 49 97

Help

Complaint

Exhibit B

EXHIBIT B



Complaint

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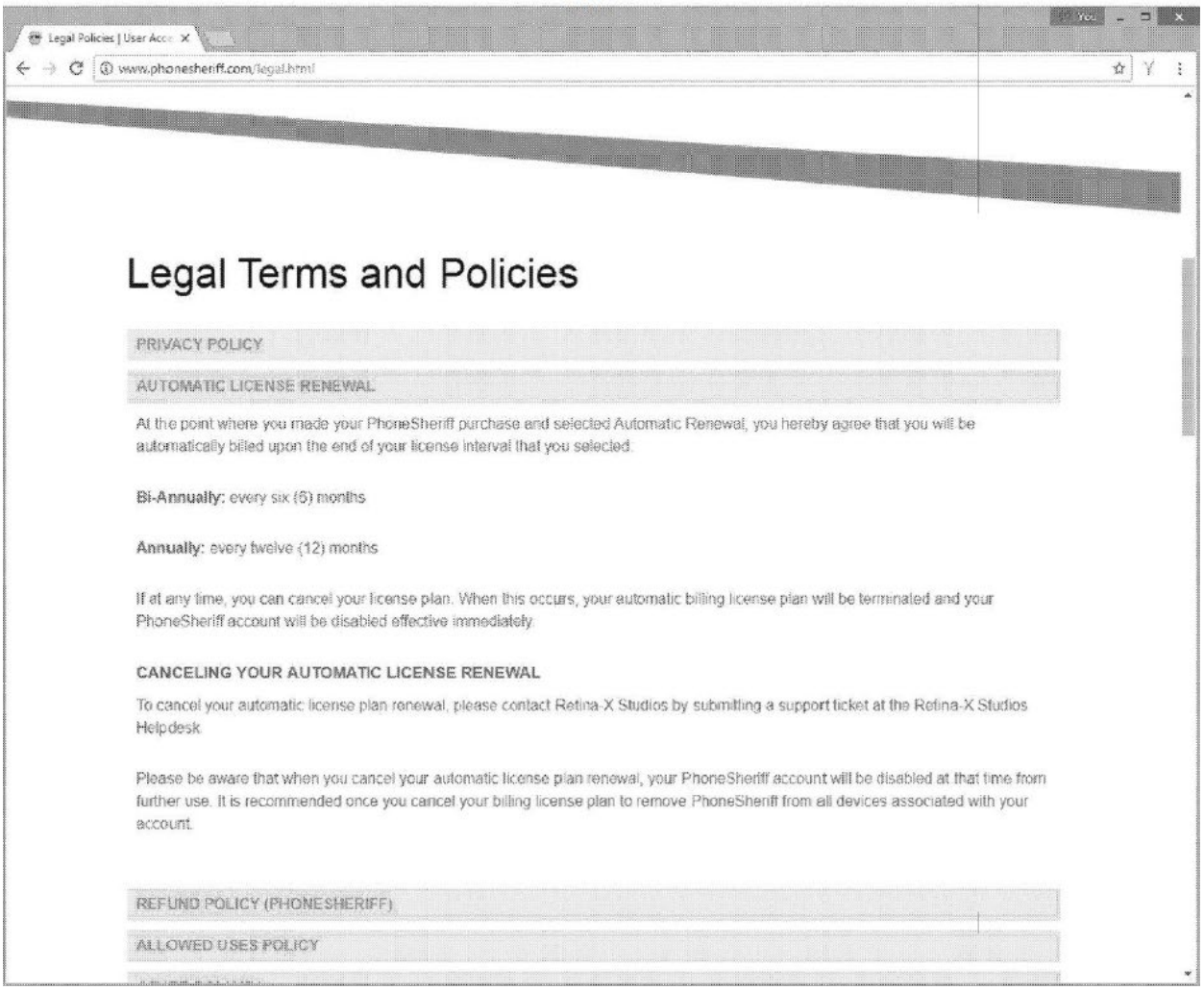

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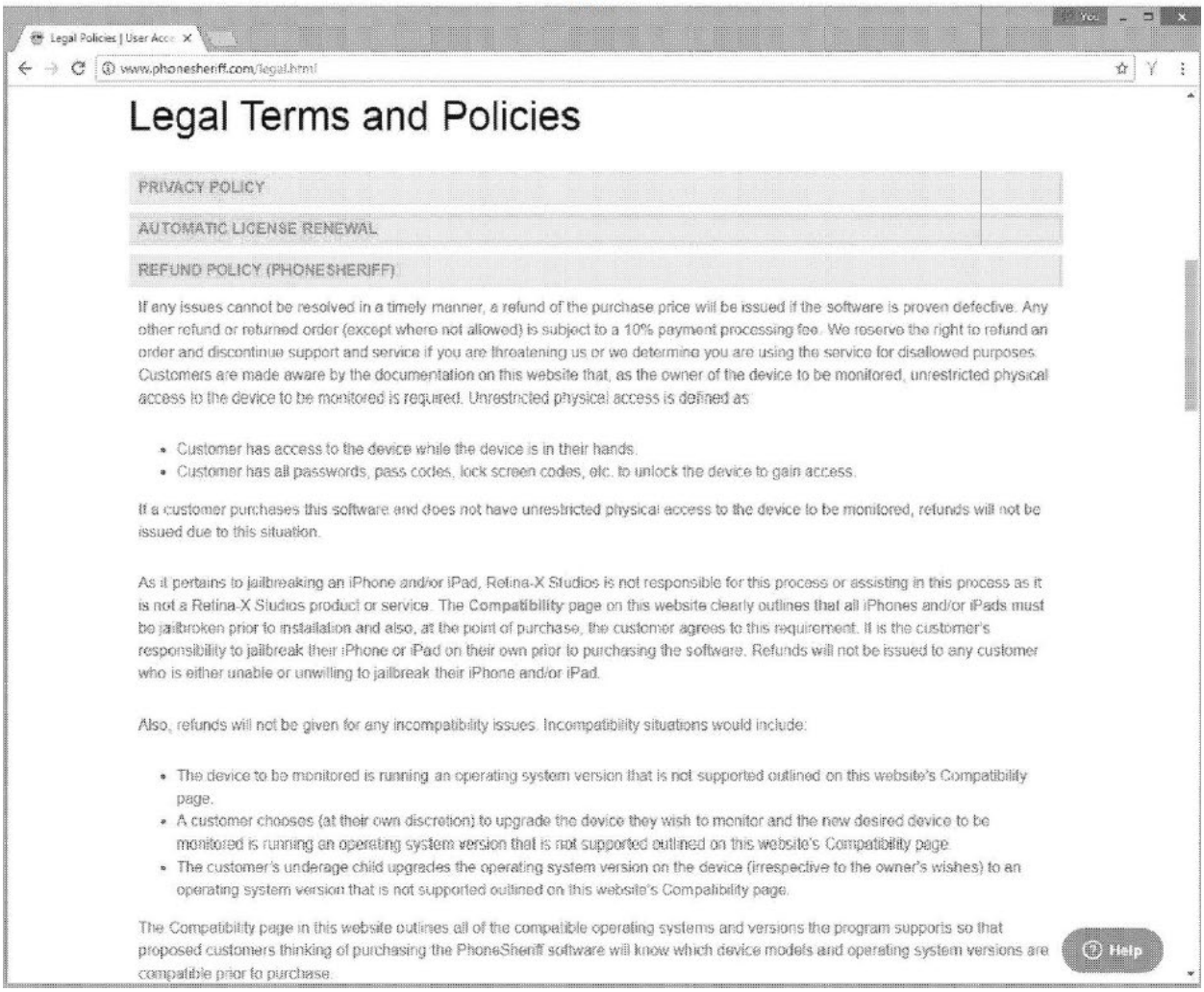
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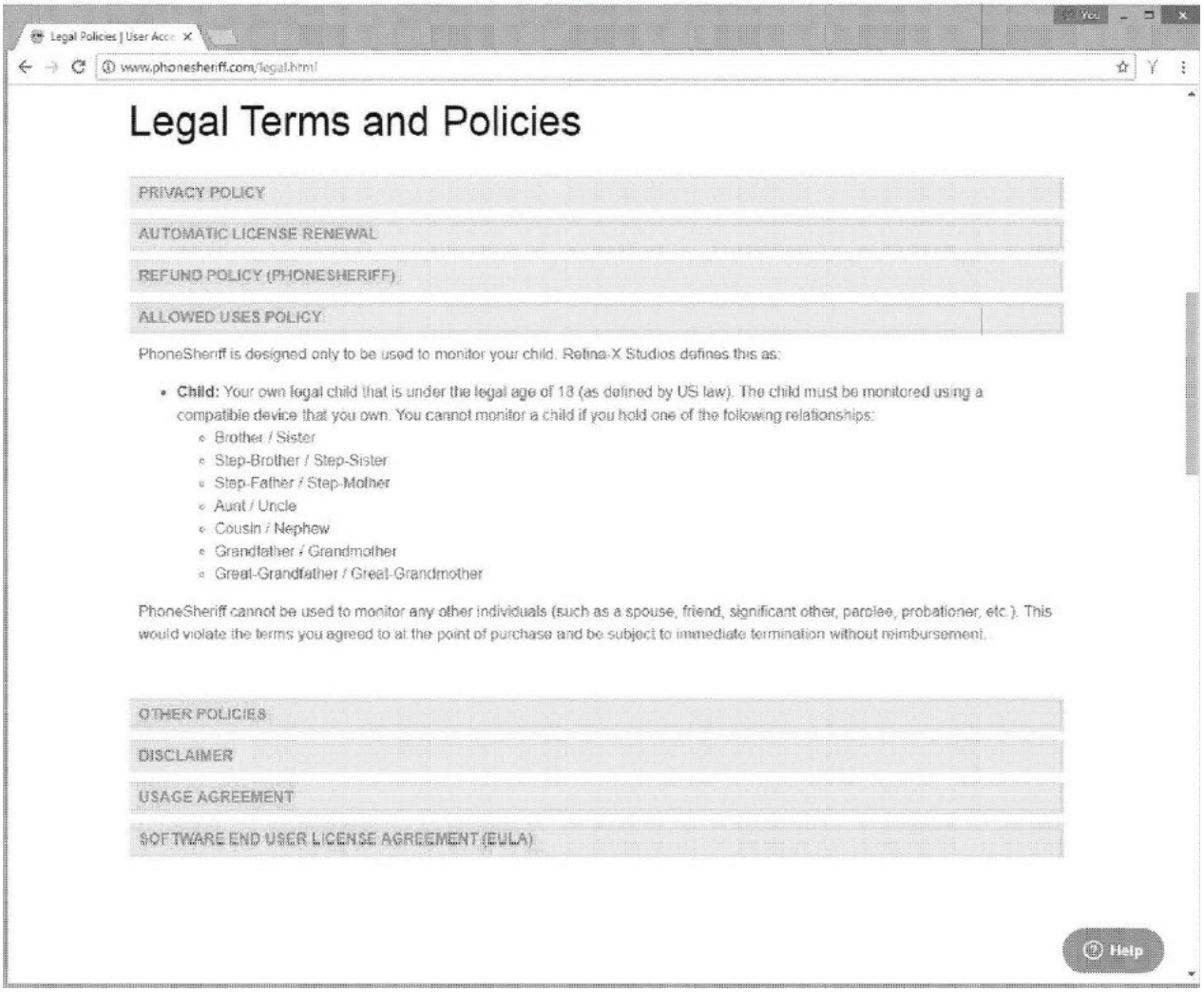
www.phonesheriff.com/legal.html
Legal Terms and Policies
PRIVACY POLICY
AUTOMATIC LICENSE RENEWAL
REFUND POLICY (PHONESHERIFF)
If any issues cannot be resolved in a timely manner, a refund of the purchase price will be issued if the software is proven defective. Any other refund or returned order (except where not allowed) is subject to a 10% payment processing fee. We reserve the right to refund an order and discontinue support and service if you are threatening us or we determine you are using the service for disallowed purposes. Customers are made aware by the documentation on this website that, as the owner of the device to be monitored, unrestricted physical access to the device to be monitored is required. Unrestricted physical access is defined as:
Customer has access to the device while the device is in their hands.
Customer has all passwords, pass codes, lock screen codes, etc. to unlock the device to gain access.
If a customer purchases this software and does not have unrestricted physical access to the device to be monitored, refunds will not be issued due to this situation.
As it pertains to jailbreaking an iPhone and/or iPad, Retina-X Studios is not responsible for this process or assisting in this process as it is not a Retina-X Studios product or service. The Compatibility page on this website clearly outlines that all iPhones and/or iPads must be jailbroken prior to installation and also, at the point of purchase, the customer agrees to this requirement. It is the customer's responsibility to jailbreak their iPhone or iPad on their own prior to purchasing the software. Refunds will not be issued to any customer who is either unable or unwilling to jailbreak their iPhone and/or iPad.
Also, refunds will not be given for any incompatibility issues. Incompatibility situations would include:
The device to be monitored is running an operating system version that is not supported outlined on this website's Compatibility page.
A customer chooses (at their own discretion) to upgrade the device they wish to monitor and the new desired device to be monitored is running an operating system version that is not supported outlined on this website's Compatibility page.
The customer's underage child upgrades the operating system version on the device (irrespective to the owner's wishes) to an operating system version that is not supported outlined on this website's Compatibility page.
The Compatibility page in this website outlines all of the compatible operating systems and versions the program supports so that proposed customers thinking of purchasing the PhoneSheriff software will know which device models and operating system versions are compatible prior to purchase.
Help

Complaint

EXHIBIT B



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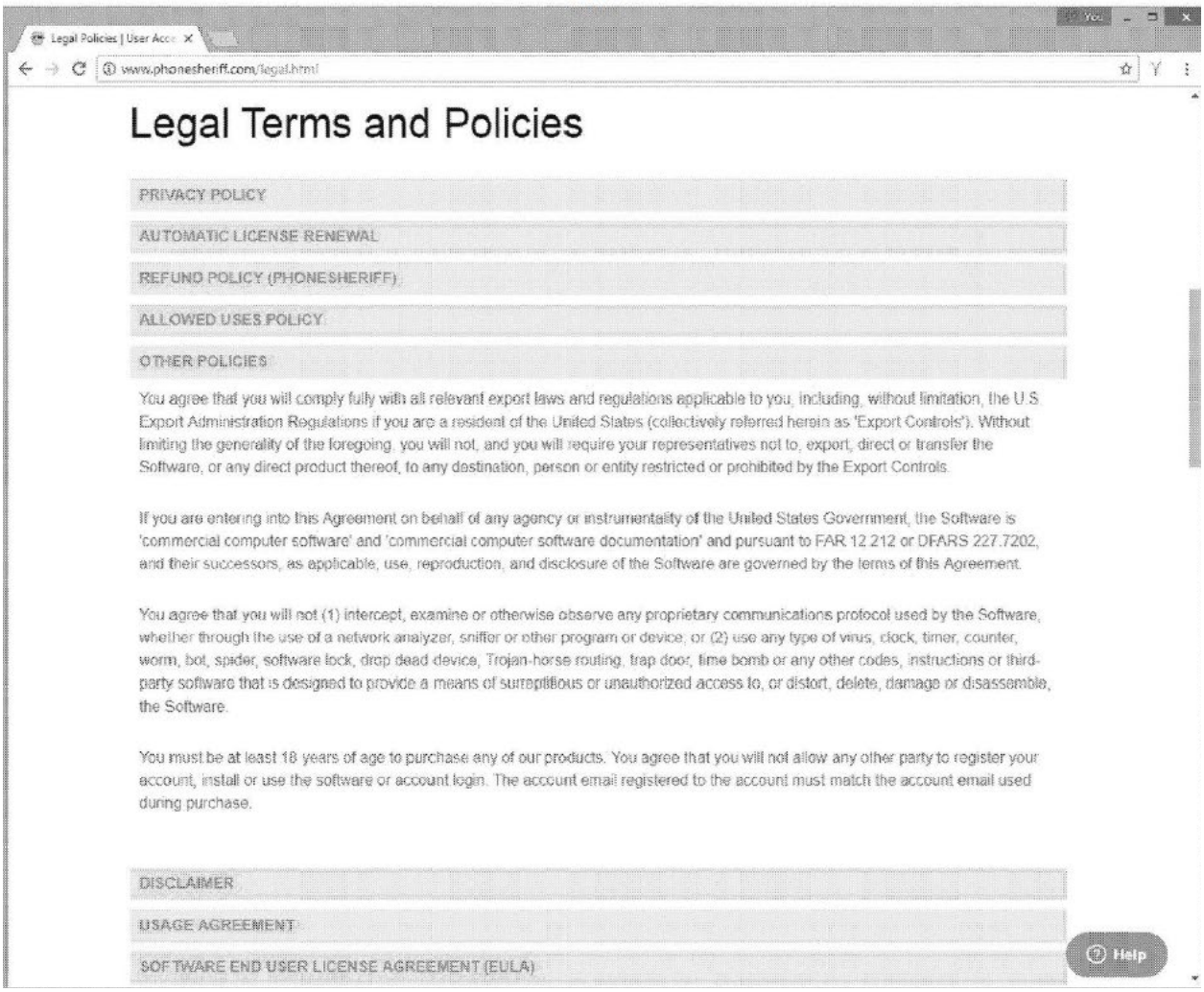
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You agree that you will comply fully with all relevant export laws and regulations applicable to you, including, without limitation, the U.S. Export Administration Regulations if you are a resident of the United States (collectively referred herein as 'Export Controls'). Without limiting the generality of the foregoing, you will not, and you will require your representatives not to, export, direct or transfer the Software, or any direct product thereof, to any destination, person or entity restricted or prohibited by the Export Controls.
If you are entering into this Agreement on behalf of any agency or instrumentality of the United States Government, the Software is 'commercial computer software' and 'commercial computer software documentation' and pursuant to FAR 12.212 or DFARS 227.7202, and their successors, as applicable, use, reproduction, and disclosure of the Software are governed by the terms of this Agreement.
You agree that you will not (1) intercept, examine or otherwise observe any proprietary communications protocol used by the Software, whether through the use of a network analyzer, sniffer or other program or device; or (2) use any type of virus, clock, timer, counter, worm, bot, spader, software lock, drop dead device, Trojan-horse routing, trap door, time bomb or any other codes, instructions or third-party software that is designed to provide a means of surreptitious or unauthorized access to, or distort, delete, damage or disassemble, the Software.
You must be at least 18 years of age to purchase any of our products. You agree that you will not allow any other party to register your account, install or use the software or account login. The account email registered to the account must match the account email used during purchase.
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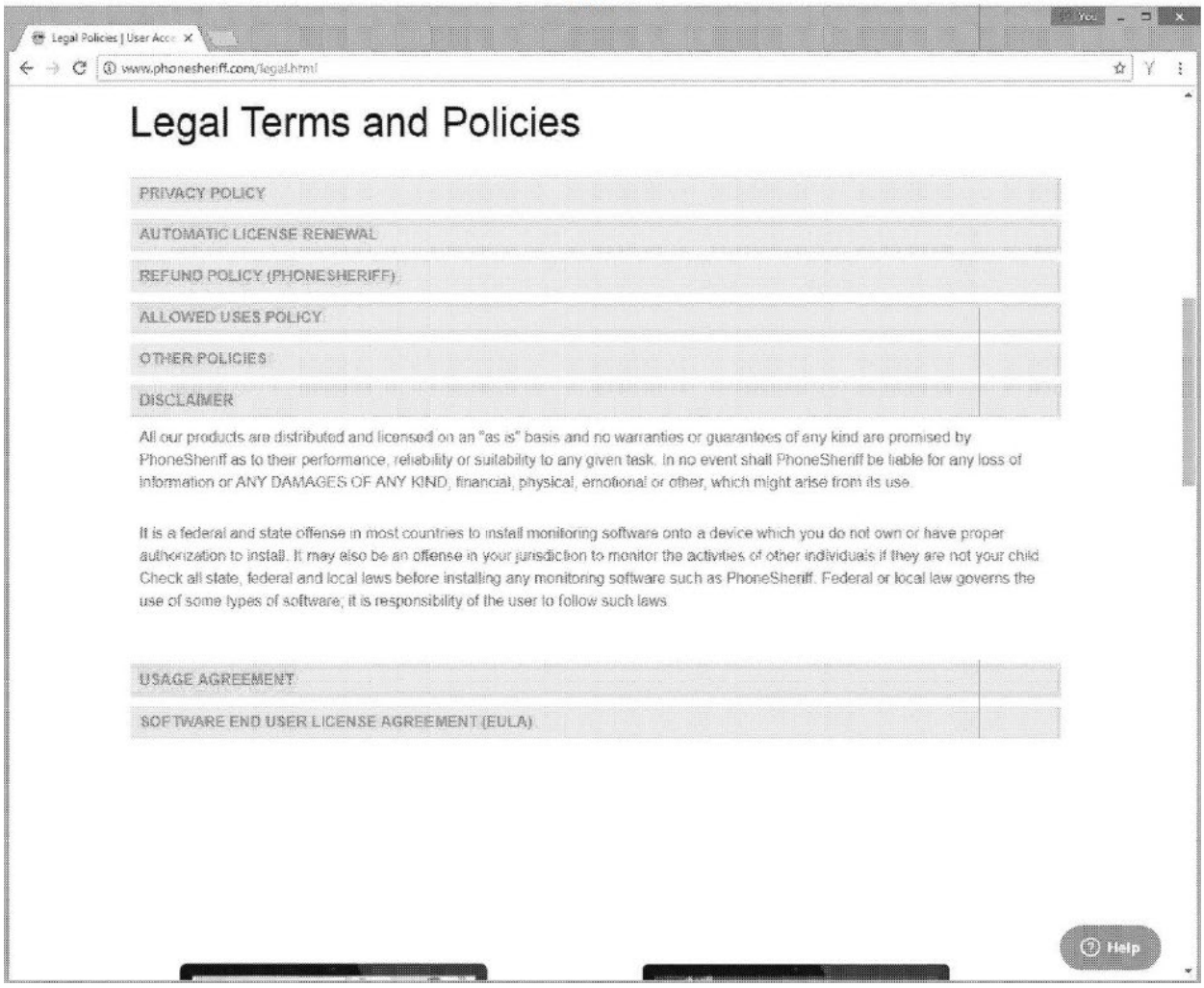

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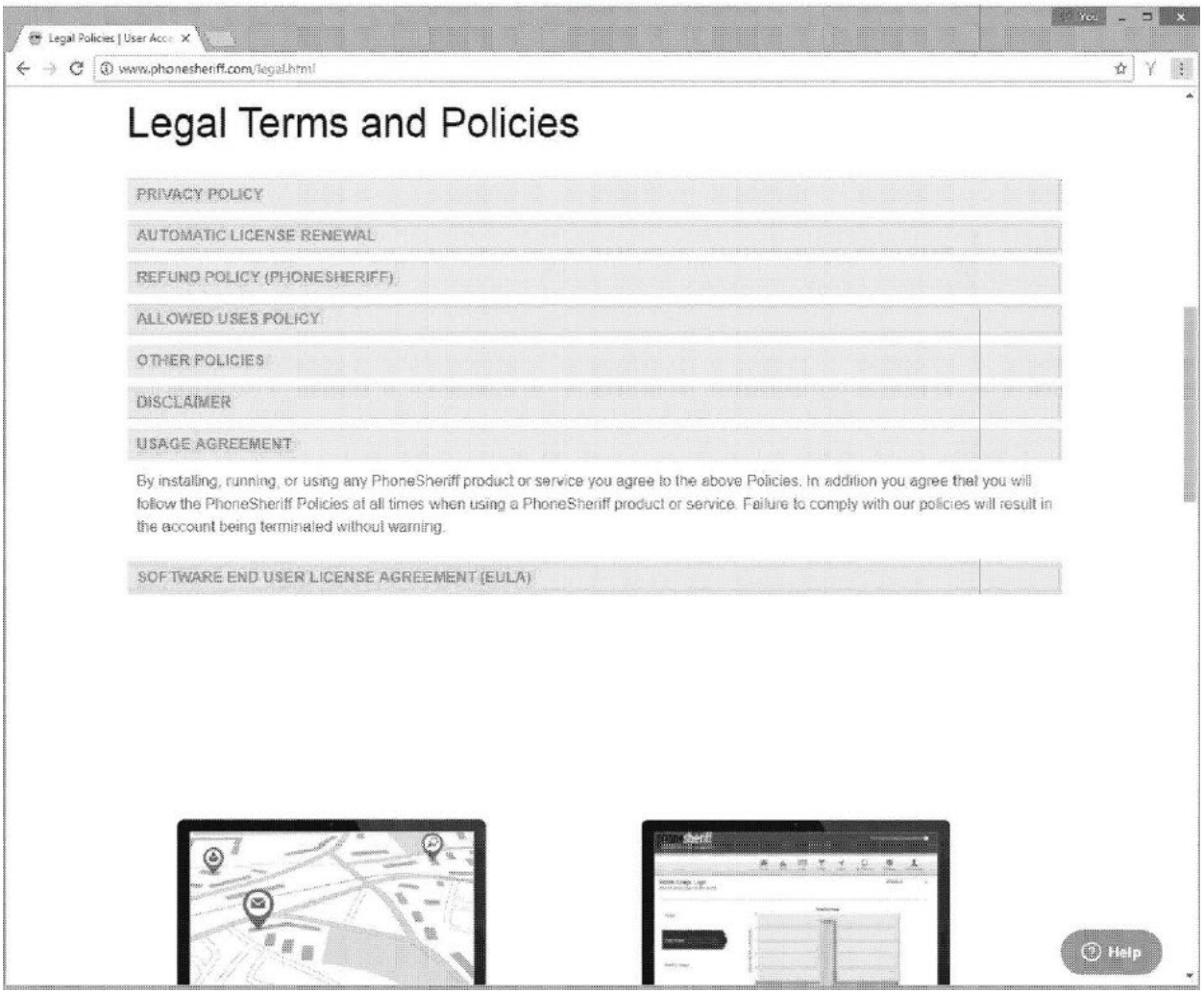
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ALLOWED USES POLICY
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USAGE AGREEMENT
By installing, running, or using any PhoneSheriff product or service you agree to the above Policies. In addition you agree that you will follow the PhoneSheriff Policies at all times when using a PhoneSheriff product or service. Failure to comply with our policies will result in the account being terminated without warning.
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EXHIBIT B

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USAGE AGREEMENT

SOFTWARE END USER LICENSE AGREEMENT (EULA)

The smartphone/tablet software, artwork, music, and other components included in this product (collectively referred to herein as the "Software") are the copyrighted property of PhoneSheriff.com and its licensors (collectively referred to as "REX"). The Software is licensed (not sold) to you, and REX owns all copyright, trade secret, patent and other proprietary rights in the Software. You may use the Software on a single computer. You may not: (1) copy (other than once for back-up purposes), distribute, rent, lease or sublicense all or any portion of the Software; (2) modify or prepare derivative works of the Software, (3) transmit the Software over a network, by telephone or electronically using any means, except in the course of your installation of the Software over authorized networks; (4) reverse engineer, decompile or disassemble the Software. You may transfer the Software, but only if the recipient agrees to accept the terms and conditions of this Agreement. If you transfer the Software, you must transfer all components and documentation and erase any copies residing on computer equipment. Your license is automatically terminated if you transfer the Software.

You expressly acknowledge and agree that use of the Software is at your sole risk. Except for the limited (90) day warranty on the media set forth below, While PhoneSheriff remains undetected by any known software, it is the user's responsibility to stop programs which might block PhoneSheriff on the device, should this situation arise. Due to the fact that the software is a digital good and registration information cannot be reclaimed, no refunds can be issued and all sales are final. All logs are stored inside your account for a minimum of 30 days. Logs older than 30 days are subject to deletion during maintenance of the server.

REX warrants to the original consumer purchaser that the media furnished in this product will be free from defects in materials and workmanship under normal use for a period of ninety (90) days from the date of purchase (as evidenced by your receipt). If the media furnished in this product proves to be defective, and provided that the original consumer purchaser returns the media to REX in accordance with the instructions in this paragraph, REX will replace the defective media: (a) free of charge to the consumer purchaser, if the media proves to be defective within the ninety (90) day period following the date of purchase, and (b) for a fee of $8.00 per Compact Disc, if the media proves to be defective after the expiration of the ninety (90) day warranty period.

To obtain a replacement CD, please return the CD only, postage prepaid, to REX, at the address below, accompanied by proof of date of purchase, a description of the defect, and your name and return address, as well as a check for $8.00 per CD if after expiration of the warranty period. REX will mail a replacement to you.

Terms are subject to change at any time.

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Help

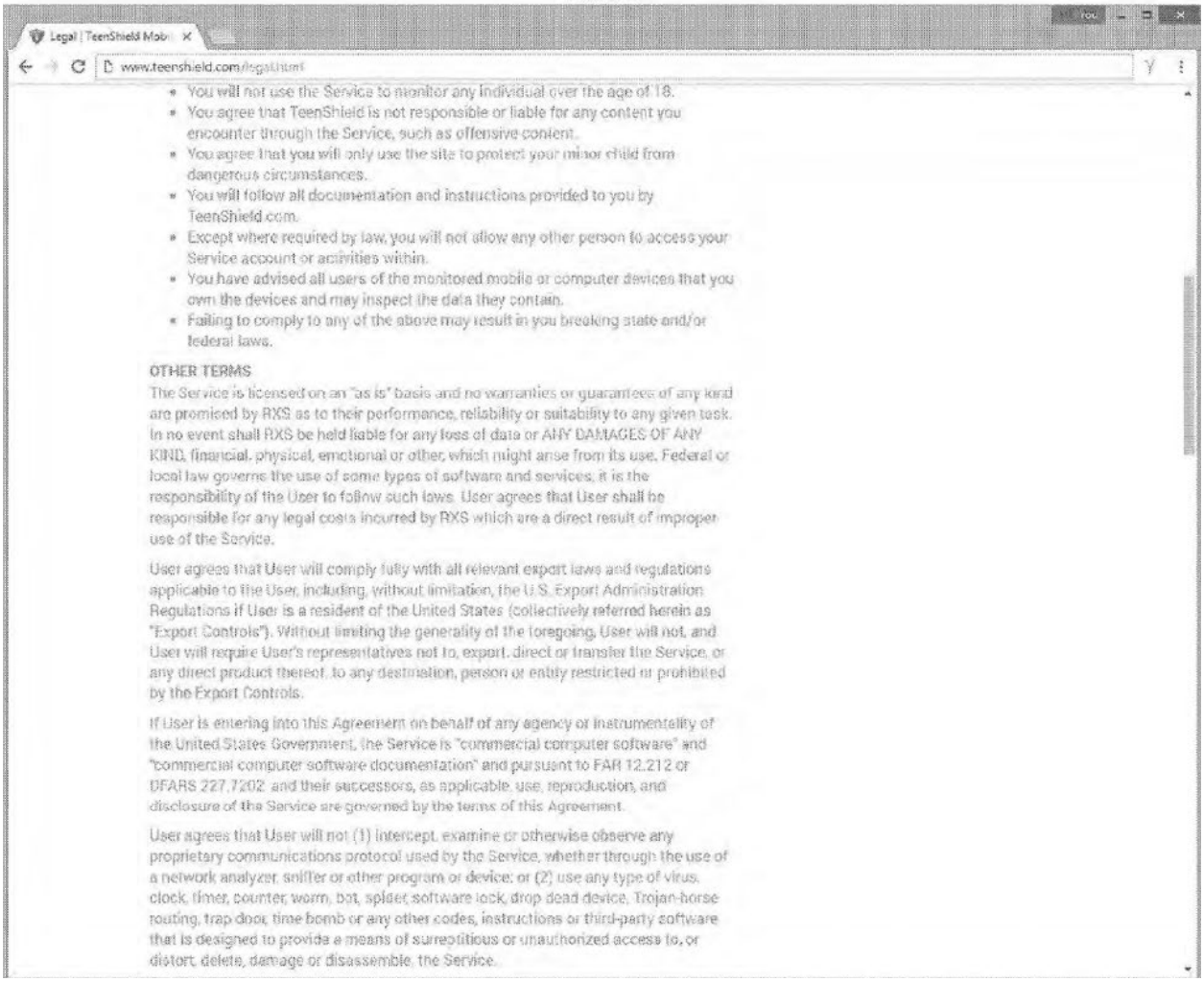
Complaint

Exhibit C

EXHIBIT C

Complaint

EXHIBIT C



Legal | TeenShield Mobi

www.teenshield.com/legal.html

- You will not use the Service to monitor any individual over the age of 18.
- You agree that TeenShield is not responsible or liable for any content you encounter through the Service, such as offensive content.
- You agree that you will only use the site to protect your minor child from dangerous circumstances.
- You will follow all documentation and instructions provided to you by TeenShield.com.
- Except where required by law, you will not allow any other person to access your Service account or activities within.
- You have advised all users of the monitored mobile or computer devices that you own the devices and may inspect the data they contain.
- Failing to comply to any of the above may result in you breaking state and/or federal laws.

OTHER TERMS

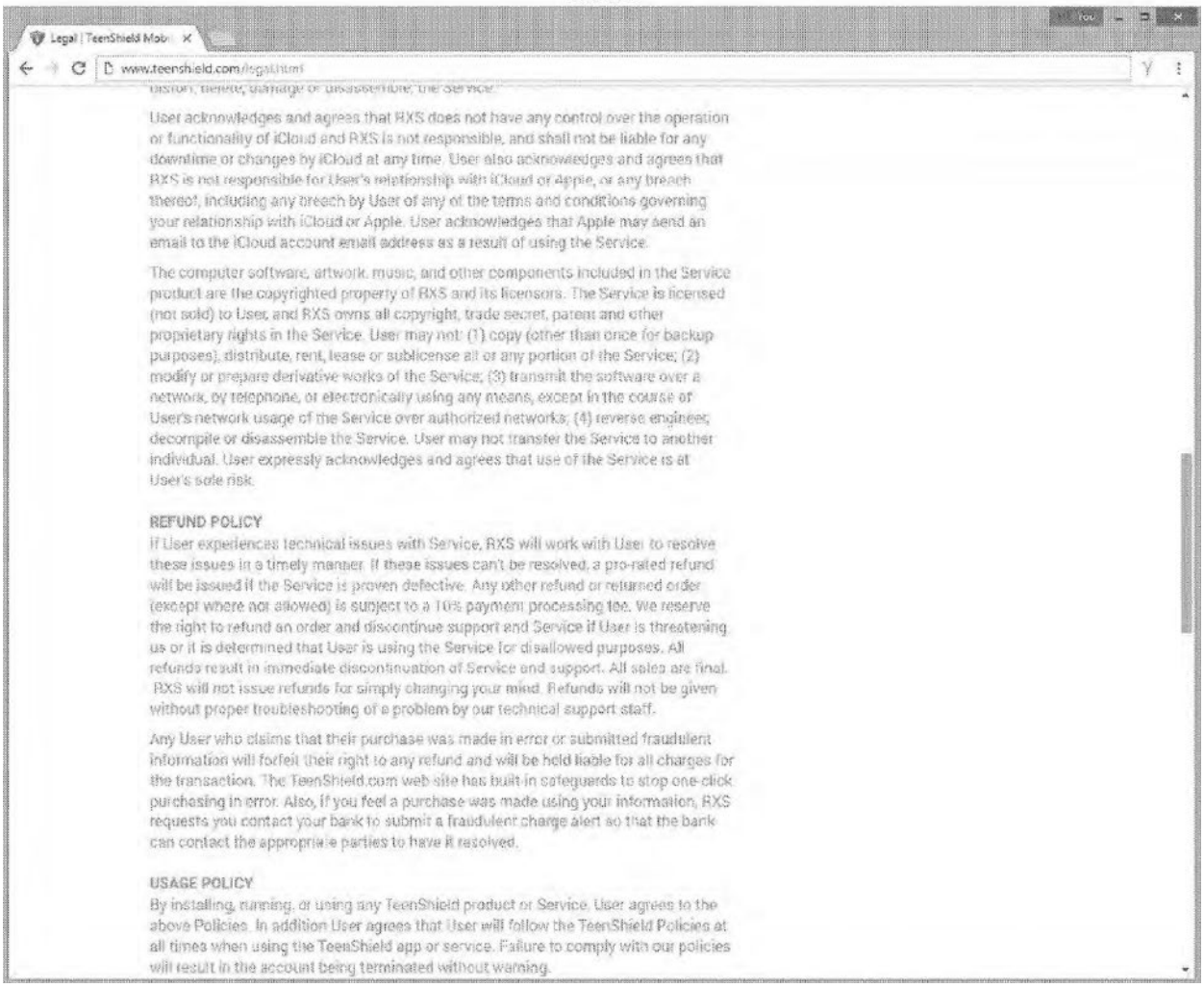
The Service is licensed on an "as is" basis and no warranties or guarantees of any kind are promised by RXS as to their performance, reliability or suitability to any given task. In no event shall RXS be held liable for any loss of data or ANY DAMAGES OF ANY KIND, financial, physical, emotional or other, which might arise from its use. Federal or local law governs the use of some types of software and services; it is the responsibility of the User to follow such laws. User agrees that User shall be responsible for any legal costs incurred by RXS which are a direct result of improper use of the Service.

User agrees that User will comply fully with all relevant export laws and regulations applicable to the User, including, without limitation, the U.S. Export Administration Regulations if User is a resident of the United States (collectively referred herein as "Export Controls"). Without limiting the generality of the foregoing, User will not, and User will require User's representatives not to, export, direct or transfer the Service, or any direct product thereof, to any destination, person or entity restricted or prohibited by the Export Controls.

If User is entering into this Agreement on behalf of any agency or instrumentality of the United States Government, the Service is "commercial computer software" and "commercial computer software documentation" and pursuant to FAR 12.212 or DFARS 227.7202 and their successors, as applicable, use, reproduction, and disclosure of the Service are governed by the terms of this Agreement.

User agrees that User will not (1) intercept, examine or otherwise observe any proprietary communications protocol used by the Service, whether through the use of a network analyzer, sniffer or other program or device; or (2) use any type of virus, clock, timer, counter, worm, bot, spider, software lock, drop dead device, Trojan-horse routing, trap door, time bomb or any other codes, instructions or third-party software that is designed to provide a means of surreptitious or unauthorized access to, or distort, delete, damage or disassemble, the Service.

EXHIBIT C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www.teenshield.com/legal.html
User acknowledges and agrees that RXS does not have any control over the operation or functionality of iCloud and RXS is not responsible, and shall not be liable for any downtime or changes by iCloud at any time. User also acknowledges and agrees that RXS is not responsible for User's relationship with iCloud or Apple, or any breach thereof, including any breach by User of any of the terms and conditions governing your relationship with iCloud or Apple. User acknowledges that Apple may send an email to the iCloud account email address as a result of using the Service.
The computer software, artwork, music, and other components included in the Service product are the copyrighted property of RXS and its licensors. The Service is licensed (not sold) to User, and RXS owns all copyright, trade secret, patent and other proprietary rights in the Service. User may not: (1) copy (other than once for backup purposes), distribute, rent, lease or sublicense all or any portion of the Service; (2) modify or prepare derivative works of the Service; (3) transmit the software over a network, by telephone, or electronically using any means, except in the course of User's network usage of the Service over authorized networks; (4) reverse engineer, decompile or disassemble the Service. User may not transfer the Service to another individual. User expressly acknowledges and agrees that use of the Service is at User's sole risk.
REFUND POLICY
If User experiences technical issues with Service, RXS will work with User to resolve these issues in a timely manner. If these issues can't be resolved, a pro-rated refund will be issued if the Service is proven defective. Any other refund or returned order (except where not allowed) is subject to a 10% payment processing fee. We reserve the right to refund an order and discontinue support and Service if User is threatening us or it is determined that User is using the Service for disallowed purposes. All refunds result in immediate discontinuation of Service and support. All sales are final. RXS will not issue refunds for simply changing your mind. Refunds will not be given without proper troubleshooting of a problem by our technical support staff.
Any User who claims that their purchase was made in error or submitted fraudulent information will forfeit their right to any refund and will be held liable for all charges for the transaction. The TeenShield.com web site has built in safeguards to stop one-click purchasing in error. Also, if you feel a purchase was made using your information, RXS requests you contact your bank to submit a fraudulent charge alert so that the bank can contact the appropriate parties to have it resolved.
USAGE POLICY
By installing, running, or using any TeenShield product or Service, User agrees to the above Policies. In addition User agrees that User will follow the TeenShield Policies at all times when using the TeenShield app or service. Failure to comply with our policies will result in the account being terminated without warning.

Complaint

EXHIBIT C

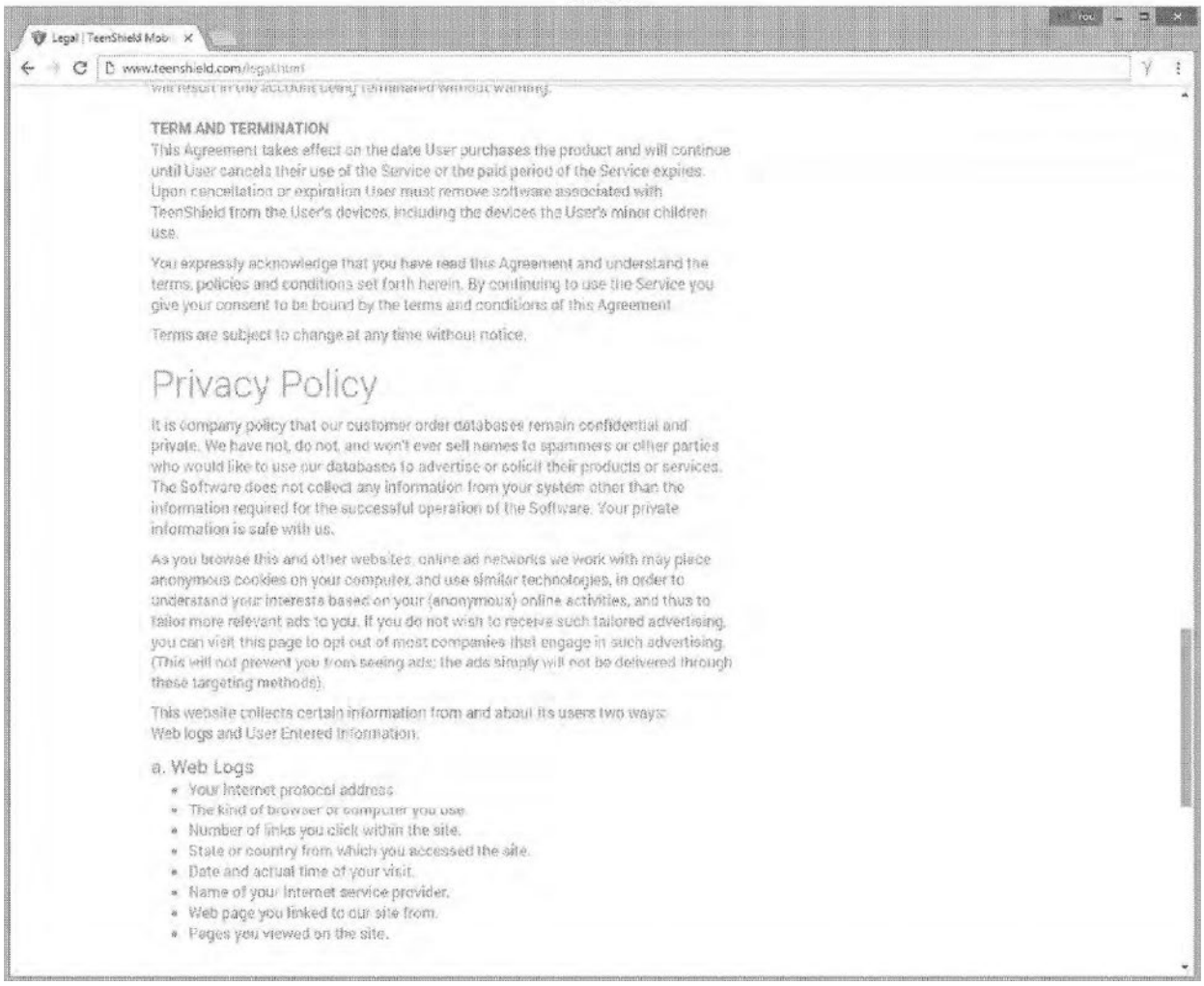
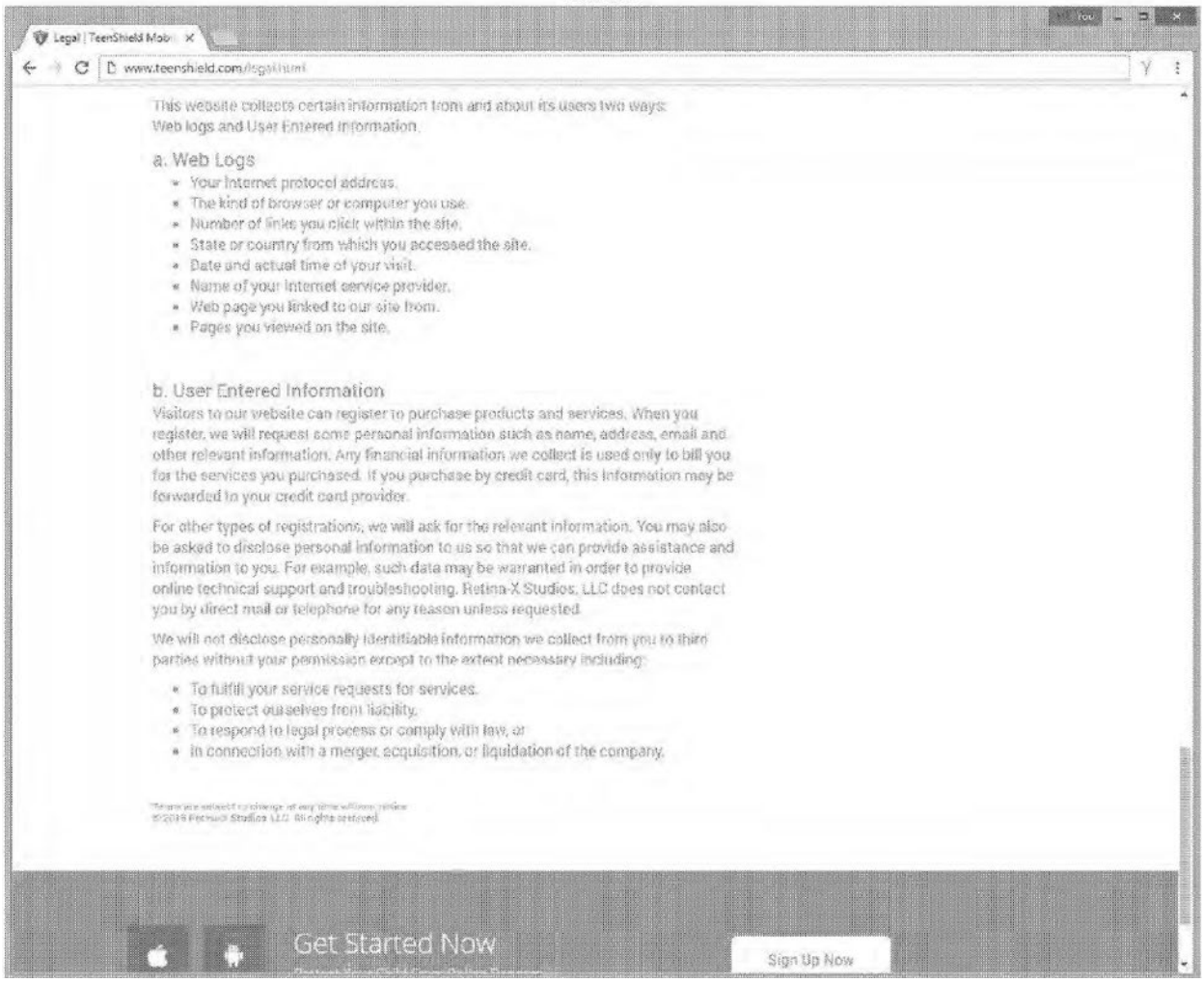


EXHIBIT C


Legal | TeenShield Mobi
www.teenshield.com/legal.html
This website collects certain information from and about its users two ways:
Web logs and User Entered Information.
a. Web Logs
Your Internet protocol address.
The kind of browser or computer you use.
Number of links you click within the site.
State or country from which you accessed the site.
Date and actual time of your visit.
Name of your Internet service provider.
Web page you linked to our site from.
Pages you viewed on the site.
b. User Entered Information
Visitors to our website can register to purchase products and services. When you register, we will request some personal information such as name, address, email and other relevant information. Any financial information we collect is used only to bill you for the services you purchased. If you purchase by credit card, this information may be forwarded to your credit card provider.
For other types of registrations, we will ask for the relevant information. You may also be asked to disclose personal information to us so that we can provide assistance and information to you. For example, such data may be warranted in order to provide online technical support and troubleshooting. Retina-X Studios, LLC does not contact you by direct mail or telephone for any reason unless requested.
We will not disclose personally identifiable information we collect from you to third parties without your permission except to the extent necessary including:
To fulfill your service requests for services.
To protect ourselves from liability.
To respond to legal process or comply with law, or
In connection with a merger, acquisition, or liquidation of the company.
Get Started Now
Sign Up Now

DECISION

The Federal Trade Commission ("Commission") initiated an investigation of certain acts and practices of the Respondents named in the caption. The Commission's Bureau of Consumer Protection ("BCP") prepared and furnished to Respondents a draft Complaint. BCP proposed to present the draft Complaint to the Commission for its consideration. If issued by the Commission, the draft Complaint would charge the Respondents with violations of the Federal Trade Commission Act and the Children's Online Privacy Protection Rule.

Respondents and BCP thereafter executed an Agreement Containing Consent Order ("Consent Agreement"). The Consent Agreement includes: 1) statements by Respondents that they neither admit nor deny any of the allegations in the Complaint, except as specifically stated in this Decision and Order, and that only for purposes of this action, they admit the facts necessary to establish jurisdiction; and 2) waivers and other provisions as required by the Commission's Rules.

The Commission considered the matter and determined that it had reason to believe that Respondents have violated the Federal Trade Commission Act and the Children's Online Privacy Protection Rule, and that a Complaint should issue stating its charges in that respect. The Commission accepted the executed Consent Agreement and placed it on the public record for a period of 30 days for the receipt and consideration of public comments. The Commission duly considered any comments received from interested persons pursuant to Section 2.34 of its Rules, 16 C.F.R. § 2.34. Now, in further conformity with the procedure prescribed in Rule 2.34, the Commission issues its Complaint, makes the following Findings, and issues the following Order:

Findings

1. The Respondents are:

    a. Respondent Retina-X Studios, LLC, a Florida limited liability company with its principal place of business at 731 Duval Station Road, Suite 107, Box 203, Jacksonville, Florida 32218.

    b. Respondent James N. Johns, Jr. the registered agent and sole member of Respondent Retina-X Studios, LLC. Individually or in concert with others, he formulates, directs, or controls the policies, acts, or practices of Retina-X Studios, LLC. His principal place of business is the same as that of Retina-X Studios, LLC.

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

ORDER

Definitions

For the purpose of this Order, the following definitions apply:

A. "Child" or "Children" means an individual under the age of 13.

B. "Clear(ly) and Conspicuous(ly)" means that a required disclosure is difficult to miss (i.e., easily noticeable) and easily understandable by ordinary consumers, including in all of the following ways:

1. In any communication that is solely visual or solely audible, the disclosure must be made through the same means through which the communication is presented. In any communication made through both visual and audible means, such as a television advertisement, the disclosure must be presented simultaneously in both the visual and audible portions of the communication even if the representation requiring the disclosure is made in only one means.

2. A visual disclosure, by its size, contrast, location, the length of time it appears, and other characteristics, must stand out from any accompanying text or other visual elements so that it is easily noticed, read, and understood.

3. An audible disclosure, including by telephone or streaming video, must be delivered in a volume, speed, and cadence sufficient for ordinary consumers to easily hear and understand it.

4. In any communication using an interactive electronic medium, such as the Internet or software, the disclosure must be unavoidable.

5. The disclosure must use diction and syntax understandable to ordinary consumers and must appear in each language in which the representation that requires the disclosure appears.

6. The disclosure must comply with these requirements in each medium through which it is received, including all electronic devices and face-to-face communications.

7. The disclosure must not be contradicted or mitigated by, or inconsistent with, anything else in the communication.

8. When the representation or sales practice targets a specific audience, such as Children, the elderly, or the terminally ill, "ordinary consumers" includes reasonable members of that group.

C. "Collects" or "Collection" means, for the purposes of Provision III of this Order, the gathering of any Personal Information from a Child by any means, including but not limited to:

1. Requesting, prompting, or encouraging a Child to submit Personal Information online;

2. Enabling a Child to make Personal Information publicly available in identifiable form; or

3. Passive tracking of a Child online.

D. "Covered Business" means Corporate Respondent, any business that Corporate Respondent controls, directly or indirectly, and any business that Individual Respondent controls, directly or indirectly.

E. "Covered Incident" means any instance in which any United States federal, state, or local law or regulation requires a Covered Business or Individual Respondent to notify any U.S. federal, state, or local government entity that information collected or received, directly or indirectly, by a Covered Business from or about an individual consumer was, or is reasonably believed to have been, accessed or acquired without authorization.

F. "Disclose" or "Disclosure" means, with respect to Personal Information:

1. The release of Personal Information Collected by an operator from a Child in identifiable form for any purpose, except where an operator provides such information to a person who provides Support for the Internal Operations of the Web Site or Online Service; and

2. Making Personal Information Collected by an operator from a Child publicly available in identifiable form by any means, including but not limited to a public posting through the Internet, or through a personal home page or screen posted on a Web site or online service; a pen pal service; an electronic mail service; a message board; or a chat room.

G. "Internet" means collectively the myriad of computer and telecommunication facilities, including equipment and operating software, which comprises the interconnected world-wide network of networks that employ the Transmission Control Protocol/Internet Protocol, or any predecessor or successor protocols to such protocol, to communicate information of all kinds by wire, radio, or other methods of transmission.

H. "Jailbreak(ing) or Root(ing)" includes any action that bypasses a restriction by the Mobile Device manufacturer or operating system.

I. "Mobile Device" means any portable computing device that operates using a mobile operating system, including but not limited to, any smartphone, tablet, wearable, or sensor, or any periphery of any portable computing device.

J. "Monitoring Product or Service" means any software application, program, or code that that can be installed on a user's Mobile Device to track or monitor that user's activities on the Mobile Device, including but not limited to, the user's text messages, web browser history, geolocation, and photos.

K. "Online Contact Information" means an email address or any other substantially similar identifier that permits direct contact with a person online, including but not limited to, an instant messaging user identifier, a voice over internet protocol (VOIP) identifier, or a video chat identifier.

L. "Operator" means any person who operates a Web site located on the Internet or an online service and who Collects or maintains Personal Information from or about the users of or visitors to such Web site or online service, or on whose behalf such information is Collected or maintained, or offers products or services for sale through the Web site or online service, where such Web site or online service is operated for commercial purposes involving commerce among the several States, or with one or more foreign nations; in any territory of the United States or in the District of Columbia, or between any such territory and another such territory or any State or foreign nation; or between the District of Columbia and any State, territory, or foreign nation.

M. "Parent" includes a legal guardian.

N. "Person" means any individual, partnership, corporation, trust, estate, cooperative, association, or other entity.

O. "Personal Information" means individually identifiable information from or about an individual consumer, including:

1. A first and last name;

2. A home or other physical address;

3. An email address;

4. A telephone number;

5. A Social Security number;

6. A driver's license or other government issues identification number;

7. A financial account number;

8. Credit or debit card information;

9. Date of birth;

10. Online Contact Information as defined in 16 C.F.R. § 312.2;

11. A screen or user name where it functions in the same manner as Online Contact Information, as defined in 16 C.F.R. § 312.2;

12. A persistent identifier that can be used to recognize a user over time and across different Web sites or online services. Such persistent identifier includes, but is not limited to, a customer number held in a cookie, an Internet Protocol (IP) address, a processor or device serial number, or unique device identifier;

13. A photograph, video, or audio file;

14. Geolocation information sufficient to identify street name and name of a city of town; or

15. Information concerning a Child or the parents of that Child that the Operator Collects online from the Child and combines with an identifier described in this section.

P. "Respondents" means Corporate Respondent and Individual Respondent, individually, collectively, or in any combination.

1. "Corporate Respondent" means Retina-X Studios, LLC, and its successors and assigns.

2. "Individual Respondent" means James N. Johns, Jr.

Q. "Support for the Internal Operations of the Web Site or Online Service" means:

1. Those activities necessary to:

a. Maintain or analyze the functioning of the Web site or online service;

b. Perform network communications;

c. Authenticate users of, or personalize the content on, the Web site or online service;

d. Serve contextual advertising on the Web site or online service or cap the frequency of advertising;

e. Protect the security or integrity of the user, Web site, or online service;

f. Ensure legal or regulatory compliance; or

g. Fulfill a request of a Child as permitted by 16 C.F.R. §§ 312.5(c)(3) and (4).

2. So long as the information Collected for the activities listed in paragraphs (1)(a) – (g) of this definition is not used or disclosed to contact a specific individual, including through behavioral advertising, to amass a profile on a specific individual, or for any other purpose.

R. "Web site or online service directed to Children" means a commercial Web site or online service, or portion thereof, that is targeted to Children.

1. In determining whether a Web site or online service, or a portion thereof, is directed to Children, the Commission will consider its subject matter, visual content, user of animated characters or Child-oriented activities and incentives, music or other audio content, age of models, presence of Child celebrities or celebrities who appeal to Children, language or other characteristics of the Web site or online service, we well as whether advertising promoting or appearing on the Web site or online service is directed to Children. The Commission will also consider competent and reliable empirical evidence regarding audience composition, and evidence regarding the intended audience.

2. A Web site or online service shall be deemed directed to Children when it has actual knowledge that it is Collecting Personal Information directly from users of another Web site or online service directed to Children.

3. A Web site or online service that is directed to Children under this criteria set forth in paragraph (1) of this definition, but that does not target Children as its primary audience, shall not be deemed directed to Children if it:

a. Does not Collect Personal Information from any visitor prior to Collecting age information; and

b. Prevents the Collection, use, or disclosure or Personal Information from visitors who identify themselves as under age 13 without first complying with the notice and parental consent provisions of 16 C.F.R. Part 312, attached hereto as Appendix A.

4. A Web site or online service shall not be deemed directed to Children solely because it refers or links to a commercial Web site or online service directed

to Children by using information location tools, including a directory, index, reference, pointer, or hypertext link

I. MONITORING PRODUCTS AND SERVICES

IT IS ORDERED that Respondents, and Respondents' officers, agents, 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, are permanently restrained and enjoined from, or assisting others in, promoting, selling, or distributing a Monitoring Product or Service unless Respondents comply with the following:

A. **Mobile Device Security:** No Monitoring Product or Service's functionality may require circumventing security protections implemented by the Mobile Device operating system or manufacturer, such as by Jailbreaking or Rooting a Mobile Device.

B. **Registration Attestation and Documentation:** Prior to the sale or distribution of any Monitoring Product or Service, Respondents must obtain:

1. An express written attestation from the purchaser that it will use the Monitoring Product or Service for legitimate and lawful purposes by authorized users.

   a. The express written attestation must state the legitimate and lawful purpose for which the purchaser is using the device, which may include only the following:

      i. Parent monitoring a minor Child;

      ii. Employer monitoring an employee who has provided express written consent to being monitored; or

      iii. Adult monitoring another adult who has provided express written consent to being monitored;

   b. Respondents cannot provide purchasers with written attestation language;

   c. Respondents cannot suggest, direct, or otherwise assist, purchasers in submitting fraudulent written attestations; and

2. Documentation proving that the purchaser is an authorized user on the monitored Mobile Device's service carrier account.

C. **Icon Notice:** The Monitoring Product or Service must display an application icon, accompanied by the name of the Monitoring Product or Service adjacent to the

application icon. The consumer must be able to click on the application icon to a page on which Respondents present a Clear and Conspicuous notice stating:

1. The name and material functions of the Monitoring Product or Service;

2. That the Monitoring Product or Service is running on the user's Mobile Device; and

3. Where and how the user can contact Respondents for additional information, or to resolve an issue of improper installation of the Monitoring Product or Service.

Exception to the Icon Notice Requirement:

1. Respondents may program the Monitoring Product or Service to allow the purchaser of the Monitoring Product or Service to disable the Icon Notice only if the purchaser attests, prior to installation, that the purchaser is the legal guardian or parent of a minor Child, and that the Monitoring Software or Product will be installed on a Mobile Device predominantly used by the minor Child.

II. ADDITIONAL WARNINGS AND NOTICES

IT IS FURTHER ORDERED that Respondents, and Respondents' officers, agents, 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, are permanently restrained and enjoined from, or assisting others in, promoting, selling, or distributing Monitoring Products or Services unless Respondents provide the purchaser with the following notices:

A. Home Page Notice: The home page of any Internet website advertising the Monitoring Product or Service must Clearly and Conspicuously provide notice that the Monitoring Product or Service may only be used for legitimate and lawful purposes by authorized users, and that installing or using the Monitoring Product or Service for any other purpose may violate local, state, and/or federal law. The foregoing notice must be placed such that it can be viewed on the screen first seen by a potential purchaser who lands on the home page.

B. Purchase Page Notice: Respondents may not complete the sale of a Monitoring Product or Service unless Respondents provide the purchaser with Clear and Conspicuous notice the Monitoring Product or Service may only be used for legitimate and lawful purposes by authorized users, and that installing or using the Monitoring Product or Service for any other purpose may violate local, state, and/or federal law.

III. INJUNCTION CONCERNING THE COLLECTION OF PERSONAL INFORMATION

IT IS FURTHER ORDERED that Respondents, and Respondents' officers, agents, 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 being an operator of any Web site or online service directed to Children or of any Web site or online service with actual knowledge that it is Collecting or maintaining Personal Information from a Child, are hereby permanently restrained and enjoined from violating the Children's Privacy Protection Rule, 16 C.F.R. Part 312, including but not limited to failing to establish and maintain reasonable procedures to protect the confidentiality, security, and integrity of Personal Information from Children.

A copy of the Children's Online Privacy Protection Rule, 16 C.F.R. Part 312, is attached hereto as Appendix A.

IV. PROHIBITION AGAINST MISREPRESENTATIONS

IT IS FURTHER ORDERED that Respondents, and Respondents' officers, agents, 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 any product or service, are hereby permanently restrained and enjoined from misrepresenting, expressly or by implication, the extent to which Respondents maintain and protect the privacy, security, confidentiality, or integrity of Personal Information.

V. DATA DELETION

IT IS FURTHER ORDERED that within one hundred twenty (120) days after entry of this Order, Respondents and Respondents' offers, agents, employees, and attorneys, and all other persons in active concert or participation with any of them, who receive actual notice of this Order, must destroy all Personal Information collected from a Monitoring Product or Service prior to entry of this Order. Provided, however, that such Personal Information need not be destroyed, and may be disclosed, to the extent requested by a government agency or required by law, regulation, or court order, including without limitation as required by rules applicable to the safeguarding of evidence in pending litigation.

VI. MANDATED INFORMATION SECURITY PROGRAM

IT IS FURTHER ORDERED that each Covered Business shall not transfer, sell, share, collect, maintain, or store Personal Information unless it establishes and implements, and thereafter maintains, a comprehensive information security program ("Information Security Program") that protects the security, confidentiality, and integrity of such Personal Information. To satisfy this requirement, each Covered Business must, at a minimum:

A. Document in writing the content, implementation, and maintenance of the Information Security Program;

B. Provide the written program and any evaluations thereof or updates thereto to its board of directors or governing body or, if no such board or equivalent governing body exists, to a senior officer responsible for its information security program at least once every twelve months and promptly after any Covered Incident;

C. Designate a qualified employee or employees to coordinate and be responsible for the Information Security Program;

D. Assess and document, at least once every twelve months and promptly following a Covered Incident, internal and external risks to the security, confidentiality, or integrity of Personal Information that could result in the unauthorized disclosure, misuse, loss, theft, alteration, destruction, or other compromise of such information;

E. Design, implement, maintain, and document safeguards that control for the internal and external risks to the security, confidentiality, or integrity of Personal Information identified in response to sub-Provision VI.D. Each safeguard shall be based on the volume and sensitivity of the Personal Information that is at risk, and the likelihood that the risk could be realized and result in the unauthorized access, collection, use, alteration, destruction, or disclosure of the Personal Information. Respondents' safeguards shall also include:

1. Technical measures to monitor all of Respondents' networks and all systems and assets within those networks to identify data security events, including unauthorized attempts to exfiltrate Personal Information from those networks;

2. Technical measures to secure Respondents' web applications and mobile applications and address well-known and reasonably foreseeable vulnerabilities, such as cross-site scripting, structured query language injection, and other risks identified by Respondents through risk assessments and/or penetration testing;

3. Data access controls for all databases storing Personal Information, including by, at a minimum, (a) requiring authentication to access them, and (b) limiting employee or service provider access to what is needed to perform that employee's job function;

4. Encryption of all Personal Information on Respondents' computer networks; and

5. Establishing and enforcing policies and procedures to ensure that all service providers with access to Respondents' network or access to Personal Information are adhering to Respondents' Information Security Program.

F. Assess, at least once every twelve (12) months and promptly following a Covered Incident, the sufficiency of any safeguards in place to address the risks to the security, confidentiality, or integrity of Personal Information, and modify the Information Security Program based on the results.

G. Test and monitor the effectiveness of the safeguards at least once every twelve months and promptly following a Covered Incident, and modify the Information Security Program based on the results. Such testing shall include vulnerability testing of each of Respondents' network(s) once every four (4) months and promptly after any Covered Incident, and penetration testing of each Covered Business's network(s) at least once every twelve (12) months and promptly after any Covered Incident;

H. Select and retain service providers capable of safeguarding Personal Information they receive from each Covered Business, and contractually require service providers to implement and maintain safeguards for Personal Information; and

I. Evaluate and adjust the Information Security Program in light of any changes to Respondents' operations or business arrangements, a Covered Incident, or any other circumstances that Respondents know or have reason to know may have an impact on the effectiveness of the Information Security Program. At a minimum, each Covered Business must evaluate the Information Security Program at least once every twelve (12) months and modify the Information Security Program based on the results.

VII. INFORMATION SECURITY ASSESSMENTS BY A THIRD PARTY

IT IS FURTHER ORDERED that, in connection with compliance with Provision VI of this Order titled Mandated Information Security Program, Respondents must obtain initial and biennial assessments ("Assessments"):

A. The Assessments must be obtained from a qualified, objective, independent third-party professional ("Assessor"), who: (1) uses procedures and standards generally accepted in the profession; (2) conducts an independent review of the Information Security Program; and (3) retains all documents relevant to each Assessment for five (5) years after completion of such Assessment and will provide such documents to the Commission within ten (10) days of receipt of a written request from a representative of the Commission. No documents may be withheld on the basis of a claim of confidentiality, proprietary or trade secrets, work product, attorney client privilege, statutory exemption, or any similar claim.

B. For each Assessment, Respondents shall provide the Associate Director for Enforcement for the Bureau of Consumer Protection at the Federal Trade Commission with the name and affiliation of the person selected to conduct the Assessment, which the Associate Director shall have the authority to approve in his or her sole discretion.

C. The reporting period for the Assessments must cover: (1) the first one hundred eighty (180) days after the issuance date of the Order for the initial Assessment; and (2) each 2-year period thereafter for twenty (20) years after issuance of the Order for the biennial Assessments.

D. Each Assessment must: (1) determine whether each Covered Business has implemented and maintained the Information Security Program required by Provision VI of this Order, titled Mandated Information Security Program; (2) assess the effectiveness of each Covered Business's implementation and maintenance of sub-Provisions VI.A-I; (3) identify any gaps or weaknesses in the Information Security Program; and (4) identify specific evidence (including, but not limited to, documents reviewed, sampling and testing performed, and interviews conducted) examined to make such determinations, assessments, and identifications, and explain why the evidence that the Assessor examined is sufficient to justify the Assessor's findings. No finding of any Assessment shall rely solely on assertions or attestations by a Covered Business's management. The Assessment shall be signed by the Assessor and shall state that the Assessor conducted an independent review of the Information Security Program, and did not rely solely on assertions or attestations by a Covered Business's management.

E. Each Assessment must be completed within sixty (60) days after the end of the reporting period to which the Assessment applies. Unless otherwise directed by a Commission representative in writing, Respondents must submit the initial Assessment to the Commission within ten (10) days after the Assessment has been completed via email to DEbrief@ftc.gov or 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 re Retina-X Studios, LLC, FTC File No. 172 3118." All subsequent biennial Assessments shall be retained by Respondents until the order is terminated and provided to the Associate Director for Enforcement within ten (10) days of request.

VIII. COOPERATION WITH THIRD PARTY INFORMATION SECURITY ASSESSOR

IT IS FURTHER ORDERED that Respondents, whether acting directly or indirectly, in connection with any Assessment required by Provision VII of this Order titled Information Security Assessments by a Third Party, must:

A. Disclose all material facts to the Assessor, and not misrepresent in any manner, expressly or by implication, any fact material to the Assessor's: (1) determination of whether Respondents have implemented and maintained the Information Security Program required by Provision VI of this Order, titled Mandated Information Security Program; (2) assessment of the effectiveness of the implementation and maintenance of sub-Provisions VI.A-I; or (3) identification of any gaps or weaknesses in the Information Security Program; and

B. Provide or otherwise make available to the Assessor all information and material in their possession, custody, or control that is relevant to the Assessment for which there is no reasonable claim of privilege.

IX. ANNUAL CERTIFICATION

IT IS FURTHER ORDERED that in connection with compliance with Provision VI of this Order titled Mandated Information Security Program, Respondents shall:

A. One year after the issuance date of this Order, and each year thereafter, provide the Commission with a certification from a senior corporate manager, or, if no such senior corporate manager exists, a senior officer of each Covered Business responsible for each Covered Business's Information Security Program that: (1) each Covered Business has established, implemented, and maintained the requirements of this Order; (2) each Covered Business is not aware of any material noncompliance that has not been (a) corrected or (b) disclosed to the Commission; and (3) includes a brief description of any Covered Incident. The certification must be based on the personal knowledge of the senior corporate manager, senior officer, or subject matter experts upon whom the senior corporate manager or senior officer reasonably relies in making the certification.

B. Unless otherwise directed by a Commission representative in writing, submit all annual certifications to the Commission pursuant to this Order via email to DEbrief@ftc.gov or 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, "Retina-X Studios, LLC, FTC File No. 172 3118, Docket No. C-4711."

X. COVERED INCIDENT REPORTS

IT IS FURTHER ORDERED that Respondents, for any Covered Business, within a reasonable time after the date of discovery of a Covered Incident, but in any event no later than 10 days after the date the Covered Business, or any of the Covered Business's clients, first notifies any U.S. federal, state, or local government entity of the Covered Incident, must submit a report to the Commission. The report must include, to the extent possible:

A. The date, estimated date, or estimated date range when the Covered Incident occurred;

B. A description of the facts relating to the Covered Incident, including the causes and scope of the Covered Incident, if known;

C. A description of each type of information that triggered the notification obligation to the U.S. federal, state, or local government entity;

D. The number of consumers whose information triggered the notification obligation to the U.S. federal, state, or local government entity;

E. The acts that the Covered Business has taken to date to remediate the Covered Incident and protect Personal Information from further exposure or access, and protect affected individuals from identity theft or other harm that may result from the Covered Incident; and

F. A representative copy of each materially different notice required by U.S. federal, state, or local law or regulation and sent by the Covered Business or any of its clients to consumers or to any U.S. federal, state, or local government entity.

Unless otherwise directed by a Commission representative in writing, all Covered Incident reports to the Commission pursuant to this Order must 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, "Retina-X Studios, LLC, FTC File No. 172 3118, Docket No. C-4711."

XI. ORDER ACKNOWLEDGMENTS

IT IS FURTHER ORDERED that Respondents obtain acknowledgments of receipt of this Order:

A. Each Respondent, within seven (7) days of entry of this Order, must submit to the Commission an acknowledgment of receipt of this Order sworn under penalty of perjury.

B. For ten (10) years after entry of this Order, the Individual Respondent, for any business that such Respondent, individually or collectively with any other Respondent, is the majority owner or controls directly or indirectly, and the Corporate Respondent, must deliver a copy a copy of this Order to: (1) all principals, officers, directors, and LLC managers and members; (2) all employees having managerial responsibilities for conduct related to the subject matter of the Order, and all agents and representatives who participate in conduct related to the subject matter of the Order; and (3) any business entity resulting from any change in structure as set forth in the Provision titled Compliance Reporting. Delivery must occur within seven (7) days of entry of this Order for current personnel. For all others, delivery must occur before they assume their responsibilities.

C. From each individual or entity to which a Respondent delivered a copy of this Order, that Respondent must obtain, within thirty (30) days, a signed and dated acknowledgment of receipt of this Order.

XII. COMPLIANCE REPORT AND NOTICES

IT IS FURTHER ORDERED that Respondents make timely submissions to the Commission:

A. One year after entry of this Order, each Respondent must submit a compliance report, sworn under penalty of perjury, in which:

1. Each Respondent must: (a) identify the primary physical, postal, and email address and telephone number, as designated points of contact, which representatives of the Commission and Plaintiff may use to communicate with Respondent; (b) identify all of the Respondents' businesses by all of their names, telephone numbers, and physical, postal, email, and Internet addresses; (c) describe the activities of each business, including the goods and services offered, the means of advertising, marketing, and sales, and the involvement of any other Respondent (which Individual Respondent must describe if he knows or should know due to his own involvement); (d) describe in detail whether and how that Respondent is in compliance with each Provision of this Order, including a discussion of all of the changes Respondents made to comply with the Order; and (e) provide a copy of each Order Acknowledgment obtained pursuant to this Order, unless previously submitted to the Commission.

2. Additionally, the Individual Respondent must: (a) identify all telephone numbers and all physical, postal, email and Internet addresses, including all residences; (b) identify all business activities, including any business for which Individual Respondent performs services whether as an employee or otherwise and any entity in which Individual Respondent has any ownership interest; and (c) describe in detail Individual Respondent's involvement in each such business, including title, role, responsibilities, participation, authority, control, and any ownership.

B. For 10 years after the issuance date of this Order, each Respondent must submit a compliance notice, sworn under penalty of perjury, within fourteen (14) days of any changes in the following:

1. Each Respondent must report any change in: (a) any designated point of contact; or (b) the structure of Corporate Respondent or any entity that Respondent has any ownership interest in or control directly or indirectly that may affect compliance obligations arising under this Order, including: creation, merger, sale, or dissolution of the entity or any subsidiary, parent, or affiliate that engages in any acts or practices subject to this Order.

2. Additionally, Individual Respondent must report any change in: (a) name, including aliases or fictitious name, or residence address; or (b) title or role in any business activity, including (i) any business for which Individual

Respondent performs services whether as an employee or otherwise and (ii) any entity in which Individual Respondent has any ownership interest and over which Individual Respondent has direct or indirect control. For each such business activity, also identify its name, physical address, and any Internet address.

C. Each Respondent must submit to the Commission notice of the filing of any bankruptcy petition, insolvency proceeding, or similar proceeding by or against such Respondent within fourteen (14) days of its filing.

D. Any submission to the Commission required by this Order to sworn under penalty of perjury must be true and accurate and comply with 28 U.S.C. § 1746, such as by concluding: "I declare under penalty of perjury under the laws of the United States of America that the foregoing is true and correct. Executed on: _____" and supplying the date, signatory's full name, title (if applicable), and signature.

E. Unless otherwise directed by a Commission representative in writing, all submissions to the Commission pursuant to this Order must 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: "United States v. Retina-X Studios, LLC, FTC File No. 172 3118, Docket No. C-4711."

XIII. RECORDKEEPING

IT IS FURTHER ORDERED that Respondents must create certain records for ten (10) years after entry of this Order, and retain each such record for 5 years. Specifically, Corporate Respondent and Individual Respondent, for any business that such Respondent, individually or collectively with any other Respondent, is a majority owner or controls directly or indirectly, must create and retain the following records:

A. Accounting records showing the revenues from all goods or services sold, the costs incurred in generating those revenues, and resulting net profit or loss;

B. Personnel records showing, for each person providing services, whether as an employee or otherwise, that person's: name; address; telephone numbers; job title or position; dates of service; and (if applicable) the reason for termination;

C. Copies or records of all consumer complaints and refund requests, whether received directly or indirectly, such as through a third party, and any response;

D. For five (5) years after the date of preparation of each Assessment required by this Order, all materials and evidence that the Assessor considered, reviewed, relied upon or examined to prepare the Assessment, whether prepared by or on behalf of Respondents, including all plans, reports, studies, reviews, audits, audit trails,

policies, training materials, and assessments, and any other materials concerning Respondents' compliance with related Provisions of this Order, for the compliance period covered by such Assessment;

E. All records necessary to demonstrate full compliance with each provision of this Order, including all submissions to the Commission; and

F. A copy of each unique advertisement or other marketing material.

XIV. COMPLIANCE MONITORING

IT IS FURTHER ORDERED that, for the purpose of monitoring Respondents' compliance with this Order:

A. Within ten (10) days of receipt of a written request from a representative of the Commission, each Respondent must submit additional compliance reports or other requested information, which must be sworn under penalty of perjury; appear for depositions; and produce documents for inspection and copying.

B. For matters concerning this Order, representatives of the Commission are authorized to communicate directly with each Respondent. Respondents must permit representatives of the Commission to interview any employee or other person affiliated with any Respondent who has agreed to such an interview. The interviewee may have counsel present.

C. The Commission may use all other lawful means, including posing, through its representatives as consumers, suppliers, or other individuals or entities, to Respondent s or any individual or entity affiliated with Respondents, without the necessity of identification of prior notice. Nothing in this Order limits the Commission's lawful use of compulsory process, pursuant to Sections 9 and 20 of the FTC Act, 15 U.S.C. §§ 49, 57b-1.

D. Upon written request from a representative of the Commission, any consumer reporting agency must furnish consumer reports concerning the Individual Respondent, pursuant to Section 604(2) of the Fair Credit Reporting Act, 15 U.S.C. §1681b(a)(2).

XV. ORDER EFFECTIVE DATES

IT IS FURTHER ORDERED that this Order is final and effective upon the date of its publication on the Commission's website (ftc.gov) as a final order. This Order will terminate March 26, 2040, or twenty (20) years from the most recent date that the United States or the Commission files a complaint (with or without an accompanying settlement) in federal court alleging any violation of this Order, whichever comes later; *provided, however,* that the filing of such a complaint will not affect the duration of:

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

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

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

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 Provision 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.

Attachment A

average firm-wide billing rate (partners and associates) in 2011 was $403, the average partner rate was $482, and the average associate rate was $303.

The Commission believes it reasonable to assume that the workload among law firm partners and associates for COPPA compliance questions could be competently addressed and efficiently distributed among attorneys at varying levels of seniority, but would be weighted most heavily to more junior attorneys. Thus, assuming an apportionment of two-thirds of such work is done by associates, and one-third by partners, a weighted average tied to the average firm-wide associate and average firm-wide partner rates, respectively, in the *National Law Journal* 2011 survey would be about $365 per hour. The Commission believes that this rate B which is very near the mean of TIA's stated range of purported hourly rates that its members typically pay to engage counsel for COPPA compliance questions B is an appropriate measure to calculate the cost of legal assistance for operators to comply with the final Rule amendments.[396]

TIA also states that the 2012 SNPRM estimate of $42 per hour for technical support is too low, and that engaging expert technical personnel can, on average, involve hourly costs that range from $72 to $108.[397] Similar to TIA's hours estimate, discussed above, the Commission believes that TIA's estimate may have been based on implementing requirements that, ultimately, the Commission has determined not to adopt. For example, technical personnel will not need to "ensure" the security procedures of third parties; operators that have been eligible to use email plus for parental consents will not be required to implement new systems to replace it. It is unclear whether TIA's estimate for technical support is based on the types of disclosure-related tasks that the final Rule amendments would actually require, other tasks that the final Rule amendments would not require, or non-disclosure tasks not covered by the PRA. Moreover, unlike its estimate for lawyer assistance, TIA's estimates for technical labor are not accompanied by an adequate explanation of why estimates for technical support drawn from BLS statistics are not an appropriate basis for the FTC's PRA analysis. Accordingly, the Commission believes it is reasonable to retain the 2012 SNPRM estimate of $42 per hour for technical assistance based on BLS data.

Thus, for the 180 new operators per year not previously accounted for under the FTC's currently cleared estimates, 10,800 cumulative disclosure hours would be composed of 9,000 hours of legal assistance and 1,800 hours of technical support. Applied to hourly rates of $365 and $42, respectively, associated labor costs for the 180 new operators potentially subject to the proposed amendments would be $3,360,600 (*i.e.*, $3,285,000 for legal support plus $75,600 for technical support).

Similarly, for the estimated 2,910 existing operators covered by the final Rule amendments, 58,200 cumulative disclosure hours would consist of 48,500 hours of legal assistance and 9,700 hours for technical support. Applied at hourly rates of $365 and $42, respectively, associated labor costs would total $18,109,900 (*i.e.*, $17,702,500 for legal support plus $407,400 for technical support). Cumulatively, estimated labor costs for new and existing operators subject to the final Rule amendments is $21,470,500.

(2) Reporting

The Commission staff assumes that the tasks to prepare augmented safe harbor program applications occasioned by the final Rule amendments will be performed primarily by lawyers, at a mean labor rate of $180 an hour.[398] Thus, applied to an assumed industry total of 120 hours per year for this task, incremental associated yearly labor costs would total $21,600.

The Commission staff assumes periodic reports will be prepared by compliance officers, at a labor rate of $28 per hour.[399] Applied to an assumed industry total of 600 hours per year for this task, associated yearly labor costs would be $16,800.

Cumulatively, labor costs for the above-noted reporting requirements total approximately $38,400 per year.

G. Non-Labor/Capital Costs

Because both operators and safe harbor programs will already be equipped with the computer equipment and software necessary to comply with the Rule's new notice requirements, the final Rule amendments should not impose any additional capital or other non-labor costs.[400]

List of Subjects in 16 CFR Part 312

Children, Communications, Consumer protection, Electronic mail, Email, Internet, Online service, Privacy, Record retention, Safety, science and technology, Trade practices, Web site, Youth.

■ Accordingly, for the reasons stated above, the Federal Trade Commission revises part 312 of Title 16 of the Code of Federal Regulations to read as follows:

PART 312—CHILDREN'S ONLINE PRIVACY PROTECTION RULE

Sec.

[396] *Cf.* Civil Division of the United States Attorney's Office for the District of Columbia, United States Attorney's Office, District of Columbia, Laffey Matrix B 2003-2013, *available at http://www justice.gov/usao/dc/divisions/Laffey_Matrix_2003-2013.pdf* (updated "Laffey Matrix" for calculating "reasonable" attorneys fees in suits in which fee shifting is authorized can be evidence of prevailing market rates for litigation counsel in the Washington, DC area; rates in table range from $245 per hour for most junior associates to $505 per hour for most senior partners).

[397] Toy Industry Association (comment 89, 2012 SNPRM), at 18.

[398] Based on Commission staff's experience with previously approved safe harbor programs, staff anticipates that most of the legal tasks associated with safe harbor programs will be performed by in-house counsel. *Cf.* Toy Industry Association (comment 89, 2012 SNPRM), at 19 (regional BLS statistics for lawyer wages can support estimates of the level of in-house legal support likely to be required on an ongoing basis). Moreover, no comments were received in response to the February 9, 2011 and May 31, 2011 **Federal Register** notices (76 FR at 7211 and 76 FR at 31334, respectively, *available at http://www.gpo.gov/fdsys/pkg/FR-2011-02-09/pdf/2011-2904.pdf* and *http://www.gpo.gov/fdsys/pkg/FR-2011-05-31/pdf/2011-13357.pdf*), which assumed a labor rate of $150 per hour for lawyers or similar professionals to prepare and submit a new safe harbor application. Nor was that challenged in the comments responding to the 2011 NPRM.

[399] *See* Bureau of Labor Statistics National Compensation Survey: Occupational Earnings in the United States, 2010, at Table 3, *available at http://www bls.gov/ncs/ocs/sp/nctb1477.pdf*. This rate has not been contested.

[400] NCTA commented that the Commission failed to consider costs "related to redeveloping child-directed Web sites" that operators would be "forced" to incur as a result of the proposed Rule amendments, including for "new equipment and software required by the expanded regulatory regime." NCTA (comment 113, 2011 NPRM), at 23. Similarly, TIA commented that the proposed Rule amendments would entail "increased monetary costs with respect to technology acquisition and implementation * * *." Toy Industry Association (comment 163, 2011 NPRM), at 17. These comments, however, do not specify projected costs or which Rule amendments would entail the asserted costs.

Authority: 15 U.S.C. 6501–6508.

§ 312.1 Scope of regulations in this part.

This part implements the Children's Online Privacy Protection Act of 1998, (15 U.S.C. 6501, *et seq.*,) which prohibits unfair or deceptive acts or practices in connection with the collection, use, and/or disclosure of personal information from and about children on the Internet.

§ 312.2 Definitions.

Child means an individual under the age of 13.

Collects or *collection* means the gathering of any personal information from a child by any means, including but not limited to:

(1) Requesting, prompting, or encouraging a child to submit personal information online;

(2) Enabling a child to make personal information publicly available in identifiable form. An operator shall not be considered to have collected personal information under this paragraph if it takes reasonable measures to delete all or virtually all personal information from a child's postings before they are made public and also to delete such information from its records; or

(3) Passive tracking of a child online.

Commission means the Federal Trade Commission.

Delete means to remove personal information such that it is not maintained in retrievable form and cannot be retrieved in the normal course of business.

Disclose or disclosure means, with respect to personal information:

(1) The release of personal information collected by an operator from a child in identifiable form for any purpose, except where an operator provides such information to a person who provides support for the internal operations of the Web site or online service; and

(2) Making personal information collected by an operator from a child publicly available in identifiable form by any means, including but not limited to a public posting through the Internet, or through a personal home page or screen posted on a Web site or online service; a pen pal service; an electronic mail service; a message board; or a chat room.

Federal agency means an agency, as that term is defined in Section 551(1) of title 5, United States Code.

Internet means collectively the myriad of computer and telecommunications facilities, including equipment and operating software, which comprise the interconnected world-wide network of networks that employ the Transmission Control Protocol/Internet Protocol, or any predecessor or successor protocols to such protocol, to communicate information of all kinds by wire, radio, or other methods of transmission.

Obtaining verifiable consent means making any reasonable effort (taking into consideration available technology) to ensure that before personal information is collected from a child, a parent of the child:

(1) Receives notice of the operator's personal information collection, use, and disclosure practices; and

(2) Authorizes any collection, use, and/or disclosure of the personal information.

Online contact information means an email address or any other substantially similar identifier that permits direct contact with a person online, including but not limited to, an instant messaging user identifier, a voice over internet protocol (VOIP) identifier, or a video chat user identifier.

Operator means any person who operates a Web site located on the Internet or an online service and who collects or maintains personal information from or about the users of or visitors to such Web site or online service, or on whose behalf such information is collected or maintained, or offers products or services for sale through that Web site or online service, where such Web site or online service is operated for commercial purposes involving commerce among the several States or with 1 or more foreign nations; in any territory of the United States or in the District of Columbia, or between any such territory and another such territory or any State or foreign nation; or between the District of Columbia and any State, territory, or foreign nation. This definition does not include any nonprofit entity that would otherwise be exempt from coverage under Section 5 of the Federal Trade Commission Act (15 U.S.C. 45). Personal information is *collected or maintained on behalf of* an operator when:

(1) It is collected or maintained by an agent or service provider of the operator; or

(2) The operator benefits by allowing another person to collect personal information directly from users of such Web site or online service.

Parent includes a legal guardian.

Person means any individual, partnership, corporation, trust, estate, cooperative, association, or other entity.

Personal information means individually identifiable information about an individual collected online, including:

(1) A first and last name;

(2) A home or other physical address including street name and name of a city or town;

(3) Online contact information as defined in this section;

(4) A screen or user name where it functions in the same manner as online contact information, as defined in this section;

(5) A telephone number;

(6) A Social Security number;

(7) A persistent identifier that can be used to recognize a user over time and across different Web sites or online services. Such persistent identifier includes, but is not limited to, a customer number held in a cookie, an Internet Protocol (IP) address, a processor or device serial number, or unique device identifier;

(8) A photograph, video, or audio file where such file contains a child's image or voice;

(9) Geolocation information sufficient to identify street name and name of a city or town; or

(10) Information concerning the child or the parents of that child that the operator collects online from the child and combines with an identifier described in this definition.

Release of personal information means the sharing, selling, renting, or transfer of personal information to any third party.

Support for the internal operations of the Web site or online service means:

(1) Those activities necessary to:

(i) Maintain or analyze the functioning of the Web site or online service;

(ii) Perform network communications;

(iii) Authenticate users of, or personalize the content on, the Web site or online service;

(iv) Serve contextual advertising on the Web site or online service or cap the frequency of advertising;

(v) Protect the security or integrity of the user, Web site, or online service;

(vi) Ensure legal or regulatory compliance; or

(vii) Fulfill a request of a child as permitted by § 312.5(c)(3) and (4);

(2) So long as The information collected for the activities listed in paragraphs (1)(i)–(vii) of this definition is not used or disclosed to contact a specific individual, including through behavioral advertising, to amass a

profile on a specific individual, or for any other purpose.

Third party means any person who is not:

(1) An operator with respect to the collection or maintenance of personal information on the Web site or online service; or

(2) A person who provides support for the internal operations of the Web site or online service and who does not use or disclose information protected under this part for any other purpose.

Web site or online service directed to children means a commercial Web site or online service, or portion thereof, that is targeted to children.

(1) In determining whether a Web site or online service, or a portion thereof, is directed to children, the Commission will consider its subject matter, visual content, use of animated characters or child-oriented activities and incentives, music or other audio content, age of models, presence of child celebrities or celebrities who appeal to children, language or other characteristics of the Web site or online service, as well as whether advertising promoting or appearing on the Web site or online service is directed to children. The Commission will also consider competent and reliable empirical evidence regarding audience composition, and evidence regarding the intended audience.

(2) A Web site or online service shall be deemed directed to children when it has actual knowledge that it is collecting personal information directly from users of another Web site or online service directed to children.

(3) A Web site or online service that is directed to children under the criteria set forth in paragraph (1) of this definition, but that does not target children as its primary audience, shall not be deemed directed to children if it:

(i) Does not collect personal information from any visitor prior to collecting age information; and

(ii) Prevents the collection, use, or disclosure of personal information from visitors who identify themselves as under age 13 without first complying with the notice and parental consent provisions of this part.

(4) A Web site or online service shall not be deemed directed to children solely because it refers or links to a commercial Web site or online service directed to children by using information location tools, including a directory, index, reference, pointer, or hypertext link.

§ 312.3 Regulation of unfair or deceptive acts or practices in connection with the collection, use, and/or disclosure of personal information from and about children on the Internet.

General requirements. It shall be unlawful for any operator of a Web site or online service directed to children, or any operator that has actual knowledge that it is collecting or maintaining personal information from a child, to collect personal information from a child in a manner that violates the regulations prescribed under this part. Generally, under this part, an operator must:

(a) Provide notice on the Web site or online service of what information it collects from children, how it uses such information, and its disclosure practices for such information (§ 312.4(b));

(b) Obtain verifiable parental consent prior to any collection, use, and/or disclosure of personal information from children (§ 312.5);

(c) Provide a reasonable means for a parent to review the personal information collected from a child and to refuse to permit its further use or maintenance (§ 312.6);

(d) Not condition a child's participation in a game, the offering of a prize, or another activity on the child disclosing more personal information than is reasonably necessary to participate in such activity (§ 312.7); and

(e) Establish and maintain reasonable procedures to protect the confidentiality, security, and integrity of personal information collected from children (§ 312.8).

§ 312.4 Notice.

(a) *General principles of notice.* It shall be the obligation of the operator to provide notice and obtain verifiable parental consent prior to collecting, using, or disclosing personal information from children. Such notice must be clearly and understandably written, complete, and must contain no unrelated, confusing, or contradictory materials.

(b) *Direct notice to the parent.* An operator must make reasonable efforts, taking into account available technology, to ensure that a parent of a child receives direct notice of the operator's practices with regard to the collection, use, or disclosure of personal information from children, including notice of any material change in the collection, use, or disclosure practices to which the parent has previously consented.

(c) *Content of the direct notice to the parent*—(1) *Content of the direct notice to the parent under § 312.5(c)(1) (Notice to Obtain Parent's Affirmative Consent to the Collection, Use, or Disclosure of a Child's Personal Information).* This direct notice shall set forth:

(i) That the operator has collected the parent's online contact information from the child, and, if such is the case, the name of the child or the parent, in order to obtain the parent's consent;

(ii) That the parent's consent is required for the collection, use, or disclosure of such information, and that the operator will not collect, use, or disclose any personal information from the child if the parent does not provide such consent;

(iii) The additional items of personal information the operator intends to collect from the child, or the potential opportunities for the disclosure of personal information, should the parent provide consent;

(iv) A hyperlink to the operator's online notice of its information practices required under paragraph (d) of this section;

(v) The means by which the parent can provide verifiable consent to the collection, use, and disclosure of the information; and

(vi) That if the parent does not provide consent within a reasonable time from the date the direct notice was sent, the operator will delete the parent's online contact information from its records.

(2) *Content of the direct notice to the parent under § 312.5(c)(2) (Voluntary Notice to Parent of a Child's Online Activities Not Involving the Collection, Use or Disclosure of Personal Information).* Where an operator chooses to notify a parent of a child's participation in a Web site or online service, and where such site or service does not collect any personal information other than the parent's online contact information, the direct notice shall set forth:

(i) That the operator has collected the parent's online contact information from the child in order to provide notice to, and subsequently update the parent about, a child's participation in a Web site or online service that does not otherwise collect, use, or disclose children's personal information;

(ii) That the parent's online contact information will not be used or disclosed for any other purpose;

(iii) That the parent may refuse to permit the child's participation in the Web site or online service and may require the deletion of the parent's online contact information, and how the parent can do so; and

(iv) A hyperlink to the operator's online notice of its information

practices required under paragraph (d) of this section.

(3) *Content of the direct notice to the parent under § 312.5(c)(4) (Notice to a Parent of Operator's Intent to Communicate with the Child Multiple Times).* This direct notice shall set forth:

(i) That the operator has collected the child's online contact information from the child in order to provide multiple online communications to the child;

(ii) That the operator has collected the parent's online contact information from the child in order to notify the parent that the child has registered to receive multiple online communications from the operator;

(iii) That the online contact information collected from the child will not be used for any other purpose, disclosed, or combined with any other information collected from the child;

(iv) That the parent may refuse to permit further contact with the child and require the deletion of the parent's and child's online contact information, and how the parent can do so;

(v) That if the parent fails to respond to this direct notice, the operator may use the online contact information collected from the child for the purpose stated in the direct notice; and

(vi) A hyperlink to the operator's online notice of its information practices required under paragraph (d) of this section.

(4) *Content of the direct notice to the parent required under § 312.5(c)(5) (Notice to a Parent In Order to Protect a Child's Safety).* This direct notice shall set forth:

(i) That the operator has collected the name and the online contact information of the child and the parent in order to protect the safety of a child;

(ii) That the information will not be used or disclosed for any purpose unrelated to the child's safety;

(iii) That the parent may refuse to permit the use, and require the deletion, of the information collected, and how the parent can do so;

(iv) That if the parent fails to respond to this direct notice, the operator may use the information for the purpose stated in the direct notice; and

(v) A hyperlink to the operator's online notice of its information practices required under paragraph (d) of this section.

(d) *Notice on the Web site or online service.* In addition to the direct notice to the parent, an operator must post a prominent and clearly labeled link to an online notice of its information practices with regard to children on the home or landing page or screen of its Web site or online service, *and,* at each area of the Web site or online service where personal information is collected from children. The link must be in close proximity to the requests for information in each such area. An operator of a general audience Web site or online service that has a separate children's area must post a link to a notice of its information practices with regard to children on the home or landing page or screen of the children's area. To be complete, the online notice of the Web site or online service's information practices must state the following:

(1) The name, address, telephone number, and email address of all operators collecting or maintaining personal information from children through the Web site or online service. *Provided that:* The operators of a Web site or online service may list the name, address, phone number, and email address of one operator who will respond to all inquiries from parents concerning the operators' privacy policies and use of children's information, as long as the names of all the operators collecting or maintaining personal information from children through the Web site or online service are also listed in the notice;

(2) A description of what information the operator collects from children, including whether the Web site or online service enables a child to make personal information publicly available; how the operator uses such information; and, the operator's disclosure practices for such information; and

(3) That the parent can review or have deleted the child's personal information, and refuse to permit further collection or use of the child's information, and state the procedures for doing so.

§ 312.5 Parental consent.

(a) *General requirements.* (1) An operator is required to obtain verifiable parental consent before any collection, use, or disclosure of personal information from children, including consent to any material change in the collection, use, or disclosure practices to which the parent has previously consented.

(2) An operator must give the parent the option to consent to the collection and use of the child's personal information without consenting to disclosure of his or her personal information to third parties.

(b) *Methods for verifiable parental consent.* (1) An operator must make reasonable efforts to obtain verifiable parental consent, taking into consideration available technology. Any method to obtain verifiable parental consent must be reasonably calculated, in light of available technology, to ensure that the person providing consent is the child's parent. (2) Existing methods to obtain verifiable parental consent that satisfy the requirements of this paragraph include:

(i) Providing a consent form to be signed by the parent and returned to the operator by postal mail, facsimile, or electronic scan;

(ii) Requiring a parent, in connection with a monetary transaction, to use a credit card, debit card, or other online payment system that provides notification of each discrete transaction to the primary account holder;

(iii) Having a parent call a toll-free telephone number staffed by trained personnel;

(iv) Having a parent connect to trained personnel via video-conference;

(v) Verifying a parent's identity by checking a form of government-issued identification against databases of such information, where the parent's identification is deleted by the operator from its records promptly after such verification is complete; or

(vi) *Provided that,* an operator that does not "disclose" (as defined by § 312.2) children's personal information, may use an email coupled with additional steps to provide assurances that the person providing the consent is the parent. Such additional steps include: Sending a confirmatory email to the parent following receipt of consent, or obtaining a postal address or telephone number from the parent and confirming the parent's consent by letter or telephone call. An operator that uses this method must provide notice that the parent can revoke any consent given in response to the earlier email.

(3) *Safe harbor approval of parental consent methods.* A safe harbor program approved by the Commission under § 312.11 may approve its member operators' use of a parental consent method not currently enumerated in paragraph (b)(2) of this section where the safe harbor program determines that such parental consent method meets the requirements of paragraph (b)(1) of this section.

(c) *Exceptions to prior parental consent.* Verifiable parental consent is required prior to any collection, use, or disclosure of personal information from a child *except* as set forth in this paragraph:

(1) Where the sole purpose of collecting the name or online contact information of the parent or child is to provide notice and obtain parental consent under § 312.4(c)(1). If the operator has not obtained parental consent after a reasonable time from the date of the information collection, the

operator must delete such information from its records;

(2) Where the purpose of collecting a parent's online contact information is to provide voluntary notice to, and subsequently update the parent about, the child's participation in a Web site or online service that does not otherwise collect, use, or disclose children's personal information. In such cases, the parent's online contact information may not be used or disclosed for any other purpose. In such cases, the operator must make reasonable efforts, taking into consideration available technology, to ensure that the parent receives notice as described in § 312.4(c)(2);

(3) Where the sole purpose of collecting online contact information from a child is to respond directly on a one-time basis to a specific request from the child, and where such information is not used to re-contact the child or for any other purpose, is not disclosed, and is deleted by the operator from its records promptly after responding to the child's request;

(4) Where the purpose of collecting a child's and a parent's online contact information is to respond directly more than once to the child's specific request, and where such information is not used for any other purpose, disclosed, or combined with any other information collected from the child. In such cases, the operator must make reasonable efforts, taking into consideration available technology, to ensure that the parent receives notice as described in § 312.4(c)(3). An operator will not be deemed to have made reasonable efforts to ensure that a parent receives notice where the notice to the parent was unable to be delivered;

(5) Where the purpose of collecting a child's and a parent's name and online contact information, is to protect the safety of a child, and where such information is not used or disclosed for any purpose unrelated to the child's safety. In such cases, the operator must make reasonable efforts, taking into consideration available technology, to provide a parent with notice as described in § 312.4(c)(4);

(6) Where the purpose of collecting a child's name and online contact information is to:

(i) Protect the security or integrity of its Web site or online service;

(ii) Take precautions against liability;

(iii) Respond to judicial process; or

(iv) To the extent permitted under other provisions of law, to provide information to law enforcement agencies or for an investigation on a matter related to public safety; and where such information is not be used for any other purpose;

(7) Where an operator collects a persistent identifier and no other personal information and such identifier is used for the sole purpose of providing support for the internal operations of the Web site or online service. In such case, there also shall be no obligation to provide notice under § 312.4; or

(8) Where an operator covered under paragraph (2) of the definition of *Web site or online service directed to children* in § 312.2 collects a persistent identifier and no other personal information from a user who affirmatively interacts with the operator and whose previous registration with that operator indicates that such user is not a child. In such case, there also shall be no obligation to provide notice under § 312.4.

§ 312.6 Right of parent to review personal information provided by a child.

(a) Upon request of a parent whose child has provided personal information to a Web site or online service, the operator of that Web site or online service is required to provide to that parent the following:

(1) A description of the specific types or categories of personal information collected from children by the operator, such as name, address, telephone number, email address, hobbies, and extracurricular activities;

(2) The opportunity at any time to refuse to permit the operator's further use or future online collection of personal information from that child, and to direct the operator to delete the child's personal information; and

(3) Notwithstanding any other provision of law, a means of reviewing any personal information collected from the child. The means employed by the operator to carry out this provision must:

(i) Ensure that the requestor is a parent of that child, taking into account available technology; and

(ii) Not be unduly burdensome to the parent.

(b) Neither an operator nor the operator's agent shall be held liable under any Federal or State law for any disclosure made in good faith and following reasonable procedures in responding to a request for disclosure of personal information under this section.

(c) Subject to the limitations set forth in § 312.7, an operator may terminate any service provided to a child whose parent has refused, under paragraph (a)(2) of this section, to permit the operator's further use or collection of personal information from his or her child or has directed the operator to delete the child's personal information.

§ 312.7 Prohibition against conditioning a child's participation on collection of personal information.

An operator is prohibited from conditioning a child's participation in a game, the offering of a prize, or another activity on the child's disclosing more personal information than is reasonably necessary to participate in such activity.

§ 312.8 Confidentiality, security, and integrity of personal information collected from children.

The operator must establish and maintain reasonable procedures to protect the confidentiality, security, and integrity of personal information collected from children. The operator must also take reasonable steps to release children's personal information only to service providers and third parties who are capable of maintaining the confidentiality, security and integrity of such information, and who provide assurances that they will maintain the information in such a manner.

§ 312.9 Enforcement.

Subject to sections 6503 and 6505 of the Children's Online Privacy Protection Act of 1998, a violation of a regulation prescribed under section 6502 (a) of this Act shall be treated as a violation of a rule defining an unfair or deceptive act or practice prescribed under section 18(a)(1)(B) of the Federal Trade Commission Act (15 U.S.C. 57a(a)(1)(B)).

§ 312.10 Data retention and deletion requirements.

An operator of a Web site or online service shall retain personal information collected online from a child for only as long as is reasonably necessary to fulfill the purpose for which the information was collected. The operator must delete such information using reasonable measures to protect against unauthorized access to, or use of, the information in connection with its deletion.

§ 312.11 Safe harbor programs.

(a) *In general.* Industry groups or other persons may apply to the Commission for approval of self-regulatory program guidelines ("safe harbor programs"). The application shall be filed with the Commission's Office of the Secretary. The Commission will publish in the **Federal Register** a document seeking public comment on the application. The Commission shall issue a written determination within 180 days of the filing of the application.

(b) *Criteria for approval of self-regulatory program guidelines.* Proposed safe harbor programs must demonstrate

that they meet the following performance standards:

(1) Program requirements that ensure operators subject to the self-regulatory program guidelines ("subject operators") provide substantially the same or greater protections for children as those contained in §§ 312.2 through 312.8, and 312.10.

(2) An effective, mandatory mechanism for the independent assessment of subject operators' compliance with the self-regulatory program guidelines. At a minimum, this mechanism must include a comprehensive review by the safe harbor program, to be conducted not less than annually, of each subject operator's information policies, practices, and representations. The assessment mechanism required under this paragraph can be provided by an independent enforcement program, such as a seal program.

(3) Disciplinary actions for subject operators' non-compliance with self-regulatory program guidelines. This performance standard may be satisfied by:

(i) Mandatory, public reporting of any action taken against subject operators by the industry group issuing the self-regulatory guidelines;

(ii) Consumer redress;

(iii) Voluntary payments to the United States Treasury in connection with an industry-directed program for violators of the self-regulatory guidelines;

(iv) Referral to the Commission of operators who engage in a pattern or practice of violating the self-regulatory guidelines; or

(v) Any other equally effective action.

(c) *Request for Commission approval of self-regulatory program guidelines.* A proposed safe harbor program's request for approval shall be accompanied by the following:

(1) A detailed explanation of the applicant's business model, and the technological capabilities and mechanisms that will be used for initial and continuing assessment of subject operators' fitness for membership in the safe harbor program;

(2) A copy of the full text of the guidelines for which approval is sought and any accompanying commentary;

(3) A comparison of each provision of §§ 312.2 through 312.8, and 312.10 with the corresponding provisions of the guidelines; and

(4) A statement explaining:

(i) How the self-regulatory program guidelines, including the applicable assessment mechanisms, meet the requirements of this part; and

(ii) How the assessment mechanisms and compliance consequences required under paragraphs (b)(2) and (b)(3) provide effective enforcement of the requirements of this part.

(d) *Reporting and recordkeeping requirements.* Approved safe harbor programs shall:

(1) By July 1, 2014, and annually thereafter, submit a report to the Commission containing, at a minimum, an aggregated summary of the results of the independent assessments conducted under paragraph (b)(2) of this section, a description of any disciplinary action taken against any subject operator under paragraph (b)(3) of this section, and a description of any approvals of member operators' use of a parental consent mechanism, pursuant to § 312.5(b)(4);

(2) Promptly respond to Commission requests for additional information; and

(3) Maintain for a period not less than three years, and upon request make available to the Commission for inspection and copying:

(i) Consumer complaints alleging violations of the guidelines by subject operators;

(ii) Records of disciplinary actions taken against subject operators; and

(iii) Results of the independent assessments of subject operators' compliance required under paragraph (b)(2) of this section.

(e) *Post-approval modifications to self-regulatory program guidelines.* Approved safe harbor programs must submit proposed changes to their guidelines for review and approval by the Commission in the manner required for initial approval of guidelines under paragraph (c)(2) of this section. The statement required under paragraph (c)(4) of this section must describe how the proposed changes affect existing provisions of the guidelines.

(f) *Revocation of approval of self-regulatory program guidelines.* The Commission reserves the right to revoke any approval granted under this section if at any time it determines that the approved self-regulatory program guidelines or their implementation do not meet the requirements of this part. Safe harbor programs that were approved prior to the publication of the Final Rule amendments must, by March 1, 2013, submit proposed modifications to their guidelines that would bring them into compliance with such amendments, or their approval shall be revoked.

(g) *Operators' participation in a safe harbor program.* An operator will be deemed to be in compliance with the requirements of §§ 312.2 through 312.8, and 312.10 if that operator complies with Commission-approved safe harbor program guidelines. In considering whether to initiate an investigation or bring an enforcement action against a subject operator for violations of this part, the Commission will take into account the history of the subject operator's participation in the safe harbor program, whether the subject operator has taken action to remedy such non-compliance, and whether the operator's non-compliance resulted in any one of the disciplinary actions set forth in paragraph (b)(3).

§ 312.12 Voluntary Commission Approval Processes.

(a) *Parental consent methods.* An interested party may file a written request for Commission approval of parental consent methods not currently enumerated in § 312.5(b). To be considered for approval, a party must provide a detailed description of the proposed parental consent methods, together with an analysis of how the methods meet § 312.5(b)(1). The request shall be filed with the Commission's Office of the Secretary. The Commission will publish in the **Federal Register** a document seeking public comment on the request. The Commission shall issue a written determination within 120 days of the filing of the request; and

(b) *Support for internal operations of the Web site or online service.* An interested party may file a written request for Commission approval of additional activities to be included within the definition of support for internal operations. To be considered for approval, a party must provide a detailed justification why such activities should be deemed support for internal operations, and an analysis of their potential effects on children's online privacy. The request shall be filed with the Commission's Office of the Secretary. The Commission will publish in the **Federal Register** a document seeking public comment on the request. The Commission shall issue a written determination within 120 days of the filing of the request.

§ 312.13 Severability.

The provisions of this part are separate and severable from one another. If any provision is stayed or determined to be invalid, it is the Commission's intention that the remaining provisions shall continue in effect.

By direction of the Commission, Commissioner Rosch abstaining, and Commissioner Ohlhausen dissenting.

Donald S. Clark,

Secretary.

Dissenting Statement of Commissioner Maureen K. Ohlhausen

I voted against adopting the amendments to the Children's Online Privacy Protection Act (COPPA) Rule because I believe a core provision of the amendments exceeds the scope of the authority granted us by Congress in COPPA, the statute that underlies and authorizes the Rule.[401] Before I explain my concerns, I wish to commend the Commission staff for their careful consideration of the multitude of issues raised by the numerous comments in this proceeding. Much of the language of the amendments is designed to preserve flexibility for the industry while striving to protect children's privacy, a goal I support strongly. The final proposed amendments largely strike the right balance between protecting children's privacy online and avoiding undue burdens on providers of children's online content and services. The staff's great expertise in the area of children's privacy and deep understanding of the values at stake in this matter have been invaluable in my consideration of these important issues.

In COPPA Congress defined who is an operator and thereby set the outer boundary for the statute's and the COPPA Rule's reach.[402] It is undisputed that COPPA places obligations on operators of Web sites or online services directed to children or operators with actual knowledge that they are collecting personal information from children. The statute provides, "It is unlawful for an operator of a Web site or online service directed to children, or any operator that has actual knowledge that it is collecting personal information from a child, to collect personal information from a child in a manner that violates the regulations prescribed [by the FTC]."[403]

The Statement of Basis and Purpose for the amendments (SBP) discusses concerns that the current COPPA Rule may not cover child-directed Web sites or services that do not themselves collect children's personal information but may incorporate third-party plug-ins that collect such information[404] for the plug-ins' use but do not collect or maintain the information for, or share it with, the child-directed site or service. To address these concerns, the amendments add a new proviso to the definition of operator in the COPPA Rule: "Personal information is collected or maintained on behalf of an operator when: (a) it is collected or maintained by an agent or service provider of the operator; or (b) the operator benefits by allowing another person to collect personal information directly from users of such Web site or online service."[405]

The proposed amendments construe the term "on whose behalf such information is collected and maintained" to reach child-directed Web sites or services that merely derive from a third-party plug-in some kind of benefit, which may well be unrelated to the collection and use of children's information (*e.g.*, content, functionality, or advertising revenue). I find that this proviso—which would extend COPPA obligations to entities that do not collect personal information from children or have access to or control of such information collected by a third-party does not comport with the plain meaning of the statutory definition of an operator in COPPA, which covers only entities "on whose behalf such information is collected and maintained."[406] In other words, I do not believe that the fact that a child-directed site or online service receives any kind of benefit from using a plug-in is equivalent to the collection of personal information by the third-party plug-in on behalf of the child-directed site or online service.

As the Supreme Court has directed, an agency "must give effect to the unambiguously expressed intent of Congress."[407] Thus, regardless of the policy justifications offered, I cannot support expanding the definition of the term "operator" beyond the statutory parameters set by Congress in COPPA.

I therefore respectfully dissent.

[FR Doc. 2012–31341 Filed 1–16–13; 8:45 am]

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[401] 15 U.S.C. 6501–6506.

[402] COPPA, 15 U.S.C. 6501(2), defines the term "operator" as "any person who operates a Web site located on the Internet or an online service and who collects or maintains personal information from or about users of or visitors to such Web site or online service, or on whose behalf such information is collected and maintained * * *" As stated in the Statement of Basis and Purpose for the original COPPA Rule, "The definition of 'operator' is of central importance because it determines who is covered by the Act and the Rule." Children's Online Privacy Protection Rule 64 FR 59888, 59891 (Nov. 3, 1999) (final rule).

[403] 15 U.S.C. 6502(a)(1).

[404] If the third-party plugs-ins are child-directed or have actual knowledge that they are collecting children's personal information they are already expressly covered by the COPPA statute. Thus, as the SBP notes, a behavioral advertising network that targets children under the age of 13 is already deemed an operator. The amendment must therefore be aimed at reaching third-party plug-ins that are either not child-directed or do not have actual knowledge that they are collecting children's personal information, which raises a question about what harm this amendment will address. For example, it appears that this same type of harm could occur through general audience Web sites and online services collecting and using visitors' personal information without knowing whether some of the data is children's personal information, which is a practice that COPPA and the amendments do not prohibit.

[405] 16 CFR 312.2 (Definitions).

[406] This expanded definition of operator reverses the Commission's previous conclusion that the appropriate test for determining an entity's status as an operator is to "look at the entity's relationship to the data collected," using factors such as "who owns and/or controls the information, who pays for its collection and maintenance, the pre-existing contractual relationships regarding collection and maintenance of the information, and the role of the Web site or online service in collecting and/or maintaining the information (*i.e.*, whether the site participates in collection or is merely a conduit through which the information flows to another entity.)" Children's Online Privacy Protection Rule 64 FR 59888, 59893, 59891 (Nov. 3, 1999) (final rule).

[407] *Chevron* v. *Natural Resources Defense Council, Inc.*, 467 U.S. 837, 842–43 (1984) ("When a court reviews an agency's construction of the statute which it administers, it is confronted with two questions. First, always, is the question whether Congress has directly spoken to the precise question at issue. If the intent of Congress is clear, that is the end of the matter; for the court, as well as the agency, must give effect to the unambiguously expressed intent of Congress.").

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 Retina-X Studios, LLC ("Retina-X") and individual Respondent James N. Johns, Jr. (collectively, "Respondents").

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

From 2007 to 2018 Retina-X developed and sold various products and services, each with the means to allow a purchaser to monitor, often surreptitiously, another person's activities on that person's mobile device. James N. Johns, Jr. is the registered agent and sole member of Retina-X. Individually or in concert with others, Mr. Johns controlled or had the authority to control, or participated in the acts and practices alleged in the proposed complaint.

Respondents' mobile device monitoring products and services included MobileSpy, PhoneSheriff, and TeenShield. These monitoring products and services had varying capabilities and costs. Purchasers were often required to jailbreak or root (i.e., actions to bypass various restrictions implemented by the operating system on and/or the manufacturer of mobile devices) the device user's mobile device prior to installing Respondents' monitoring products and services. Jailbreaking or rooting a mobile device exposes a mobile device to various security vulnerabilities and likely invalidates any warranty that a mobile device manufacturer or carrier provides.

All of Respondents' monitoring products and services required that the purchaser have physical access to the device user's mobile device, and could remotely monitor the device user's activities from an online dashboard. By default, Respondents' monitoring products and services disclosed to the device user that they were being monitored (e.g., an icon on, cl monitored mobile device). However, purchasers could turn off this feature so that the monitoring products and services could run surreptitiously, meaning that the device user was unaware that he or she was being monitored . Respondents provided purchasers with instructions on how to remove the icon that would confirm that monitoring products and services were installed on a particular mobile device.

Device users surreptitiously monitored by Respondents ' monitoring products and services could not uninstall or remove Respondents' monitoring products and services because they did not know that they were being monitored. Device users often had no way of knowing that Respondents' monitoring products and services were being used on their phone. Respondents did not take any steps to ensure that purchasers would use Respondents' monitoring products and services for legitimate purposes, such as to monitor employees or children.

Moreover, Respondents did not take steps to secure the personal information collected from purchasers and device users being monitored. Respondents outsourced most of their product development and maintenance to a service provider. Respondents engaged in a number of practices

that, taken together, failed to provide reasonable data security to protect the personal information collected from consumers. As a result of these unreasonable data security practices, Respondents were breached twice.

The Commission proposed 5-count complaint alleges that Respondents violated Section 5(a) of the Federal Trade Commission Act and the Children's Online Privacy Protection Rule. The first count alleges that Respondents unfairly sold monitoring products and services that required jailbreaking or rooting, without taking reasonable steps to ensure that the monitoring products and services would only be used for legitimate and lawful purposes by the purchaser.

The second to fourth counts allege that Respondents deceived consumers about Respondents' data security practices by falsely representing that consumers' personal information collected through MobileSpy, PhoneSheriff, and TeenShield, and stored in Respondents' databases was confidential, private, and safe. The fifth count alleges that Respondents violated the Children's Online Privacy Protection Rule by failing to establish and maintain reasonable procedures to protect the confidentiality, security, and integrity of personal information collected from children through the TeenShield product. Respondents failed to implement appropriate security procedures to protect the personal information collected from consumers, including children, such as by: (1) failing to adopt, implement, or maintain security standards, policies, procedures or practices; (2) failing to conduct security testing of mobile applications that could be exploited to gain unauthorized access to consumers' sensitive personal information for well-known and reasonably foreseeable vulnerabilities; (3) failing to contractually require their service providers to adopt and implement information security standards, policies, procedures or practices; (4) failing to perform adequate oversight of service providers; and (5) failing to adopt and implement written information security standards, policies, procedures, or practices that would apply to the oversight of their service providers.

The proposed order contains provisions designed to prevent Respondents from engaging in the same or similar acts or practices in the future.

Part I of the proposed order prohibits Respondents from selling a monitoring product unless: (1) the monitoring product does not circumvent security protections implemented by the mobile device operating system or manufacturer; (2) prior to the sale of the monitoring product, express written attestation is obtained from the purchaser that the monitoring product stating that the monitoring product will be used for legitimate and lawful purposes; and (3) documentation is obtained proving that the purchaser is an authorized user on the monitored mobile device's service carrier account. The proposed order also requires that Respondents display an application icon, including the name of the monitoring product, when the monitoring product is on the mobile device. Moreover, a clear and conspicuous notice must be presented when the application icon is clicked.

Part II of the order restrains Respondents from distributing monitoring products unless Respondents have: (1) a home page notice stating that the monitoring product may only be used for legitimate and lawful purposes by authorized users; and (2) a purchase page notice stating that the monitoring product may only be used for legitimate and lawful purposes by authorized users,

and that installing or using the monitoring product for any other purpose may violate local, state, and/or federal law.

Part III of the proposed order prohibits Respondents from violating the Children's Online Privacy Protection Rule. Part IV of the proposed order prohibits Respondents from misrepresenting the extent to which Respondents maintain and protect the privacy, security, confidentiality, or integrity of consumers' personal information. Part V requires that Respondents' delete all personal information collected from a monitoring product prior to entry of the proposed order within 120 days.

Part VI of the proposed order prohibits Respondents, and any business that a Respondent controls, directly, or indirectly, from transferring, selling, sharing, collecting, maintaining, or storing personal information unless Respondents establish and implement, and thereafter maintain, a comprehensive information security program that protects the security confidentiality, and integrity of such personal information. Part VII requires Respondents to obtain initial and biennial data security assessments for twenty years. Part VIII of the proposed order requires Respondents to disclose all material facts to the assessor and prohibits Respondents from misrepresenting any fact material to the assessments required by Part VII. Part IX requires Respondents to submit an annual certification from a senior corporate manager (or senior officer responsible for its information security program), that Respondents have implemented the requirements of the proposed order, are not aware of any material noncompliance that has not been corrected or disclosed to the Commission, and includes a brief description of any covered incident involving unauthorized access to or acquisition of personal information. Part X requires Respondents to submit a report to the Commission of their discovery of any covered incident.

Parts XI through XIV of the proposed order are reporting and compliance provisions, which including recordkeeping requirements and provisions requiring Respondents to provide information or documents necessary for the Commission to monitor compliance. Part XV states that the proposed order will remain in effect for 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

AGNATEN SE, VETERINARY SPECIALISTS OF NORTH AMERICA, LLC, AND NVA PARENT 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-4707; File No. 191 0160
Complaint, February 14, 2020 – Decision, April 9, 2020

This consent order addresses the $5 billion acquisition by Agnaten SE of all assets of NVA Parent Inc. in violation of Section 7 of the Clayton Act and Section 5 of the Federal Trade Commission Act. The complaint alleges that the Acquisition would reduce the number of specialty providers of internal medicine, oncology, and ophthalmology service in all of the relevant markets and significantly increase concentration in each market. The Acquisition eliminates head-to-head competition between Compassion First and NVA in the provision of specialty and emergency veterinary services. The consent order requires Respondents to divest, within 10 days after the Acquisition Date, the Divestiture Clinics to MedVet and that Respondent Agnaten shall not acquire Respondent NVA until it has obtained for all the Divestiture Clinics.

Participants

For the *Commission*: *Michael R. Barnett.*

For the *Respondents*: *Matthew P. Hendrickson* and *Jessica N. Schneider, Skadden, Arps, Slate, Meagher & Flom LLP; Katherine A. Rocco* and *Muran Zhu, Kirkland & Ellis LLP.*

COMPLAINT

Pursuant to the Clayton Act and the Federal Trade Commission Act, and its authority thereunder, the Federal Trade Commission ("Commission"), having reason to believe that Respondents Agnaten SE, the owner of Veterinary Specialists of North America, LLC and Compassion-First Pet Hospitals ("Compassion First"), a corporation subject to the jurisdiction of the Commission, has agreed to acquire Respondent NVA Parent Inc. ("NVA"), 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. RESPONDENTS

1. Respondent Compassion First is a private corporation organized, existing, and doing business under and by virtue of the laws of Austria, with its office and principal place of business located at Rooseveltplaz 4-5/Top 10, A-1090 Vienna, Austria, with its United States

office for service of process located at 1701 Pennsylvania Avenue, NW, Suite 801, Washington, D.C. 20006.

2. Respondent Veterinary Specialists of North America is a limited liability company 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 106 Apple Street, Tinton Falls, New Jersey 07724.

3. Respondent NVA Parent Inc. is a corporation organized, existing, and doing business under and by virtue of the laws of the State of Delaware, with its office and principal place of business located at 2000 Avenue of the Stars, 12th Floor, Los Angeles, California 90067.

4. 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

5. Pursuant to a Stock Purchase Agreement dated June 3, 2019, Compassion First proposes to acquire all of the assets of NVA in a transaction valued at approximately $5 billion (the "Acquisition"). The Acquisition is subject to Section 7 of the Clayton Act, as amended, 15 U.S.C. § 18.

III. THE RELEVANT MARKETS

6. The relevant lines of commerce in which to analyze the effects of the Acquisition are individual specialty veterinary services and emergency veterinary services. Specialty veterinary services are required in cases where a general practitioner veterinarian does not have the expertise or equipment necessary to treat the patient. General practitioner veterinarians commonly refer such cases to a specialist, typically a doctor of veterinary medicine who is board-certified within the required specialty. Individual veterinary specialties include internal medicine, neurology, oncology, ophthalmology, radiation oncology, and surgery. Emergency veterinary services are those used in acute situations in which a general practice veterinarian is not available, or in some cases, not properly trained or equipped to treat the patient's medical problem. Compassion First and NVA both provide specialty and off-hours emergency veterinary services in facilities operated across the United States.

7. For the purposes of this Complaint, the relevant areas in which to assess the competitive effects of the Acquisition are local, delineated by the distance and time that pet owners travel to receive treatment.

8. The specific relevant markets in which to analyze the competitive effects of the Acquisition are:

a. internal medicine, oncology, ophthalmology, and surgery specialty veterinary services and emergency veterinary services in and around Asheville, North Carolina and Greenville, South Carolina;

b. neurology and radiation oncology specialty veterinary services in the area between Norwalk, Connecticut and Yonkers, New York; and

c. emergency veterinary services in and around Fairfax and Manassas, Virginia.

IV. THE STRUCTURE OF THE MARKETS

9. All of the relevant markets are currently highly concentrated, and the Acquisition combines two close competitors and significantly increases concentration in each market.

10. In the area in and around Asheville, North Carolina and Greenville, South Carolina, the Acquisition would reduce the number of specialty providers of internal medicine, oncology, and ophthalmology services from two to one. The Acquisition would also reduce the number of providers of emergency veterinary services and specialty veterinary surgical services from three to two.

11. In the area between Norwalk, Connecticut and Yonkers, New York, the Acquisition would reduce the number of providers for neurology and radiation oncology from two to one.

12. In the area in and around Fairfax and Manassas, Virginia, Compassion First and NVA are each other's closest competitors and the Acquisition would combine two of a limited number of effective providers of emergency veterinary services in the area.

V. ENTRY CONDITIONS

13. Entry into the relevant markets would not be timely, likely, or sufficient in magnitude, character, and scope to deter or counteract the anticompetitive effects of the Acquisition. For *de novo* entrants, obtaining financing to build a new specialty or emergency veterinary facility and acquiring or leasing necessary equipment can be expensive and time consuming. The investment is risky for specialists that do not have established practices and bases of referrals in the area. In addition, extensive education and training, beyond that required to become a general practitioner veterinarian, is required to become a licensed veterinary specialist. Consequently, specialists are frequently in short supply, and recruiting them to move to a new area often takes more than two years. Timely entry by emergency clinics is also difficult and expensive due to the costs and risks associated with emergency staffing and equipment.

VI. EFFECTS OF THE ACQUISITION

14. The effects of the Acquisition, if consummated, may be to substantially lessen competition and to tend to create a monopoly in the relevant markets in violation of Section 7 of

the Clayton Act, as amended, 15 U.S.C. § 18, and Section 5 of the FTC Act, as amended, 15 U.S.C. § 45, by, among other things:

a. eliminating head-to-head competition between Compassion First and NVA in the provision of specialty and emergency veterinary services;

b. increasing the likelihood that Compassion First unilaterally exercises market power; and

c. increasing the likelihood that customers are forced to pay higher prices or experience a degradation in quality of the relevant services.

VII. VIOLATIONS CHARGED

15. The Acquisition constitutes 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 fourteenth day of February, 2020 issues its Complaint against said Respondents.

By the Commission.

ORDER TO MAINTAIN ASSETS

The Federal Trade Commission ("Commission") initiated an investigation of the proposed acquisition by Respondent Agnaten, SE ("Agnaten"), the owner of Veterinary Specialists of North America and Compassion-First Pet Hospitals, of Respondent NVA Parent, Inc. ("NVA"), collectively "Respondents." The Commission's Bureau of Competition prepared and furnished to Respondents the Draft Complaint, which it proposed to present to the Commission for its consideration. If issued by the Commission, the Draft Complaint 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.

Respondents and the Bureau of Competition executed an Agreement Containing Consent Orders ("Consent Agreement") containing (1) an admission by Respondents of all the jurisdictional facts set forth in the Draft Complaint, (2) 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 the Draft Complaint, or that the facts alleged in the Draft Complaint, other than jurisdictional facts, are true, (3) waivers and other provisions as required by the Commission's Rules, and (4) a proposed Decision and Order and Order to Maintain Assets.

Order to Maintain Assets

The Commission considered the matter and determined to accept the executed Consent Agreement and to place such Consent Agreement on the public record for a period of 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 issues its Complaint, makes the following jurisdictional findings, and issues this Order to Maintain Assets:

1. Respondent Agnaten is a corporation organized, existing, and doing business under and by virtue of the laws of Austria, with its office and principal place of business located at Roosevelt place 4-5/Top 10, A-1090 Vienna, Austria, with its United States office for service of process located at 1701 Pennsylvania Ave., NW, Suite 801, Washington, DC 20006.

2. Respondent Veterinary Specialists of North America is a limited liability company 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 106 Apple St, Suite 207, Tinton Falls, NJ 07724.

3. Respondent NVA 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 2000 Avenue of the Stars, 12th Floor, Los Angeles, CA 90067.

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

I. Definitions

IT IS ORDERED that, as used in this Order to Maintain Assets, the following definitions, and all other definitions used in the Consent Agreement and the Decision and Order, shall apply:

A. "Agnaten" means Agnaten, SE, its directors, officers, employees, agents, representatives, successors, and assigns; and the joint ventures, subsidiaries, partnerships, divisions, groups, and affiliates controlled by Agnaten, SE, including, but not limited to, Veterinary Specialists of North America, Compassion-First Pet Hospitals, and the respective directors, officers, employees, agents, representatives, successors, and assigns of each.

B. "NVA" means NVA Parent, Inc., its directors, officers, employees, agents, representatives, successors, and assigns; and the joint ventures, subsidiaries, partnerships, divisions, groups, and affiliates controlled by NVA Parent, Inc., and the respective directors, officers, employees, agents, representatives, successors, and assigns of each.

C. "Decision and Order" means the:

1. Proposed Decision and Order contained in the Consent Agreement in this matter until the issuance of a final Decision and Order by the Commission; and

2. Final Decision and Order issued by the Commission following the issuance and service of a final Decision and Order by the Commission in this matter.

D. "Monitor" means any Person appointed by the Commission to serve as a Monitor pursuant to the Decision and Order and this Order to Maintain Assets.

E. "Orders" means the Decision and Order and this Order to Maintain Assets.

II. Asset Maintenance

IT IS FURTHER ORDERED that, until the Divestiture Date, Respondents shall:

A. Maintain the viability, marketability, and competitiveness of the Divestiture Clinics, and shall not cause the wasting or deterioration of any of the Divestiture Clinics. Respondents shall not cause the Divestiture Clinics to be operated in a manner inconsistent with applicable laws, nor shall they sell, transfer, encumber, or otherwise impair the viability, marketability, or competitiveness of the Divestiture Clinics.

B. Continue to maintain the Divestiture Clinics in the regular and ordinary course of business, in accordance with past practice, including regular repair and maintenance efforts and maintaining customary hours of operation and departments, and shall use best efforts to preserve the existing relationships with suppliers, customers, employees, and others having business relations with the Divestiture Clinics.

C. Maintain the organization and properties of each of the Divestiture Clinics, including current business operations, physical facilities, working conditions, staffing levels, and a work force of equivalent size, training, and expertise associated with each of the Divestiture Clinics. Among other actions as may be necessary to comply with these obligations, Respondents shall, without limitation:

1. Use best efforts to retain employees at each of the Divestiture Clinics; when vacancies occur, replace the employees in the regular and ordinary course of business, in accordance with past practice; and not transfer any employees from any of the Divestiture Clinics;

2. Provide each employee of the Divestiture Clinics 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 Clinics;

3. Not transfer any Clinic Assets from any Divestiture Clinics, other than in the ordinary course of business, in accordance with past practice;

4. Make all payments required to be paid under any contract or lease when due, and otherwise pay all liabilities and satisfy all obligations associated with each of the Divestiture Clinics, in each case in a manner in accordance with past practice;

5. Maintain the Business Records of each of the Divestiture Clinics;

6. Provide each of the Divestiture Clinics with sufficient working capital to operate at least at current rates of operation, to meet all capital calls with respect to the related Divestiture Clinics, and to carry on, at least at their scheduled pace, all capital projects, business plans, and promotional activities for each of the Divestiture Clinics;

7. Continue, at least at their scheduled pace, any additional expenditures for each of the Divestiture Clinics authorized prior to the date the Consent Agreement was signed by Respondents including, but not limited to, all repairs, renovations, distribution, marketing, and sales expenditures;

8. Provide the resources necessary to respond to competition and to prevent any diminution in sales at each of the Divestiture Clinics;

9. Make available for use by each of the Divestiture Clinics funds sufficient to perform all routine maintenance and all other maintenance as may be necessary to, and all replacements of, any assets related to the operation of the Divestiture Clinics;

10. Provide support services to each of the Divestiture Clinics at least at the level as were being provided to the Divestiture Clinics by Respondents as of the date the Consent Agreement was signed by Respondents; and

11. Maintain, and not terminate or permit the lapse of, any Governmental Approvals necessary for the operation of any Divestiture Clinic.

III. Employees

IT IS FURTHER ORDERED that, Respondents:

A. Shall, no later than 10 days after a request from an Acquirer, provide the Acquirer with the following information for each Relevant Employee, and, to the extent known and applicable, each independent contractor who has worked at a

Divestiture Clinic since June 3, 2019, as and to the extent permitted by law (unless such information has already been provided):

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 Acquirer's option, copies of all employee benefit plans and summary plan descriptions (if any) applicable to the Relevant Employee.

B. Shall, within a reasonable time after a request from an Acquirer, provide to the 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. Shall remove any impediments within the control of Respondents that may deter Relevant Employees from accepting employment with an 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 an Acquirer, and shall not make any counteroffer to a Relevant Employee who receives a written offer of employment from an 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.

D. Shall provide reasonable financial incentives for Relevant Employees, as identified by Respondents and any Acquirer, to continue in their positions. Such incentives may include, but are not limited to, guaranteeing a retention bonus for the veterinarians at the Divestiture Clinics to assure their continued employment at such clinic, a continuation 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.

E. Shall not interfere, directly or indirectly, with the hiring or employing by the Acquirer of any Relevant Employees, not offer any incentive to such employees to decline employment with the Acquirer, and not otherwise interfere with the recruitment of any Relevant Employee by 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 III.E.; *provided further, however,* that this Paragraph III.E. 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.

F. Shall not, for a period of one (1) year following the Divestiture Date of the particular Divestiture Clinic, hire a Relevant Employee that is a doctor of veterinary medicine to work at any of Respondents' veterinary clinics in the areas identified in Appendix A of the Decision and Order, related to that particular Divestiture Clinic.

Provided however, Respondent Agnaten may offer part-time contract hours to a doctor of veterinary medicine at a Divestiture Clinic who has been working as a part-time contract veterinarian for Respondent Agnaten or Respondent NVA in the areas identified in Appendix A of the Decision and Order, related to that particular Divestiture Clinic, if the part-time contract hours offered by Respondent Agnaten would not, in any way, interfere with the ability of the doctor of veterinary medicine to fulfill his or her employment responsibilities to the Acquirer.

Provided further, however, that this Paragraph III.F. shall not prohibit Respondents from making offers of employment to or employing any Relevant Employee that is a doctor of veterinary medicine if an Acquirer has notified Respondents in writing that the Acquirer does not intend to make an offer of employment to that doctor of veterinary medicine, or where the doctor of veterinary medicine's employment has been terminated by the Acquirer.

G. Shall not, for a period of 2 years following the Divestiture Date of any Divestiture Clinic, directly or indirectly, solicit or otherwise attempt to induce any of the Relevant Employees who have accepted offers of employment with an 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. Subject to Paragraph III.F. above, hire Relevant Employees who apply for employment with Respondents, as long as such employees were not solicited by Respondents in violation of this Paragraph III.G.; *provided further, however,* that this Paragraph III.G. shall not prohibit Respondents from making offers of employment to or employing any Relevant Employee if an 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.

IV. Confidentiality

IT IS FURTHER ORDERED that Respondents:

A. Shall not disclose Confidential Business Information relating exclusively to any of the Divestiture Clinics to any Person other than the Acquirer of the Divestiture Clinics;

B. Shall not use Confidential Business Information relating exclusively to any of the Divestiture Clinics for any purpose other than for complying with the terms of the Orders, for complying with any law, or for the purposes of billing and collections; and

C. Shall destroy all records of Confidential Business Information relating exclusively to any of the Divestiture Clinics, except to the extent that: (i) Respondents are required by law to retain such information, and (ii) Respondents' inside or outside attorneys may keep one copy solely for archival purposes, but may not disclose such copy to the rest of Agnaten or NVA, respectively.

V. Monitor

IT IS FURTHER ORDERED THAT:

A. Thomas Carpenter shall be appointed Monitor to ensure that Respondents expeditiously comply with all of their obligations and perform all of their responsibilities as required by the Orders.

B. No later than one (1) day after the Acquisition Date, Respondents shall, pursuant to the Monitor Agreement, attached as Appendix B and Non-Public Appendix C (Compensation) to the Decision and Order, transfer to the Monitor all the rights, powers, and authorities necessary to permit the Monitor to perform his duties and responsibilities in a manner consistent with the purposes of the Orders.

C. In the event a substitute Monitor is required, 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 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. Not later than 10 days after appointment of a Monitor, Respondents shall execute an agreement that, subject to the prior approval of the Commission, confers on the Monitor all the rights and powers necessary to permit the Monitor to monitor Respondents' compliance with the terms of the Orders and the Divestiture Agreements in a manner consistent with the purposes of the Orders.

D. Respondents shall Consent to the following terms and conditions regarding the powers, duties, authorities, and responsibilities of the Monitor:

1. The Monitor shall have the power and authority to monitor Respondents' compliance with the terms of the Orders and the Divestiture Agreements, and shall exercise such power and authority and carry out the duties and responsibilities of the Monitor in a manner consistent with the purposes of the Orders and in consultation with the Commission, including, but not limited to:

    a. Ensuring that Respondents expeditiously comply with all obligations and perform all responsibilities as required by the Orders, and the Divestiture Agreements;

    b. Monitoring any transition services agreements; and

    c. Ensuring that Confidential Business Information is not received or used by Respondents or the Acquirers, except as allowed in the Orders.

2. The Monitor shall serve as an independent third party and not as an employee or agent of any Respondent or of the Commission.

3. The Monitor shall serve for such time as is necessary to monitor Respondents' compliance with the provisions of the Orders and the Divestiture Agreements.

4. Subject to any demonstrated legally recognized privilege, the Monitor shall have full and complete access to Respondents' personnel, books, documents, records kept in the ordinary course of business, facilities and technical information, and such other relevant information as the Monitor may reasonably request, related to Respondents' compliance with their obligations under the Orders and the Divestiture Agreements. Respondents shall cooperate with any reasonable request of the Monitor and shall take no action to interfere with or impede the Monitor's ability to monitor Respondents' compliance with the Orders and the Divestiture Agreements.

5. The Monitor shall serve, without bond or other security, at the expense of Respondents, on such reasonable and customary terms and conditions as the Commission may set. The Monitor shall have authority to employ, at the expense of Respondents, such consultants, accountants, attorneys, and other representatives and assistants as are reasonably necessary to carry out the Monitor's duties and responsibilities. The Monitor shall account for all expenses incurred, including fees for services rendered, subject to the approval of the Commission.

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

7. Respondents shall report to the Monitor in accordance with the requirements of the Orders and/or as otherwise provided in any agreement approved by the Commission. The Monitor shall evaluate the reports submitted to the Monitor by Respondents, and any reports submitted by the Acquirer with respect to the performance of Respondents' obligations under the Orders and the Divestiture Agreements.

8. Within one (1) month from the date the Monitor is appointed pursuant to this Paragraph V.D., every 60 days thereafter, and otherwise as requested by the Commission, the Monitor shall report in writing to the Commission concerning performance by Respondents of their obligations under the

Orders and the Divestiture Agreements. The reporting obligations contained in the Decision and Order shall control after the Decision and Order becomes final.

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

E. The Commission may, among other things, require the Monitor and each of the Monitor's consultants, accountants, attorneys, and other representatives and assistants, to sign an appropriate confidentiality agreement relating to Commission materials and information received in connection with the performance of the Monitor's duties.

F. If the Commission determines that the Monitor has ceased to act or failed to act diligently, the Commission may appoint a substitute Monitor pursuant to Paragraph V.C., above.

G. The Commission may on its own initiative, or at the request of the Monitor, issue such additional orders or directions as may be necessary or appropriate to ensure compliance with the requirements of the Orders and the Divestiture Agreements.

H. A Monitor appointed pursuant to this Order to Maintain Assets may be the same Person appointed as a Divestiture Trustee pursuant to the Decision and Order.

VI. Compliance Reports

IT IS FURTHER ORDERED that within 30 days after the date this Order to Maintain Assets is issued by the Commission, and every 30 days thereafter until Respondents have fully complied with this Order to Maintain Assets, 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 the provisions of this Order to Maintain Assets; *Provided, however*, that, after the Decision and Order in this matter becomes final, the reports due under this Order to Maintain Assets may be consolidated with, and submitted to the Commission on the same timing as, the reports required to be submitted by Respondents pursuant the Decision and Order. Respondents shall submit at the same time a copy of their report concerning compliance with this Order to the Monitor. Respondents shall include in their reports, among other things that are required from time to time, a full description of the efforts to comply with this Order.

VII. Change in Respondents

IT IS FURTHER ORDERED that Respondent Agnaten shall notify the Commission at least 30 days prior to:

A. Any proposed dissolution of Agnaten, SE;

B. Any proposed acquisition, merger, or consolidation of Agnaten, SE; and

C. Any other change in Respondent Agnaten, 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.

VIII. Access

IT IS FURTHER ORDERED that, for purposes of determining or securing compliance with this Order to Maintain Assets, and subject to any legally recognized privilege, and upon 5 days' written notice to the applicable Respondent made to its 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 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.

IX. Purpose

The purpose of this Order to Maintain Assets is to: (1) maintain and preserve the Divestiture Clinics as viable, marketable, competitive, and ongoing businesses until the divestiture required by the Decision and Order is achieved; (2) ensure that Respondents obtain no Confidential Business Information relating to the Divestiture Clinics, 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.

X. Term

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

A. 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;

B. The day after Respondents or a Divestiture Trustee completes the divestiture required by the Decision and Order; *Provided, however*, that, if at the time such divestiture has been completed, the Decision and Order in this matter is not yet final, then this Order to Maintain Assets shall terminate the day after the Decision and Order becomes final;

C. The day after Respondents, with the concurrence of the Acquirer, certifies in writing to the Commission as to the completion of all Transition Assistance provided by Respondents to the Acquirer; or

D. The day the Commission otherwise directs that this Order to Maintain Assets is terminated.

By the Commission.

DECISION

The Federal Trade Commission ("Commission") initiated an investigation of the proposed acquisition by Respondent Agnaten, SE, ("Agnaten"), the owner of Veterinary Specialists of North America and Compassion-First Pet Hospitals, of Respondent NVA Parent, Inc. ("NVA"), collectively "Respondents." The Commission's Bureau of Competition prepared and furnished to Respondents the Draft Complaint, which it proposed to present to the Commission for its consideration. If issued by the Commission, the Draft Complaint 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.

Respondents and the Bureau of Competition executed an Agreement Containing Consent Orders ("Consent Agreement") containing (1) an admission by Respondents of all the jurisdictional facts set forth in the Draft Complaint, (2) 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 the Draft Complaint, or that the facts as alleged in the Draft Complaint, other than jurisdictional facts, are true, (3) waivers and other provisions as

required by the Commission's Rules, and (4) a proposed Decision and Order and Order to Maintain Assets.

The Commission considered the matter and 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. The Commission accepted the Consent Agreement and placed it on the public record for a period of 30 days for the receipt and consideration of public comments; at the same time, it issued and served its Complaint and Order to Maintain Assets. Now, in further conformity with the procedure described in Rule 2.34, the Commission makes the following jurisdictional findings and issues the following Decision and Order ("Order"):

1. Respondent Agnaten is a corporation organized, existing, and doing business under and by virtue of the laws of Austria, with its office and principal place of business located at Rooseveltplaz 4-5/Top 10, A-1090 Vienna, Austria, with its United States office for service of process located at 1701 Pennsylvania Ave., NW, Suite 801, Washington, DC 20006.

2. Respondent Veterinary Specialists of North America is a limited liability company 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 106 Apple St, Tinton Falls, NJ 07724.

3. Respondent NVA 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 2000 Avenue of the Stars, 12th Floor, Los Angeles, CA 90067.

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

ORDER

I. Definitions

IT IS ORDERED that, as used in this Order, the following definitions shall apply and all other definitions used in the Order to Maintain Assets, shall apply:

A. "Agnaten" means Agnaten, SE, its directors, officers, employees, agents, representatives, successors, and assigns; and its joint ventures, subsidiaries, partnerships, divisions, groups, and affiliates controlled by Agnaten SE, including, but not limited to, Veterinary Specialists of North America, Compassion-First Pet Hospitals, and the respective directors, officers, employees, agents, representatives, successors, and assigns of each.

B. "NVA" means NVA Parent, Inc., its directors, officers, employees, agents, representatives, successors, and assigns; and its joint ventures, subsidiaries, partnerships, divisions, groups, and affiliates controlled by NVA Parent, Inc., and

the respective directors, officers, employees, agents, representatives, successors, and assigns of each.

C. "MedVet" means MedVet Associates, LLC, a limited liability company organized, existing, and doing business under, and by virtue of, the laws of the State of Ohio, with its executive offices and principal place of business located at 350 East Wilson Bridge Road, Worthington, OH 43085.

D. "Acquirer" means: means:

1. MedVet; or

2. Any other Person the Commission approves to acquire the Divestiture Clinics pursuant to this Decision and Order.

E. "Acquisition" means the proposed acquisition by Agnaten of NVA, described in the Stock Purchase Agreement by and among NVA Group, L.P., NVA Parent, Inc., Dino Grandparent, Inc., Petcare Acquisition Co., and JAB Holdings, B.V., dated June 3, 2019.

F. "Acquisition Date" means the date Respondents consummate the Acquisition.

G. "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.

H. "Clinic 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 Divestiture Clinics, 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, togetherwith 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 Divestiture Clinics, if such property was used by or in connection with the provision of veterinarian services at the Divestiture Clinics on or after June 3, 2019;

3. Rights under any and all contracts and agreements (e.g., leases, service agreements such as supply agreements, procurement contracts), including, but not limited to, contracts and agreements with physicians and other veterinary health care providers and support staff, suppliers, sales representatives, distributors, agents, personal property lessors, personal property lessees, licensors, licensees, consigners, and consignees;

4. Rights and title in and to use the name or part of the name of the Divestiture Clinic on a permanent and exclusive basis (even as to Respondents), including, but not limited to, the name "Veterinary Care Center," the name "REACH Veterinary Specialists," and the name "The Veterinary Referral Center;"

5. 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;

6. All consumable or disposable inventory kept in the normal course of business, including, but not limited to, janitorial, office, and medical supplies, and pharmaceuticals;

7. Accounts receivable;

8. Rights under warranties and guarantees, express or implied; and

9. Business Records.

Provided, however, that Clinic Assets do not include Excluded Assets.

Provided further, however, that Respondents may retain a copy of Business Records to the extent necessary to comply with applicable law, regulations, and other legal requirements.

I. "Commission" means the Federal Trade Commission.

J. "Confidential Business Information" means information not in the public domain that is related to or used in connection with the Divestiture Clinics, 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, bidding practices and information, procurement practices and information, supplier qualification and approval practices and information, and training practices.

K. "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.

L. "Divestiture Agreement(s)" means:

1. Divestiture Agreement by and among Respondents and MedVet, dated October 25, 2019, and all amendments, exhibits, attachments, agreements, and schedules thereto, attached to this Decision and Order as Non-Public Appendix E;

2. Divestiture Agreement by and among Veterinary Specialists of North America and MedVet, dated November 22, 2019, and all amendments, exhibits, attachments, agreements, and schedules thereto, attached to this Decision and Order as Non-Public Appendix E; or

3. Any agreement between Respondents (or a Divestiture Trustee appointed pursuant to this Order) and an Acquirer to purchase the Divestiture Clinics, and all amendments, exhibits, attachments, agreements, and schedules thereto.

M. "Divestiture Clinics" means the following veterinary clinics owned and operated by Respondents:

1. REACH Veterinary Specialists, located at 677 Brevard Road, Asheville, NC 28806;

2. The Veterinary Care Center, located at 129 Glover Avenue, Norwalk, CT 06850; and

3. The Veterinary Referral Center, 8614 Centreville Road, Manassas, VA 20110.

N. "Divestiture Date" means the date on which Respondents (or a Divestiture Trustee appointed pursuant to this Order) consummate the divestiture of the Divestiture Clinics as required by Paragraph II of this Order.

O. "Divestiture Trustee" means the person appointed pursuant to Paragraph VII of this Order.

P. "Emergency Veterinary Clinic" means a veterinary clinic that offers 24-hour or overnight service with the primary function of receiving, treating, and monitoring emergency patients during its specified hours of operation. A veterinarian is in attendance at all hours of operation and sufficient staff is available to provide timely and appropriate care. Veterinarians, support staff, instrumentation, medications, and supplies must be sufficient to provide an appropriate level of emergency care.

Q. "Excluded Assets" means:

1. Tax and medical records related to the Divestiture Clinics to the extent they are nontransferable by law;

2. Cash generated by the Divestiture Clinics prior to the Divestiture Date;

3. Intellectual Property;

4. Software, including, any third-party practice management software (to the extent not assignable);

5. Employee benefit plans;

6. Employee records (a) for any Relevant Employee that is not transferred to Acquirer, or (b) prohibited to be transferred by law; and

7. Compassion-First's Strontium-90 probe and the related Radioactive Materials License No. 6-35037-01 held by CF PC.

R. "Government Approvals" means any permissions or sanctions issued by any government or governmental organization, including, but not limited to, licenses, permits, accreditations, authorizations, registrations, certifications, certificates of occupancy, and certificates of need.

S. "Intellectual Property" means intellectual property of any kind including, but not limited to, patents, patent applications, mask works, trademarks, service marks, copyrights, trade dress, commercial names, internet web sites, internet domain names, inventions, discoveries, written and unwritten know-how, trade secrets, and proprietary information.

T. "Monitor" means the person appointed as Monitor in this Order.

U. "Person" means any individual, partnership, firm, corporation, association, trust, unincorporated organization, or other entity or governmental body.

V. "Relevant Notice Area" means the areas and veterinary clinics identified in Non-Public Appendix B to this Order.

W. "Relevant Employees" means any and all full-time employees, part-time employees, or contract employees, including but not limited to veterinarians, who work or worked at the Divestiture Clinics at any time during the 90 days preceding the date the Acquisition is completed or at any time after the date the Acquisition is completed, and whose duties relate or related to the Divestiture Clinic.

X. "Respondents" means Agnaten and NVA, collectively or individually.

Y. "Specialty Veterinarian" means a veterinarian who (i) legally holds himself or herself out as a specialist in veterinary medicine, and (ii) has board certification, in one, or more, of the following specialties: internal medicine, neurology, oncology, ophthalmology, radiation oncology, or surgery.

Z. "Specialty Veterinary Clinic" means a clinic where a Specialty Veterinarian practices.

AA. "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.

BB. "Transitional Services" means support services regarding the transfer and operation of the Divestiture Clinics, including, but not limited to, administrative assistance, assistance relating to billing, accounting, governmental regulation, human resources management, information systems, clinical assistance, and purchasing, as well as providing assistance in acquiring and obtaining access to all software used in the provision of such services.

II. Divestiture

IT IS FURTHER ORDERED that:

A. Respondents shall, within 10 days after the Acquisition Date, absolutely and in good faith, divest the Divestiture Clinics to MedVet, including all Clinic Assets related to those clinics, pursuant to and in accordance with the Divestiture Agreements, as ongoing businesses.

Provided, however, if, at the time the Commission determines to make this Order final, the Commission notifies Respondents that MedVet is not an acceptable Acquirer then, after receipt of such written notification: (1) Respondents shall immediately notify the unacceptable Acquirer of the notice received from the Commission and shall as soon as practicable, but no later than 5 business days, effect the rescission of the relevant Divestiture Agreement; and (2) Respondents shall, within 6 months of the date Respondents receive notice of such determination from the Commission, divest the Divestiture Clinics and Clinic Assets, as applicable, absolutely and in good faith, at no minimum price, as ongoing businesses to an Acquirer or Acquirers that receive the prior approval of the Commission and only in a manner that receives the prior approval of the Commission.

Provided further, however, that if, at the time the Commission determines to make this Order final, the Commission notifies Respondents that the manner in which any of the divestitures accomplished is not acceptable, the Commission may direct Respondents, or appoint a Divestiture Trustee, to effect such modifications to the manner of divestiture including, but not limited to, entering into additional agreements or arrangements, as the Commission may determine are necessary to satisfy the requirements of this Order.

B. Respondent Agnaten shall not acquire Respondent NVA until it has obtained for all the Divestiture Clinics:

1. All approvals for the assignment to the Acquirer of the rights, title, and interest to each lease for real property of each Divestiture Clinic; and

2. Any and all Governmental Approvals necessary for the Acquirer to operate each Divestiture Clinic, as of the Divestiture Date, in substantially the same manner as the applicable Respondent operated such Divestiture Clinic.

C. At the option of the Acquirer, Respondents shall grant the Acquirer a royalty-free, worldwide, non-exclusive license for the use, without any limitation, of any Intellectual Property necessary to operate the Divestiture Clinics, including but not limited to, any hospital management software, to use for a period of 1 year following the Divestiture Date.

D. Respondents:

1. Shall not disclose Confidential Business Information relating exclusively to any of the Divestiture Clinics to any Person other than the Acquirer of the Divestiture Clinics; and

2. After the Divestiture Date:

   a. Shall not use Confidential Business Information relating exclusively to any of the Divestiture Clinics for any purpose other than for complying with the terms of this Order, for complying with any law, or for the purposes of billing and collections; and

   b. Shall destroy all records of Confidential Business Information relating exclusively to any of the Divestiture Clinics, except to the extent that: (i) Respondents are required by law to retain such information, and (ii) Respondents' inside or outside attorneys may keep one copy solely for archival purposes, but may not disclose such copy to the rest of Agnaten or NVA, respectively.

E. The purpose of the divestiture is to ensure the continuation of the Divestiture Clinics as ongoing viable businesses engaged in the same business in which the assets were engaged at the time of the announcement of the Acquisition, and to remedy the lessening of competition resulting from the Acquisition as alleged in the Commission's Complaint in this matter.

III. Divestiture Agreements

IT IS FURTHER ORDERED that**:**

A. The Divestiture Agreements shall be incorporated by reference into this Order and made a part hereof, and any failure by Respondents to comply with the terms of the Divestiture Agreements shall constitute a violation of this Order; provided, however, that the Divestiture Agreements shall not limit, or be construed to limit, the terms of this Order. To the extent any provision in the Divestiture Agreements varies from or conflicts with any provision in the Order such that Respondents cannot fully comply with both, Respondents shall comply with the Order.

B. Respondents shall not modify or amend the terms of the Divestiture Agreements after the Commission issues the Order without the prior approval of the Commission, except as otherwise provided in Commission Rule 2.41(f)(5), 16 C.F.R. § 2.41(f)(5).

IV. Asset Maintenance

IT IS FURTHER ORDERED that, until the Divestiture Date, Respondents shall:

A. Maintain each of the Divestiture Clinics and all Clinic Assets in substantially the same condition (except for normal wear and tear) as they existed at the time Respondents sign the Consent Agreement;

B. Take such actions that are consistent with the past practices of Respondents in connection with each Divestiture Clinic and all the Clinic Assets, and that are taken in the ordinary course of business and in the normal day-to-day operations of the Divestiture Clinics;

C. Keep available the services of the current officers, employees, and agents of Respondents; and maintain the relations and goodwill with suppliers, veterinarians, landlords, patients, employees, agents, and others having business relations with the Divestiture Clinics and the Clinic Assets; and

D. Preserve the Divestiture Clinics and Clinic Assets as ongoing businesses and not take any affirmative action, or fail to take any action within Respondents' control, as a result of which the viability, competitiveness, and marketability of the Divestiture Clinics and Clinic Assets would be diminished.

V. Employees

IT IS FURTHER ORDERED that, Respondents:

A. Shall, no later than 10 days after a request from an Acquirer, provide the Acquirer with the following information for each Relevant Employee, and, to the extent known and applicable, each independent contractor who has worked at a Divestiture Clinic since June 3, 2019, as and to the extent permitted by law (unless such information has already been provided):

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 Acquirer's option, copies of all employee benefit plans and summary plan descriptions (if any) applicable to the Relevant Employee.

B. Shall, within a reasonable time after a request from an Acquirer, provide to the 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. Shall not interfere, directly or indirectly, with the hiring or employing by the Acquirer of any Relevant Employees, not offer any incentive to such employees to decline employment with the Acquirer, and not otherwise interfere with the recruitment of any Relevant Employee by 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 V 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.

D. Shall remove any impediments within the control of Respondents that may deter Relevant Employees from accepting employment with an 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 an Acquirer, and shall not make any counteroffer to a Relevant Employee who receives a written offer of employment from an Acquirer; *provided, however*, that nothing in this Order shall be construed to require Respondents to terminate the employment of any employee or to prevent Respondents from continuing the employment of any employee.

E. Shall provide reasonable financial incentives for Relevant Employees, as identified by Respondents and any Acquirer, to continue in their positions. Such incentives may include, but are not limited to, guaranteeing a retention bonus for the veterinarians at the Divestiture Clinics to assure their continued employment at such clinic, a continuation 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. Shall not, for a period of one (1) year following the Divestiture Date of the particular Divestiture Clinic, hire a Relevant Employee that is a doctor of veterinary medicine to work at any of Respondents' veterinary clinics in the areas identified in Appendix A, related to that particular Divestiture Clinic.

Provided however, Respondent Agnaten may offer part-time contract hours to a doctor of veterinary medicine at a particular Divestiture Clinic, who has been working as a part-time contract veterinarian for Respondent Agnaten or NVA in the areas identified in Appendix A related to that particular Divestiture Clinic, if the part-time contract hours offered by Respondent Agnaten would not, in any way, interfere with the veterinarian's ability to fulfill his or her employment responsibilities to the Acquirer.

Provided further, however, that this Paragraph V shall not prohibit Respondents from making offers of employment to or employing any Relevant Employee that is a doctor of veterinary medicine if an Acquirer has notified Respondents in writing that the Acquirer does not intend to make an offer of employment to that employee, or where the employee's employment has been terminated by the Acquirer.

G. Shall not, for a period of 2 years following the Divestiture Date of any Divestiture Clinic, directly or indirectly, solicit or otherwise attempt to induce any of the Relevant Employees who have accepted offers of employment with an 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. Subject to Paragraph V.F, above, 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 V shall not prohibit Respondents from making offers of employment to or employing any Relevant Employee if an 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. Transition Assistance

IT IS FURTHER ORDERED that, at the request of an Acquirer, for a period not to exceed one (1) year, 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 Clinics, and to provide veterinary services at the Divestiture Clinics in substantially the same manner that Respondents have operated the Divestiture Clinics; and

B. Respondents shall provide the Transitional Services required by this Paragraph VI at substantially the same level and quality as such services are provided by Respondents at the Divestiture Clinics.

Provided, however, that Respondents shall not (i) require any Acquirer to pay compensation for Transitional Services that exceeds the Direct Cost of providing such goods and services, or (ii) terminate their obligation to provide Transitional Services because of a breach by the Acquirer of any agreement to provide such assistance unless Respondents are unable to provide such services due to such breach.

VII. Monitor

IT IS FURTHER ORDERED that:

A. Thomas Carpenter shall be appointed Monitor to ensure that Respondents expeditiously comply with all of their obligations and perform all of their responsibilities as required by the Order.

B. No later than one (1) day after the Acquisition Date, Respondents shall, pursuant to the Monitor Agreement, attached as Appendix C and Non-Public Appendix D (Compensation) to this Order, transfer to the Monitor all the rights, powers, and authorities necessary to permit the Monitor to perform his duties and responsibilities in a manner consistent with the purposes of this Order.

C. In the event a substitute Monitor is required, the Commission shall select the Monitor, subject to the consent of Agnaten, which consent shall not be unreasonably withheld. If Agnaten has not opposed, in writing, including the reasons for opposing, the selection of a proposed Monitor within 10 days after notice by the staff of the Commission to Agnaten of the identity of any proposed Monitor, Agnaten shall be deemed to have consented to the selection of the proposed Monitor. Not later than ten 10 days after appointment of a substitute Monitor, Agnaten 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's compliance with the terms of this Order and the Divestiture Agreements in a manner consistent with the purposes of this Order.

D. Respondents shall consent to the following terms and conditions regarding the powers, duties, authorities, and responsibilities of the Monitor:

1. The Monitor shall have the power and authority to monitor Respondents' compliance with the terms of this Order and the Divestiture Agreements, and shall exercise such power and authority and carry out the duties and responsibilities of the Monitor in a manner consistent with the purposes of this Order and in consultation with the Commission, including, but not limited to:

   a. Ensuring that Respondents expeditiously comply with all obligations and perform all responsibilities as required by this Order, and the Divestiture Agreements;

   b. Monitoring any transition services agreements; and

   c. Ensuring that Confidential Business Information is not received or used by Respondents, except as allowed in this Order.

2. The Monitor shall serve as an independent third party and not as an employee or agent of any Respondent or of the Commission.

3. The Monitor shall serve for such time as is necessary to monitor Respondents' compliance with the provisions of this Order and the Divestiture Agreements.

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

   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 Divestiture Agreements.

5. The Monitor shall serve, without bond or other security, at the expense of Respondents, on such reasonable and customary terms and conditions as the Commission may set. The Monitor shall have authority to employ, at the expense of Respondent Agnaten, such consultants, accountants, attorneys and other representatives and assistants as are reasonably necessary to carry out the Monitor's duties and responsibilities. The Monitor shall account for all expenses incurred, including fees for services rendered, subject to the approval of the Commission.

6. Respondent Agnaten 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.

7. Respondent Agnaten shall report to the Monitor in accordance with the requirements of this Order and/or as otherwise provided in any agreement approved by the Commission. The Monitor shall evaluate the reports submitted to the Monitor by Respondent Agnaten, and any reports submitted by the Acquirer with respect to the performance of Respondent's obligations under this Order and the Divestiture Agreements.

8. Within one (1) month from the date the Monitor is appointed pursuant to this Paragraph VII, every 60 days thereafter, and otherwise as requested by the Commission, the Monitor shall report in writing to the Commission concerning performance by Respondents of their obligations under this Order, and the Divestiture Agreements.

9. Respondents may require the Monitor and each of the Monitor's consultants, accountants, attorneys, and other representatives and assistants to sign a customary confidentiality agreement; *Provided, however*, such agreement shall not restrict the Monitor from providing any information to the Commission.

E. The Commission may, among other things, require the Monitor and each of the Monitor's consultants, accountants, attorneys, and other representatives and assistants, to sign an appropriate confidentiality agreement relating to Commission materials and information received in connection with the performance of the Monitor's duties.

F. If the Commission determines that the Monitor has ceased to act or failed to act diligently, the Commission may appoint a substitute Monitor in the same manner as provided in this Paragraph VII.

G. The Commission may on its own initiative, or at the request of the Monitor, issue such additional orders or directions as may be necessary or appropriate to assure compliance with the requirements of this Order and the Divestiture Agreements.

H. A Monitor appointed pursuant to this Order may be the same Person appointed as a Divestiture Trustee pursuant to this Order.

VIII. Divestiture Trustee

IT IS FURTHER ORDERED that:

A. If Respondents have not fully complied with the obligations imposed by Paragraph II of this Order, the Commission may appoint a Divestiture Trustee to divest any remaining Divestiture Clinics, 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 VIII shall preclude the Commission or the Attorney General from seeking civil penalties or any other relief available to it, including a court-appointed Divestiture Trustee, pursuant to 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 VIII, 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 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 VIII 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 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, 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 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 VIII.

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

IX. Prior Notice

IT IS FURTHER ORDERED that:

A. For a period of 10 years from the date this Order is issued, Respondent Agnaten shall not, without providing advance written notification to the Commission in the manner described in this Paragraph IX:

1. Acquire any assets of, or financial interest in, any veterinary clinic identified, or located in, the Relevant Notice Areas; or

2. Enter into any contract to participate in the management, operation, or control of any veterinary clinic identified, or located in, the Relevant Notice Areas.

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 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 30 days after submitting such additional information or documentary material. Early termination of the waiting periods in this Paragraph IX 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 IX 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. Compliance

IT IS FURTHER ORDERED that:

A. Respondents shall:

1. Notify Commission staff via email at bccompliance@ftc.gov of the Acquisition Date and of the Divestiture Date no later than 5 days after the occurrence of each; and

2. Submit the complete Divestiture Agreement to the Commission at ElectronicFilings@ftc.gov and bccompliance@ftc.gov no later than 30 days after the Divestiture Date.

B. Respondent Agnaten shall file verified written reports ("compliance reports") in accordance with the following:

1. Respondents shall submit interim compliance reports 30 days after the Order is issued, and every 60 days thereafter until Respondents have fully complied with the provisions of Paragraph II and Paragraph V (where applicable); annual compliance reports one year after the date this Order is issued, and annually for the next 5 years on the anniversary of that date; and additional compliance reports as the Commission or its staff may request;

2. Each compliance report shall contain sufficient information and documentation to enable the Commission to determine independently whether Respondents are in compliance with the Order. Conclusory statements that Respondents have complied with their obligations under the Order are insufficient. Respondents shall include in their reports, among other information or documentation that may be necessary to demonstrate compliance:

a. a full description of the measures Respondents have implemented or plan to implement to ensure that they have complied or will comply with each paragraph of the Order; and

b. an identification of any and every Relevant Employee hired by Respondents, including a detailed explanation as to why hiring that Relevant Employee does not violate this Order.

3. Respondent Agnaten shall retain all material written communications with each party identified in the compliance report and all non-privileged internal memoranda, reports, and recommendations concerning fulfilling Respondent's obligations under the Order and provide copies of these documents to Commission staff upon request.

4. Respondent Agnaten shall verify each compliance report in the manner set forth in 28 U.S.C. § 1746 by the Chief Executive Officer or another officer or employee specifically authorized to perform this function. Respondent shall submit an original and 2 copies of each compliance report as required by Commission Rule 2.41(a), 16 C.F.R. § 2.41(a), including a paper original submitted to the Secretary of the Commission and electronic copies to the Secretary at ElectronicFilings@ftc.gov and to the Compliance Division at bccompliance@ftc.gov. In addition, Respondent shall provide a copy of each compliance report to the Monitor if the Commission has appointed one in this matter.

XI. Change in Respondents

IT IS FURTHER ORDERED that Respondent Agnaten shall notify the Commission at least 30 days prior to:

A. Any proposed dissolution of Agnaten SE;

B. Any proposed acquisition, merger, or consolidation of Agnaten SE; and

C. Any other change in Respondent Agnaten 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. Access

IT IS FURTHER ORDERED that, for purposes of determining or securing compliance with this Order, and subject to any legally recognized privilege, and upon written request and upon 5 days' notice to the applicable Respondent made to its 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. Term

IT IS FURTHER ORDERED that this Order shall terminate on April 9, 2030.

By the Commission.

ANALYSIS OF CONSENT ORDERS TO AID PUBLIC COMMENT

I. INTRODUCTION

The Federal Trade Commission ("Commission") has accepted, subject to final approval, an Agreement Containing Consent Orders ("Consent Agreement") with Agnaten SE, the owner of Veterinary Specialists of North America, LLC and Compassion-First Pet Hospitals ("Compassion First") and NVA Parent Inc. ("NVA"), which is designed to remedy the anticompetitive effects that would result from Compassion First's proposed acquisition of NVA.

Pursuant to a Stock Purchase Agreement dated June 3, 2019, Compassion First proposes to acquire all of the assets of NVA in a transaction valued at approximately $5 billion (the "Acquisition"). Both parties provide specialty and emergency veterinary services in clinics located throughout the United States. The Commission alleges in its Complaint 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 lessening competition in the markets for certain specialty and emergency veterinary services in three different localities in the United States.[1] The proposed Consent Agreement will remedy the alleged violations by preserving the competition that would otherwise be eliminated by the Acquisition. Specifically, under the terms of the Consent Agreement, Compassion First is required to divest three clinics, one in each area,[2] to MedVet Associates, LLC ("MedVet"), an operator of specialty and emergency veterinary clinics elsewhere in the country.

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 review the proposed Consent Agreement as well as any comments received, and decide whether it should withdraw, modify, or make the Consent Agreement final.

II. THE RELEVANT MARKETS AND MARKET STRUCTURES

The relevant lines of commerce in which to analyze the Acquisition are individual specialty veterinary services and emergency veterinary services. Specialty veterinary services are required in cases where a general practitioner veterinarian does not have the expertise or equipment necessary to treat the sick or injured animal. General practitioner veterinarians commonly refer such cases to a specialist, typically a doctor of veterinary medicine who is board certified in the

1 In the area around Asheville, North Carolina and Greenville, South Carolina, two Compassion First facilities compete closely with an NVA facility to provide internal medicine, oncology, ophthalmology, and surgery veterinary specialty services and emergency veterinary services. In the area between Norwalk, Connecticut and Yonkers, New York, each merging party has a clinic that provides neurology and radiation oncology veterinary specialty services that compete closely. Finally, in the area surrounding Fairfax and Manassas, Virginia, a Compassion First facility and an NVA facility compete closely to provide emergency veterinary services.

2 The divested clinics are NVA's R.E.A.C.H. Specialty Clinic in Asheville, North Carolina; Compassion First's Veterinary Referral Center of Northern Virginia in Manassas, Virginia; and Compassion First's Veterinary Care Center in Norwalk, Connecticut.

relevant specialty. Individual veterinary specialties include internal medicine, neurology, oncology, ophthalmology, radiation oncology, and surgery. Emergency veterinary services are those used in acute situations where a general practice veterinarian is not available or, in some cases, not trained or equipped to treat the patient's medical problem.

The relevant areas for the provision of specialty and emergency veterinary services are local, delineated by the distance and time that pet owners travel to receive treatment. The distance and time customers travel for specialty services are highly dependent on local factors, such as the proximity of a clinic offering the required specialty service, appointment availability, population density, demographics, traffic patterns, or specific local geographic barriers.

The Acquisition is likely to result in consumer harm in markets for the provision of the following services in the following localities:

a. internal medicine, oncology, ophthalmology, and surgery specialty veterinary services and emergency veterinary services in and around Asheville, North Carolina and Greenville, South Carolina;

b. neurology and radiation oncology specialty veterinary services in the area between Norwalk, Connecticut and Yonkers, New York; and

c. emergency veterinary services in and around Fairfax and Manassas, Virginia.

All of these relevant markets are currently highly concentrated, and the Acquisition would substantially increase concentration in each market. In some cases, the combined firm would be the only provider following the transaction. In other markets, consumers would only have one remaining alternative to the combined firm following the transaction.

III. ENTRY

Entry into the relevant markets would not be timely, likely, or sufficient in magnitude, character, and scope to deter or counteract the anticompetitive effects of the Acquisition. For *de novo* entrants, obtaining financing to build a new specialty or emergency veterinary facility and acquiring or leasing necessary equipment can be expensive and time consuming. The investment is risky for specialists that do not have established practices and bases of referrals in the area. Further, to become a licensed veterinary specialist requires extensive education and training, significantly beyond that required to become a general practitioner veterinarian. Consequently, veterinary specialists are often in short supply, and recruiting them to move to a new area frequently takes more than two years, making timely expansion by existing specialty clinics particularly difficult.

IV. EFFECTS OF THE ACQUISITION

The Acquisition, if consummated, may substantially lessen competition in each of the relevant markets by eliminating close, head-to-head competition between Compassion First and NVA for the provision of specialty and emergency veterinary services. In some markets, the

Acquisition will result in a merger to monopoly. The Acquisition increases the likelihood that Compassion First will unilaterally exercise market power and cause customers to pay higher prices for, or receive lower quality, relevant services.

V. THE CONSENT AGREEMENT

The proposed Consent Agreement remedies the Acquisition's anticompetitive effects in each market by requiring the parties to divest a facility to MedVet in all three localities. The divestitures will preserve competition between the divested clinics and the combined firm's clinics. MedVet is a qualified acquirer of the divested assets because it has significant experience acquiring, integrating, and operating specialty and emergency veterinary clinics, and it does not currently operate or have plans to operate any veterinary clinics in the relevant markets.

The Consent Agreement requires the divestiture of all regulatory permits and approvals, confidential business information, including customer information, and other assets associated with providing specialty and emergency veterinary care at the divested clinics. To ensure the divestiture is successful, the Consent Agreement also requires Compassion First and NVA to secure all third-party consents, assignments, releases, and waivers necessary to conduct business at the divested clinics.

The Consent Agreement also requires Compassion First and NVA to provide reasonable financial incentives to certain employees to encourage them to stay in their current positions. Such incentives may include, but are not limited to, guaranteed retention bonuses for specialty veterinarians at divestiture clinics. These incentives will encourage veterinarians to continue working at the divestiture clinics, which will ensure that MedVet is able to continue operating the clinics in a competitive manner.

Finally, the Consent Agreement contains several other provisions to ensure that the divestitures are successful. First, the Consent Agreement prevents Compassion First from hiring specialty or emergency veterinarians affiliated with the divested clinics for a period of one year. This provides MedVet with sufficient time to build working relationships with these important employees before Compassion First would be able to hire them back. Second, Compassion First will be required to provide transitional services for a period of one year to ensure MedVet continues to operate the divested clinics effectively as it implements its own quality care, billing, and supply systems. Finally, the Consent Agreement requires Compassion First to provide prior notice to the Commission of plans to acquire certain specialty or emergency veterinary clinics for a period of ten years from the date the Commission issues the Order.

The Order requires Compassion First and NVA to divest the clinics no later than ten business days after the consummation of the Acquisition.

The Commission has appointed Thomas A. Carpenter, D.V.M., as Monitor to ensure that Compassion First and NVA comply with all of their obligations pursuant to the Consent Agreement and to keep the Commission informed about the status of the transfer of rights and assets to MedVet. Dr. Carpenter possesses relevant experience and expertise regarding issues relevant to the divestiture, including experience as a monitor in previous FTC matters.

Analysis to Aid Public Comment

If the Commission determines that MedVet 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 and assets to MedVet and divest them to a Commission-approved acquirer within six months of the date on which the Consent Agreement becomes final. In that circumstance, the Commission may appoint a trustee to divest the rights and assets if the parties fail to divest them as required.

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

Complaint

IN THE MATTER OF

ONE ROCK CAPITAL PARTNERS II, LP, FXI HOLDINGS, INC., BAIN CAPITAL FUND XI, LP, AND INNOCOR, 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-4708; File No. 191 0087
Complaint, February 21, 2020 – Decision, April 20, 2020

This consent order addresses the $850 million acquisition by FXI Holdings, Inc. of certain assets of Innocor Inc. The complaint alleges that the Acquisition, if consummated, would violate Section 7 of the Clayton Act and Section 5 of the FTC Act by substantially lessening competition in several regional markets for low-density conventional polyurethane foam for home furnishing uses in the United States. The consent order requires the parties to divest foam-pouring plants located in Kent, Washington; Elkhart, Indiana; and Tupelo, Mississippi to Future Foam.

Participants

For the *Commission*: *Cem Akleman, Llewellyn Davis, Josh Goodman, Joonsuk Lee,* and *Blake Risenmay.*

For the *Respondents*: *Amanda P. Reeves, Latham & Watkins LLP; Jonathan Klarfeld, Ropes & Gray.*

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 FXI Holdings, Inc. (FXI), an indirect subsidiary of Respondent One Rock Capital Partners II, LP (One Rock) and Respondent Innocor, Inc. (Innocor), an indirect subsidiary of Respondent Bain Capital Fund XI, LP (Bain) (each a "Respondent" or collectively "Respondents"), have agreed to an acquisition, 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 One Rock Capital Partners II, LP is a limited partnership organized, existing, and doing business under and by virtue of the laws of Delaware, with its executive offices and principal place of business located at 30 Rockefeller Plaza, 54th Floor, New York, NY 10112.

2. Respondent FXI Holdings, Inc. is a corporation organized, existing, and doing business under and by virtue of the laws of Delaware, with its executive offices and principal place of business located at 100 Matsonford Road, 5 Radnor Corporate Center, Suite 300, Radnor, PA 19087-4560.

3. Respondent Bain Capital Fund XI, LP is a limited partnership organized, existing, and doing business under and by virtue of the laws of the Cayman Islands, with its executive offices and principal place of business located at 200 Clarendon Street, Boston, MA 02116.

4. Respondent Innocor, Inc. is a corporation, existing, organized, and doing business under and by virtue of the laws of New Jersey, with its executive offices and principal place of business located at 200 Schulz Drive, Red Bank, NJ 07701.

II. JURISDICTION

5. Respondents FXI and Innocor, 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.

III. THE PROPOSED MERGER

6. Pursuant to an Agreement and Plan of Merger (the "Merger Agreement") dated March 4, 2019, FXI and Innocor have agreed to a merger (the "Merger") in which One Rock and Bain will own 74% and 26% of the combined firm, respectively.

IV. THE RELEVANT PRODUCT MARKET

7. The relevant line of commerce in which to analyze the effects of the Merger is the sale of Low-Density Conventional Polyurethane Foam used in Home Furnishings ("Low-Density Foam"). Low-Density Foam, commonly referred to as "light and white" foam, is used as padding or cushioning in a variety of home furnishing products including mattresses, mattress toppers, pet beds, pillows, chairs, and couches. Customers do not have viable substitutes for Low-Density Foam.

V. THE RELEVANT GEOGRAPHIC MARKETS

8. Regional geographic markets are appropriate here. Low-Density Foam is bulky to ship because it contains a significant amount of air, and freight costs can be expensive relative to the value of the product. Three relevant geographic markets—the Pacific Northwest, Midwest States, and Mississippi—are appropriate to analyze the probable effects of the Merger. The Pacific Northwest geographic market includes the states of Oregon and Washington and the Midwest States geographic market includes the states of Indiana, Michigan, and Ohio.

VI. MARKET STRUCTURE

9. FXI and Innocor are two of only five major suppliers of Low-Density Foam in the United States.

10. In the Pacific Northwest, FXI and Innocor are the only suppliers of Low-Density Foam.

11. In the Midwest States, FXI and Innocor are two of the three major suppliers of Low-Density Foam.

12. In Mississippi, FXI and Innocor are two of the four major suppliers of Low-Density Foam.

13. In each of the relevant markets, the Merger would result in highly concentrated markets and a significant increase in concentration under the standards set forth in the 2010 U.S. Department of Justice and Federal Trade Commission Horizontal Merger Guidelines and the relevant case law, and, therefore, the Merger is presumptively unlawful.

VII. ENTRY CONDITIONS

14. Entry into the relevant markets described in Paragraphs 7 and 8 would not be timely, likely, or sufficient in magnitude, character, and scope to deter or counteract the expected anticompetitive effects of the Merger.

VIII. EFFECTS OF THE MERGER

15. The effects of the Merger, if consummated, may be to substantially lessen competition in the relevant lines of commerce, 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:

a. by increasing the likelihood of coordination and parallel accommodating conduct among the remaining competitors in the relevant market; and

b. by eliminating direct and substantial competition between FXI and Innocor.

IX. VIOLATIONS CHARGED

16. The allegations contained in Paragraphs 1 through 15 above are hereby incorporated by reference as though fully set forth here.

17. The Merger described in Paragraph 6, if consummated, would constitute a violation of Section 7 of the Clayton Act, as amended, 15 U.S.C. § 18.

18. The Merger described in Paragraph 6, if consummated, would constitute a violation of Section 5 of the FTC Act, as amended, 15 U.S.C. § 45.

19. The Merger Agreement described in Paragraph 6 constitutes a violation of Section 5 of the FTC Act, as amended, 15 U.S.C. § 45.

WHEREFORE, THE PREMISES CONSIDERED, the Federal Trade Commission on this twenty-first day of February, 2020, issues its complaint against said Respondents.

By the Commission.

ORDER TO MAINTAIN ASSETS

The Federal Trade Commission ("Commission") initiated an investigation of the proposed acquisition by Respondent FXI Holdings, Inc., an indirect subsidiary of Respondent One Rock Capital Partners II, LP, of Respondent Innocor, Inc., an indirect subsidiary of Respondent Bain Capital Fund XI, LP (each a "Respondent," and collectively "Respondents"). The Commission's Bureau of Competition prepared and furnished to Respondents the Draft Complaint, which it proposed to present to the Commission for its consideration. If issued by the Commission, the Draft Complaint 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.

Respondents and the Bureau of Competition executed an Agreement Containing Consent Order ("Consent Agreement") containing (1) an admission by Respondents of all the jurisdictional facts set forth in the Draft Complaint, (2) a statement that the signing of said agreement is for settlement purposes only and does not constitute an admission by Respondents that the law has been violated as alleged in the Draft Complaint, or that the facts as alleged in the Draft Complaint, other than jurisdictional facts, are true, (3) waivers and other provisions as required by the Commission's Rules, and (4) a proposed Decision and Order and Order to Maintain Assets.

The Commission considered the matter and determined to accept the executed Consent Agreement and to place such Consent Agreement on the public record for a period of 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 issues its Complaint, makes the following jurisdictional findings and issues this Order to Maintain Assets:

1. Respondent One Rock Capital Partners II, LP is a limited partnership organized, existing, and doing business under and by virtue of the laws of Delaware, with its executive offices and principal place of business located at 30 Rockefeller Plaza, 54th Floor, New York, NY 10112.

2. Respondent FXI Holdings, Inc. is a corporation organized, existing, and doing business under and by virtue of the laws of Delaware, with its executive offices and principal place of business located at 100 Matsonford Road, 5 Radnor Corporate Center, Suite 300, Radnor, PA 19087-4560.

3. Respondent Bain Capital Fund XI, LP is a limited partnership organized, existing, and doing business under and by virtue of the laws of the Cayman Islands, with its executive offices and principal place of business located at 200 Clarendon Street, Boston, MA 02116.

4. Respondent Innocor, Inc. is a corporation, existing, organized, and doing business under and by virtue of the laws of New Jersey, with its executive offices and principal place of business located at 200 Schulz Drive, Red Bank, NJ 07701.

5. 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. Definitions

IT IS HEREBY ORDERED that, as used in this Order to Maintain Assets, the following definitions, and all other definitions used in the Consent Agreement and the Decision and Order, shall apply:

A. "Asset Maintenance Period" means the period commencing on the date the Commission issues this Order to Maintain Assets and ending on the last Divestiture Date.

B. "Assets To Be Maintained" means the Polyurethane Foam Assets and the Polyurethane Foam Business.

C. "Decision and Order" means:

1. The proposed Decision and Order contained in the Consent Agreement in this matter, until issuance of a final Decision and Order by the Commission; and

2. The final Decision and Order, once it is issued by the Commission in this matter.

Order to Maintain Assets

II. Asset Maintenance

IT IS FURTHER ORDERED that during the Asset Maintenance Period, Respondents shall operate the Assets To Be Maintained in the ordinary course of business consistent with past practices, and shall:

A. Take such actions as are necessary to maintain the full economic viability, marketability, and competitiveness of the Assets To Be Maintained, to minimize any risk of loss of competitive potential of the Assets To Be Maintained, to operate the Assets To Be Maintained in a manner consistent with applicable laws and regulations, and to prevent the destruction, removal, wasting, deterioration, or impairment of the Assets To Be Maintained (including regular repair and maintenance efforts), except for ordinary wear and tear. Respondents shall not sell, transfer, encumber, terminate the operations of, or otherwise impair the Assets To Be Maintained (other than in the manner prescribed in the Decision and Order and this Order to Maintain Assets), nor take any action that lessens the full economic viability, marketability, or competitiveness of the Assets To Be Maintained; and

B. Conduct or cause to be conducted the Assets To Be Maintained in the regular and ordinary course of business and in accordance with past practice and as may be necessary to preserve the full economic viability, marketability, and competitiveness of the Assets To Be Maintained, and shall use best efforts to preserve the existing relationships with suppliers, customers, employees, governmental authorities, vendors, landlords, creditors, agents, and others having business relationships with the Assets To Be Maintained. Included in the above obligations, Respondents shall:

1. Make any payment required to be paid under any contract or lease when due, and otherwise satisfy all liabilities and obligations associated with the Assets To Be Maintained;

2. Provide the Assets To Be Maintained with sufficient financial and other resources to operate at least at current rates of operation, to meet all capital calls, to perform routine or necessary maintenance, to repair or replace facilities and equipment, and to carry on at least at their scheduled pace all capital projects, business plans, development projects, and commercial activities;

3. Provide such other resources as may be necessary to respond to competition against the Assets To Be Maintained, prevent diminution in sales of the Assets To Be Maintained, and maintain the competitive strength of the Assets To Be Maintained;

4. Provide support services at levels customarily provided by Respondents;

5. Maintain all licenses, permits, approvals, authorizations, or certifications related to or necessary for the operation of the Assets To Be Maintained, and otherwise operate the Assets To Be Maintained in accordance and compliance with all regulatory obligations and requirements;

6. Maintain the Business Information of the Assets To Be Maintained;

7. Maintain the working conditions, staffing levels, and a work force of equivalent size, training, and expertise associated with the Assets To Be Maintained, including:

   a. Continuing to provide each of the Polyurethane Foam Employees with all employee benefits offered by Respondents, including regularly scheduled or merit raises and bonuses, and regularly scheduled vesting of all benefits;

   b. Providing reasonable financial incentives to encourage Polyurethane Foam Employees to continue in his or her position until the Divestiture Date, and as may be necessary to facilitate the employment of such Polyurethane Foam Employees by the proposed Acquirer following the Divestiture Date;

   c. When vacancies occur, replacing the employees in the regular and ordinary course of business, in accordance with past practice; and

   d. Not transferring any of the Polyurethane Foam Employees to any of Respondents' assets or businesses that Respondents will not be divesting; and

8. Not reduce, change, or modify in any material respect, the levels of production, quality, pricing, service, or customer support typically associated with the Assets To Be Maintained, other than changes in the ordinary course of business.

Provided, however, that Respondents shall not be in violation of this Paragraph II if Respondents take actions (i) that are explicitly permitted or required by any Divestiture Agreement, or (ii) that have been requested or agreed-to by an Acquirer, in writing, and approved in advance by the Monitor (in consultation with Commission staff), in all cases to facilitate the Acquirer's acquisition of the Assets To Be Maintained and consistent with the purposes of the Decision and Order**.**

III. Additional Obligations

IT IS FURTHER ORDERED that:

A. Respondents, in consultation with the proposed Acquirer, for the purposes of ensuring an orderly transition, shall:

1. Develop and implement a detailed transition plan to ensure that the commencement of the operation of the Polyurethane Foam Business by the Acquirer is not delayed or impaired by the Respondents;

2. Designate employees of Respondents knowledgeable about the operation of the Polyurethane Foam Assets and Polyurethane Foam Business, who will be responsible for communicating directly with the Acquirer, and the Monitor (if one has been appointed), for the purposes of assisting in the transfer to the Acquirer of the Polyurethane Foam Assets and Polyurethane Foam Business;

3. Allow the Acquirer reasonable access to all Business Information related to the Polyurethane Foam Assets and Polyurethane Foam Business and to employees who possess or are able to locate such information; and

4. Establish projected timelines for accomplishing all tasks necessary to effectuate the transition to the Acquirer in an efficient and timely manner.

B. Respondents shall:

1. Not provide, disclose, or otherwise make available any Confidential Business Information to any person, except as required or permitted by this Order to Maintain Assets, the Decision and Order, or a Divestiture Agreement;

2. Not use any Confidential Business Information for any reason or purpose, other than as required or permitted by this Order to Maintain Assets, the Decision and Order, or a Divestiture Agreement;

3. To the extent practicable, maintain Confidential Business Information separate and apart from other data or information of the Respondents; and

4. Following the Acquisition Date, ensure that Confidential Business Information is not shared with Respondents' employees engaged in polyurethane foam production or sales activities in any of the Relevant Areas, other than employees who had access to the information prior to the Acquisition Date in the normal course of business and subject to the provisions of III.B.1 and III.B.2 above;

Provided, however, that nothing in this Paragraph III shall prevent Respondents from retaining and using any tangible or intangible property that Respondents retain the right to use pursuant to the Decision and Order (including Shared Intellectual Property), provided further that to the extent that the use of such property involves disclosure of Confidential Business Information to another person, Respondents shall require such person to maintain the confidentiality of such Confidential Business Information under terms no less restrictive than Respondents' obligations under this Order to Maintain Assets and the Decision and Order.

C. Respondents shall devise and implement measures to protect against the storage, distribution, and use of Confidential Business Information that is not permitted by this Order to Maintain Assets, the Decision and Order, or a Divestiture Agreement. These measures shall include, but not be limited to, restrictions placed on access by persons to information available or stored on any of Respondents' computers or computer networks.

D. No later than 10 days after the Divestiture Date, Respondents shall provide written notification of the restrictions on the use and disclosure of the Confidential Business Information by Respondents' personnel to all of its officers, directors, employees, or agents who may have possession or access to such Confidential Business Information. Respondents shall require such personnel to acknowledge in writing or electronically their receipt and understanding of these written instructions, and shall maintain custody of these written instructions and acknowledgments for inspection upon request by the Commission.

E. Notwithstanding this Paragraph III of this Order to Maintain Assets, and subject to the Decision and Order, Respondent may use Confidential Business Information:

1. For the purpose of performing Respondents' obligations under this Order to Maintain Assets, the Decision and Order, or a Divestiture Agreement; and

2. For purposes of complying with financial reporting requirements, obtaining legal advice, ensurng compliance with legal and regulatory requirements, prosecuting or defending legal claims, conducting investigations, or as otherwise required by law.

F. No later than the Divestiture Date, Respondents shall, at their sole expense, obtain each Consent required to transfer the Polyurethane Foam Assets, including Contracts and Governmental Authorizations. Respondents may satisfy this requirement for a required Consent by certifying that the Acquirer has equivalent arrangements or has otherwise directly obtained the necessary Consent.

Provided, however, it is not a violation of this provision for Respondents not to transfer a Contract or Governmental Authorization that Respondents have no legal right to assign, transfer or sublicense (even by obtaining relevant Consents) so long as (i) prior to signing the Consent Order, Respondents inform Commission staff and the Acquirer that they cannot transfer the relevant Contract or Governmental Authorization, and (ii) Respondents assist the Acquirer in obtaining an equivalent Contract or Governmental Authorization.

G. Respondents shall cooperate and assist the Acquirer (or any other person with whom Respondents engage in negotiations to acquire the Polyurethane Foam Assets) with a due diligence investigation of the Polyurethane Foam Assets and the Polyurethane Foam Business, including by providing sufficient and timely access to all information and employees customarily provided as part of a due diligence process.

H. Respondents shall cooperate with and assist any proposed Acquirer of the Polyurethane Foam Assets to evaluate independently and offer employment to the Polyurethane Foam Employees relating to each of the Polyurethane Foam Facilities, with such cooperation to include at least the following:

1. Not later than 5 business days after a request from a proposed Acquirer, Respondents shall, to the extent permitted by applicable law:

    a. Provide to the proposed Acquirer a list of all Polyurethane Foam Employees and provide Employee Information for each; and

    b. Allow the proposed Acquirer a reasonable opportunity to interview any Polyurethane Foam Employees;

2. Not later than 10 days after a request from a proposed Acquirer, Respondents shall provide an opportunity for the proposed Acquirer to:

    a. Meet personally, and outside the presence or hearing of any employee or agent of Respondents, with any of the Polyurethane Foam Employees; and

    b. Make offers of employment to any of the Polyurethane Foam Employees;

3. Respondents shall not directly or indirectly interfere with a proposed Acquirer's offer of employment to any one or more of the Polyurethane Foam Employees, not offer any incentive to Polyurethane Foam Employees to decline employment with a proposed Acquirer, and not otherwise interfere with the recruitment of any Polyurethane Foam Employees by a proposed Acquirer;

I. Respondents shall remove any impediments within the control of Respondents that may deter any Polyurethane Foam Employees from accepting employment with a proposed 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 a proposed Acquirer, and shall not make any counteroffer to any Polyurethane Foam Employees who receive an offer of employment from the Acquirer; *provided, however*, that nothing in this Order to Maintain Assets shall be construed to require Respondents to terminate the employment of any employee or prevent Respondents from continuing the employment of any employee.

IV. Monitor

IT IS FURTHER ORDERED that:

A. Edward J. Buthusiem shall serve as the Monitor pursuant to the agreement executed by the Monitor and Respondents, and attached as Appendix IV ("Monitor Agreement") and Non-Public Appendix IV-1 ("Monitor Compensation") to the Decision and Order. The Monitor is appointed to monitor Respondents' compliance with the terms of this Order to Maintain Assets, the Decision and Order, and the Divestiture Agreement.

B. No later than 1 day after the date this Order to Maintain Assets is issued, Respondents shall, pursuant to the Monitor Agreement, confer on the Monitor all rights, powers, and authorities necessary to permit the Monitor to monitor Respondents' compliance with the terms of this Order to Maintain Assets, the Decision and Order, and the Divestiture Agreement, in a manner consistent with the purposes of the orders.

C. 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 divestiture and related requirements of this Order to Maintain Assets, the Decision and Order, and the Divestiture 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 the orders.

2. The Monitor shall act in consultation with the Commission or its staff, and shall serve as an independent third party and not as an employee or agent of the Respondents or of the Commission.

3. The Monitor shall serve until 30 days after Respondents have satisfied all obligations under Paragraph II and IV of the Decision and Order, or until such other time as may be determined by the Commission or its staff.

D. 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 its obligations under this Order to Maintain Assets, the Decision and Order, and the Divestiture Agreement.

E. 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 to Maintain Assets, the Decision and Order, and the Divestiture Agreement.

F. 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 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 Monitor's duties and responsibilities.

G. Respondents shall indemnify the Monitor and hold the Monitor harmless against any losses, claims, damages, liabilities, or expenses arising out of, or in connection with, the performance of the Monitor's duties, including all reasonable fees of counsel and other reasonable expenses incurred in connection with the preparations for, or defense of, any claim, whether or not resulting in any liability, except to the extent that such losses, claims, damages, liabilities, or expenses result from gross negligence, willful or wanton acts, or bad faith by the Monitor. For purposes of this Paragraph IV.G, the term "Monitor" shall include all persons retained by the Monitor pursuant to Paragraph IV.F of this Order to Maintain Assets.

H. Respondents shall report to the Monitor in accordance with the requirements of this Order to Maintain Assets and the Decision and Order, and as otherwise provided in the Monitor Agreement approved by the Commission. The Monitor shall evaluate the reports submitted by the Respondents with respect to the performance of Respondents' obligations under this Order to Maintain Assets and the Decision and Order. Within 30 days from the date the Monitor receives the first such report, and every 90 days thereafter (and otherwise as the Commission or its staff may request), the Monitor shall report in writing to the Commission concerning performance by Respondents of their obligations under the orders. The Monitor shall submit a final report to the Commission within 30 days following the satisfaction by Respondents of all its obligations under Paragraphs II and IV of the Decision and Order, unless otherwise directed by the Commission or its staff.

I. Respondents 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 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.

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 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 10 days after the 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.

2. Not later than 10 days after the appointment of the substitute Monitor, Respondents 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 Respondents' compliance with the relevant terms of this Order to Maintain Assets, the Decision and Order, and the Divestiture Agreement in a manner consistent with the purposes of the orders and in consultation with the Commission.

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 this Order to Maintain Assets, the Decision and Order, and the Divestiture Agreement.

M. The 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.

V. Compliance Reports

IT IS FURTHER ORDERED that Respondents FXI and One Rock Capital shall file verified written reports ("compliance reports") in accordance with the following:

A. Within 30 days after this Order to Maintain Assets is issued, and every 30 days thereafter until this Order to Maintain Assets terminates, Respondents FXI and One Rock Capital shall submit to the Commission verified written reports ("compliance reports") setting forth in detail the manner and form in which Respondents intend to comply, are complying, and have complied with all provisions of this Order to Maintain Assets and the Decision and Order. Each compliance report shall contain sufficient information and documentation to enable the Commission to determine independently whether Respondents are in compliance with this Order to Maintain Assets and the Decision and Order. Conclusory statements that Respondents have complied with their obligations under this Order to Maintain Assets and the Decision and Order are insufficient. Respondents FXI and One Rock Capital shall include in their reports, among other information or documentation that may be necessary to demonstrate compliance, a full description of the measures Respondents have implemented or plan to implement to ensure that they have complied or will comply with each paragraph of this Order to Maintain Assets and the Decision and Order, and such supporting materials shall be retained and produced later if needed.

B. Each compliance report shall be verified in the manner set forth in 28 U.S.C. § 1746 by the Chief Executive Officer or another officer or employee specifically authorized to perform this function. Respondents FXI and One Rock Capital shall submit an original and 2 copies of each compliance report as required by Commission Rule 2.41(a), 16 C.F.R. § 2.41(a), including a paper original submitted to the Secretary of the Commission and electronic copies to the Secretary at ElectronicFilings@ftc.gov and to the Compliance Division at bccompliance@ftc.gov. In addition, Respondents FXI and One Rock Capital shall provide a copy of each compliance report to the Monitor if the Commission has appointed one in this matter.

Provided, however, that, after the Decision and Order in this matter is issued as final, the reports due under this Order to Maintain Assets may be consolidated with, and submitted to the Commission on the same timing as, the compliance reports required to be submitted by Respondents FXI and One Rock Capital pursuant to the Decision and Order.

VI. Change in Respondent

IT IS FURTHER ORDERED that Respondents FXI and One Rock Capital shall notify the Commission at least 30 days prior to:

A. Any proposed dissolution of FXI Holdings, Inc. or One Rock Capital Partners II, LP;

B. Any proposed acquisition, merger or consolidation of FXI Holdings, Inc. or One Rock Capital Partners II, LP; or

C. Any other change in Respondents FXI and One Rock Capital, including assignment and the creation, sale, or dissolution of subsidiaries, if such change may affect compliance obligations arising out of this Order.

VII. Access

IT IS FURTHER ORDERED that, for purposes of determining or securing compliance with this Order to Maintain Assets, and subject to any legally recognized privilege, upon written request and 5 days' notice to the relevant Respondent, made to its principal place of business as identified in this Order to Maintain Assets, registered office of its United States subsidiary, or its headquarters office, the notified 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 business and other records and all documentary material and electronically stored information as defined in Commission Rules 2.7(a)(1) and (2), 16 C.F.R. § 2.7(a)(1) and (2), in the possession or under the control of the Respondent related to compliance with this Order to Maintain Assets, which copying services shall be provided by the Respondent at the request of the authorized representative 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.

VIII. Purpose

IT IS FURTHER ORDERED that the purpose of this Order to Maintain Assets is to: (1) maintain and preserve the Assets To Be Maintained as viable, marketable, competitive, and ongoing businesses until the divestitures required by the Decision and Order are achieved; (2) prevent interim harm to competition pending the divestitures and other relief required by the Decision and Order; and (3) remedy the harm to competition the Commission alleged in its Complaint and ensure an Acquirer can operate the Polyurethane Foam Business in a manner equivalent in all material respects to the manner in which Respondents operated the Polyurethane Foam Business prior to the Acquisition.

IX. Term

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

A. 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 Respondents' (or a Divestiture Trustee's) completion of the divestitures required by Paragraph II of the Decision and Order;

Provided, however, that if at the time such divestitures have been completed, the Decision and Order in this matter is not yet final, then this Order to Maintain Assets shall terminate three business days after the Decision and Order becomes final;

Provided, further, however, that if the Commission, pursuant to Paragraph II.C of the Decision and Order, requires the Respondents to rescind the divestitures to Future Foam, then, upon rescission, the requirements of this Order to Maintain Assets shall again be in effect until the day after Respondents' (or a Divestiture Trustee's) completion of the divestiture of the assets required by the Decision and Order.

By the Commission.

DECISION

The Federal Trade Commission ("Commission") initiated an investigation of the proposed acquisition by Respondent FXI Holdings, Inc., an indirect subsidiary of Respondent One Rock Capital Partners II, LP, of Respondent Innocor, Inc., an indirect subsidiary of Respondent Bain Capital Fund XI, LP (each a "Respondent," and collectively "Respondents"). The Commission's Bureau of Competition prepared and furnished to Respondents the Draft Complaint, which it proposed to present to the Commission for its consideration. If issued by the Commission, the Draft Complaint 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.

Respondents and the Bureau of Competition executed an Agreement Containing Consent Order ("Consent Agreement") containing (1) an admission by Respondents of all the jurisdictional facts set forth in the Draft Complaint, (2) a statement that the signing of said agreement is for settlement purposes only and does not constitute an admission by Respondents that the law has been violated as alleged in the Draft Complaint, or that the facts as alleged in the Draft Complaint, other than jurisdictional facts, are true, (3) waivers and other provisions as required by the Commission's Rules, and (4) a proposed Decision and Order and Order to Maintain Assets.

The Commission considered the matter and 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. The Commission accepted the Consent Agreement and placed it on the public record for a period of 30 days for the receipt and consideration of public comments; at the same time, it issued and served its Complaint and Order to Maintain Assets. The Commission 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 Rule 2.34, the Commission makes the following jurisdictional findings:

1. Respondent One Rock Capital Partners II, LP is a limited partnership organized, existing, and doing business under and by virtue of the laws of Delaware, with its executive offices and principal place of business located at 30 Rockefeller Plaza, 54th Floor, New York, NY 10112.

2. Respondent FXI Holdings, Inc. is a corporation organized, existing, and doing business under and by virtue of the laws of Delaware, with its executive offices and principal place of business located at 100 Matsonford Road, 5 Radnor Corporate Center, Suite 300, Radnor, PA 19087-4560.

3. Respondent Bain Capital Fund XI, LP is a limited partnership organized, existing, and doing business under and by virtue of the laws of the Cayman Islands, with its executive offices and principal place of business located at 200 Clarendon Street, Boston, MA 02116.

4. Respondent Innocor, Inc. is a corporation, existing, organized, and doing business under and by virtue of the laws of New Jersey, with its executive offices and principal place of business located at 200 Schulz Drive, Red Bank, NJ 07701.

5. 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. Definitions

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

A. "FXI" means FXI Holdings, Inc., its directors, officers, employees, agents, representatives, successors, and assigns; and the joint ventures, subsidiaries, partnerships, divisions, groups, and affiliates controlled by FXI Holdings, Inc., and the respective directors, officers, employees, agents, representatives, successors, and assigns of each.

B. "One Rock Capital" means One Rock Capital Partners II, LP, its directors, officers, employees, agents, representatives, successors, and assigns; and the joint ventures, subsidiaries, partnerships, divisions, groups, and affiliates controlled by One Rock Capital Partners II, LP, and the respective directors, officers, employees, agents, representatives, successors, and assigns of each.

C. "Innocor" means Innocor, Inc., its directors, officers, employees, agents, representatives, successors, and assigns; and the joint ventures, subsidiaries, partnerships, divisions, groups, and affiliates controlled by Innocor, Inc., and the respective directors, officers, employees, agents, representatives, successors, and assigns of each.

D. "Bain" means Bain Capital Fund XI, LP, its directors, officers, employees, agents, representatives, successors, and assigns; and the joint ventures, subsidiaries, partnerships, divisions, groups, and affiliates controlled by Bain Capital Fund XI, LP, and the respective directors, officers, employees, agents, representatives, successors, and assigns of each.

E. "Future Foam" means Future Foam, Inc., a corporation organized, existing, and doing business under and by virtue of the laws of Nebraska, with its offices and principal place of business located at 1610 Avenue N. Council Bluffs, Iowa, 51501.

F. "Commission" means the Federal Trade Commission.

G. "Acquirer" means:

1. Future Foam; or

2. Any other person that the Commission approves to acquire the Polyurethane Foam Assets pursuant to this Decision and Order.

H. "Acquisition" means the proposed acquisition by FXI of Innocor pursuant to the terms set forth in the transaction agreement by and among Respondents dated as of March 4, 2019.

I. "Acquisition Date" means the date Respondents consummate the Acquisition.

J. **"**Business Information" means all books, records, data, and information, wherever located and however stored, relating to the Polyurethane Foam Assets or used in the Polyurethane Foam Business, including documents, written information, graphic materials, and data and information in electronic format, along with the unwritten knowledge of employees, contractors and representatives. Business Information includes records and information relating to research and development, manufacturing, process technology, engineering, product formulations, production, sales, marketing, logistics, advertising, personnel, accounting, business strategy, information technology systems, customers, customer purchasing histories, customer preferences, delivery histories, delivery routing information, suppliers and all other aspects of the Polyurethane Foam Business or Polyurethane Foam Assets. For clarity, Business Information includes Respondents' right and control over information and material provided to any other person.

K. "Confidential Business Information" means any non-public Business Information relating to the Polyurethane Foam Assets and Polyurethane Foam Business:

1. Obtained by Respondents prior to the Divestiture Date; or

2. Obtained by Respondents after the Divestiture Date, in the course of performing Respondents' obligations under this Order or any Divestiture Agreement (including any Transition Assistance agreement);

Provided, however, that Confidential Business Information shall not include:

1. Information that is in the public domain when received by Respondents;

2. Information that is not in the public domain when received by Respondents and thereafter becomes public through no act or failure to act by Respondents;

3. Information that Respondents develop or obtain independently, without violating any applicable law or this Order, and without breaching any confidentiality obligation with respect to the information; and

4. Information that becomes known to Respondents from a third party not in breach of applicable law or a confidentiality obligation with respect to the information.

L. "Consent" means any approval, consent, ratification, waiver, or other authorization.

M. "Contract" means a contract, lease, sub-lease and other agreement or obligation.

N. "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 the Respondents' employees shall not exceed then-current average hourly wage rate for such employee.

O. "Divestiture Agreement" means:

1. Future Foam Divestiture Agreement; or

2. Any agreement between Respondents (or a Divestiture Trustee appointed pursuant to Paragraph IX of this Order) and an Acquirer to purchase the Polyurethane Foam Assets, and all amendments, exhibits, attachments, ancillary agreements (including any Shared Intellectual Property License or agreements to provide Transition Assistance), and schedules thereto.

P. "Divestiture Date" means the date on which Respondents (or a Divestiture Trustee appointed pursuant to Paragraph IX of this Order) close on each of the divestitures required by Paragraph II of this Order.

Q. "Divestiture Trustee" means the trustee appointed by the Commission pursuant to Paragraph IX of this Order.

R. "Elkhart Polyurethane Foam Facility" means Respondent Innocor's polyurethane foam production facilities located at 1900 West Lusher Road in Elkhart, Indiana, including associated production plants, warehouses, storage facilities, equipment, offices, fabricating operations, and transportation assets.

S. "Employee Information" means, for each Polyurethane Foam Employee, the following information summarizing the employment history of each employee that includes, as requested by the proposed Acquirer and to the extent permitted by applicable 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. Written performance reviews for the past three years, if any;

6. Employment status (*i.e.,* active or on leave or disability; full-time or part-time);

7. Any other material terms and conditions of employment in regard to such employee that are not otherwise generally available to similarly situated employees; and

8. At the proposed Acquirer's option, copies of all employee benefit plans and summary plan descriptions (if any) applicable to the employee.

T. "Excluded Assets" means those assets and Contracts listed at Non-Public Appendix III to this Order.

U. "Future Foam Divestiture Agreement" means the agreements by and among the applicable Respondents and Future Foam, dated as of January 27, 2020, and all amendments, exhibits, attachments, ancillary agreements (including any agreements for Transition Assistance) related thereto and attached to this Order as Non-Public Appendix I.

V. "Governmental Authorization" means any license, registration, or permit issued, granted, given or otherwise made available by or under the authority of any governmental body or pursuant to any legal requirement.

W. **"**Intellectual Property" means intellectual property of any kind, including patents, patent applications, mask works, trademarks, service marks, copyrights, trade dress, commercial names, internet web sites, internet domain names, inventions, discoveries, written and unwritten know-how, process technology, engineering technology, product technology, product rights, trade secrets, and proprietary information.

X. "Kent Polyurethane Foam Facility" means Respondent FXI's polyurethane foam production facilities located at 19635 78th Avenue and 7620 S. 196 Street in Kent, Washington, including associated production plants, warehouses, storage facilities, equipment, offices, fabricating operations, and transportation assets.

Y. "Key Employees" means the employees listed at Appendix II to this Order.

Z. "Monitor" means the person approved by the Commission to serve as a Monitor pursuant to this Order or the Order to Maintain Assets.

AA. "Polyurethane Foam Assets" means all of Respondent's legal or equitable rights, title, and interests in and to all tangible and intangible assets, wherever located, relating to the Polyurethane Foam Business (including any such assets removed and not replaced after the announcement of the Acquisition, other than in the ordinary course of business), including:

1. The Polyurethane Foam Facilities;

2. Real property interests owned, leased or otherwise held, including easements and appurtenances, together with buildings, facilities and other structures, and improvements thereto;

3. Intangible rights and property, including Intellectual Property, owned, used, or licensed (as licensor or licensee) by Respondent, going concern value, goodwill, and telephone listings, internet sites and social media accounts;

4. Tangible personal property, whether owned or leased, including machinery, equipment, tools, furniture, office equipment, computer hardware, supplies, materials, vehicles, together with all express or implied warranties by manufacturers, sellers or lessors and all maintenance records and operating manuals;

5. Inventories;

6. Business Information;

7. Contracts and all outstanding offers or solicitations to enter into any Contract, and all rights thereunder and related thereto; and

8. Governmental Authorizations and all pending applications therefor or renewals thereof;

9. *Provided, however*, that Polyurethane Foam Assets need not include:

   a. Corporate headquarters of Respondents;

   b. Corporate, business, or other names of Respondents or any logo, trademark, service mark, domain name, trade or other name or any derivation thereof;

   c. Cash, cash equivalents and accounts receivable;

   d. Software that can readily be purchased or licensed from sources other than Respondents and that has not been materially modified (other than through user preference settings);

   e. Enterprise software that Respondents also use in their businesses other than the Polyurethane Foam Business;

   f. The portion of Business Information that contains information about any business other than the business divested to an Acquirer;

   g. Any original document that Respondents have a legal, contractual, or fiduciary obligation to retain the original; *provided, however,* that Respondents shall provide copies of the record and shall provide the Acquirer access to the original materials if copies are insufficient for regulatory or evidentiary purposes; and

   h. The following assets, unless the Commission, in its sole discretion and within 12 months of the date this Order is issued, determines in consultation with the Acquirer and the Monitor, that any such assets are necessary for the Acquirer to operate the Polyurethane Foam Assets or Polyurethane Foam Business in a manner that achieves the purposes of this Order:

      i. Excluded Assets; and

      ii. Shared Intellectual Property, but only if the Shared Intellectual Property License is granted pursuant to Paragraph II of this Order.

BB. "Polyurethane Foam Business" means the applicable Respondent's business of manufacturing, fabricating, and selling polyurethane foam and related products at the Polyurethane Foam Facilities.

CC. "Polyurethane Foam Employees" means: (1) with respect to each of the Polyurethane Foam Facilities, each of Respondents employees who were employed or under contract by the Polyurethane Foam Business at any time between June 1, 2019, and the Divestiture Date; and (2) the Key Employees.

DD. "Polyurethane Foam Facilities" means the Elkhart Polyurethane Foam Facility, the Kent Polyurethane Foam Facility, and the Tupelo Polyurethane Foam Facility.

EE. "Relevant Area" means the states of Indiana, Michigan, Mississippi, Ohio, Oregon, and Washington.

FF. "Shared Intellectual Property" means Intellectual Property that, at any time prior to the Divestiture Date, was used by both the Polyurethane Foam Business and Respondents' retained businesses.

GG. "Shared Intellectual Property License" means a perpetual, non-exclusive, fully paid-up, irrevocable, transferable, and royalty-free license(s), granted by Respondents to an Acquirer, to use Shared Intellectual Property (other than trademarks, domain names, and similar names and marks) in the operation of the Polyurethane Foam Business.

HH. "Tupelo Polyurethane Foam Facility" means Respondent Innocor's polyurethane foam production facilities located at 1665 South Veterans Boulevard in Tupelo, Mississippi, including associated production plants, warehouses, storage facilities, equipment, offices, fabricating operations, and transportation assets.

II. "Transition Assistance" means services, assistance, cooperation, training and access to personnel regarding the transfer and operation of the Polyurethane Foam Business, including, but not limited to, accounting and finance, human resources (employee benefits, payroll, etc.) information technology and systems, logistics (purchasing, distribution, warehousing, supply chain management, etc.), manufacturing (technology, technology transfer, operating permits and licenses, regulatory compliance, quality control, manufacturing processes and troubleshooting, etc.), research and development, sales and marketing (including customer service), and allowing an Acquirer to use Respondents' brands and marks for transitional purposes.

II. Divestiture

IT IS FURTHER ORDERED that:

A. Within 10 days of the Acquisition Date, Respondents shall divest, absolutely and in good faith, the Polyurethane Foam Assets as an ongoing business to Future Foam pursuant to the Future Foam Divestiture Agreement.

B. No later than the Divestiture Date, Respondents shall grant the Shared Intellectual Property License to Future Foam to use Shared Intellectual Property to operate the Polyurethane Foam Business, including by extending or improving existing products, processes, and services; developing new products, processes and services; and expanding, constructing, or operating additional on-site facilities or production lines.

C. If Respondents have divested the Polyurethane Foam Assets to Future Foam before the Commission issues this Order, and the Commission subsequently notifies Respondents that:

1. Future Foam is not an acceptable Acquirer of the Polyurethane Foam Assets, then Respondents shall:

a. Within 5 days of notification by the Commission, rescind the Future Foam Divestiture Agreement,

b. Within 120 days of notification by the Commission, divest the Polyurethane Foam Assets as an ongoing business, absolutely and in good faith, at no minimum price, and grant the Shared Intellectual Property License, to an Acquirer and in a manner that receives the prior approval of the Commission, and

c. Set forth the manner in which they will divest the Polyurethane Foam Assets, and comply with the other provisions of this Order, in a proposed Divestiture Agreement that is submitted to the Commission for the prior approval required by this Order.

2. The manner of the divestiture is not acceptable, then the Commission will direct the Respondents (or appoint a Divestiture Trustee) to modify the divestiture in the manner the Commission determines is necessary to satisfy the requirements of this Order, which may include entering into additional agreements or arrangements, or modifying a Divestiture Agreement.

D. Respondents shall deliver the Business Information to the Acquirer as soon as practicable in a manner that ensures their completeness, accuracy and usefulness and meets the reasonable requirements of the Acquirer.

E. No later than the Divestiture Date, Respondents shall, at their sole expense, obtain each Consent required to transfer the Polyurethane Foam Assets, including Contracts and Governmental Authorizations. Respondents may satisfy this requirement for a required Consent by certifying that the Acquirer has equivalent arrangements or has otherwise directly obtained the necessary Consent.

Provided, however, it is not a violation of this provision for Respondents not to transfer a Contract or Governmental Authorization that Respondents have no legal right to assign, transfer or sublicense (even by obtaining relevant Consents) so long as (i) prior to signing the Consent Order, Respondents inform Commission staff and the Acquirer that they cannot transfer the relevant Contract or Governmental Authorization, and (ii) Respondents assist the Acquirer in obtaining an equivalent Contract or Governmental Authorization.

F. Respondents shall cooperate and assist the Acquirer (or any other person with whom Respondents engage in negotiations to acquire the Polyurethane Foam Assets) with a due diligence investigation of the Polyurethane Foam Assets and the Polyurethane Foam Business, including by providing sufficient and timely access to all information and employees customarily provided as part of a due diligence process.

III. Divestiture Agreement

IT IS FURTHER ORDERED that:

A. The Divestiture Agreements shall be incorporated by reference into this Order and made a part hereof, and any failure by Respondents to comply with the terms of a Divestiture Agreement shall constitute a violation of this Order; *provided, however*, that the Divestiture Agreements shall not limit, or be construed to limit, the terms of this Order. To the extent any provision in a Divestiture Agreement varies from or conflicts with any provision in the Order such that Respondents cannot fully comply with both, Respondents shall comply with the Order.

B. Respondents shall not modify, replace, or extend the terms of a Divestiture Agreement after the Commission issues the Order without the prior approval of the Commission, except as otherwise provided in Commission Rule 2.41(f)(5), 16 C.F.R. § 2.41(f)(5).

IV. Transition Assistance

IT IS FURTHER ORDERED that:

A. Until Respondents have transferred all Business Information included in the Polyurethane Foam Assets, Respondents shall provide the Acquirer with access to records and information (wherever located and however stored) included in the

Business Information that Respondents have not yet transferred to the Acquirer, and to employees who possess the records and information.

B. Respondents shall provide the Acquirer with Transition Assistance sufficient to (i) efficiently transfer the Polyurethane Foam Assets to the Acquirer and (ii) assist the Acquirer in operating the Polyurethane Foam Assets and Polyurethane Foam Business in a manner equivalent in all material respects to the manner in which Respondents did so prior to the Acquisition, and shall Provide Transition Assistance:

1. As set forth in a Divestiture Agreement, or as otherwise reasonably requested by the Acquirer (whether before or after the Divestiture Date);

2. At the price set forth in a Divestiture Agreement, or if no price is set forth, at Direct Cost; and

3. For a period sufficient to meet the requirements of this paragraph, which shall be, at the option of the Acquirer, for up to 12 months after the Divestiture Date.

C. Respondents shall not cease providing Transition Assistance due to a breach by the Acquirer of a Divestiture Agreement, and shall not limit the damages (including indirect, special, and consequential damages) that an Acquirer is entitled to receive in the event of Respondents' breach of an agreement to provide Transition Assistance.

D. The Acquirer may terminate, in whole or part, any Transition Assistance provisions of the Divestiture Agreement upon commercially reasonable notice and without cost or penalty.

V. Employees

IT IS FURTHER ORDERED that:

A. Respondents shall cooperate with and assist any proposed Acquirer of the Polyurethane Foam Assets to evaluate independently and offer employment to the Polyurethane Foam Employees relating to each of the Polyurethane Foam Facilities, with such cooperation to include at least the following:

1. Not later than 5 business days after a request from a proposed Acquirer, Respondents shall, to the extent permitted by applicable law:

a. Provide to the proposed Acquirer a list of all Polyurethane Foam Employees and provide Employee Information for each; and

b. Allow the proposed Acquirer a reasonable opportunity to interview any Polyurethane Foam Employees;

2. Not later than 10 days after a request from a proposed Acquirer, Respondents shall provide an opportunity for the proposed Acquirer to:

a. Meet personally, and outside the presence or hearing of any employee or agent of Respondents, with any of the Polyurethane Foam Employees; and

b. Make offers of employment to any of the Polyurethane Foam Employees;

3. Respondents shall not directly or indirectly interfere with a proposed Acquirer's offer of employment to any one or more of the Polyurethane Foam Employees, not offer any incentive to Polyurethane Foam Employees to decline employment with a proposed Acquirer, and not otherwise interfere with the recruitment of any Polyurethane Foam Employees by a proposed Acquirer;

4. Respondents shall remove any impediments within the control of Respondents that may deter any Polyurethane Foam Employees from accepting employment with a proposed 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 a proposed Acquirer, and shall not make any counteroffer to any Polyurethane Foam Employees who receive an offer of employment from the 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;

5. Respondents shall provide Polyurethane Foam Employees with reasonable financial incentives to continue in their positions, and as may be necessary to facilitate the employment of such Polyurethane Foam Employees by the proposed Acquirer. Such incentives shall include a continuation of all employee compensation and benefits offered by Respondents, including regularly scheduled or merit raises and bonuses, regularly scheduled vesting of pension benefits, and additional reasonable incentives as may be necessary.

B. If, at any point within 6 months of the Divestiture Date, the Commission, in consultation with the Acquirer and the Monitor, determines in its sole discretion that the Acquirer should have the ability to interview, make offers of employment to, or hire any of Respondent Innocor or Respondent FXI's employees that are not otherwise included as Polyurethane Foam Employees, then the Commission may

notify Respondents that such employees are to be designated as Polyurethane Foam Employees, and the provisions of this Paragraph V shall apply to such employees as of that notification date.

C. Respondents shall:

1. For a period of 1 year from the Divestiture Date, not directly or indirectly solicit or induce, or attempt to solicit or induce, any Polyurethane Foam Employee who has accepted an offer of employment with, or who is employed by, an Acquirer to terminate his or her employment relationship with the Acquirer.

2. For a period of 2 years from the Divestiture Date, not directly or indirectly solicit or induce, or attempt to solicit or induce, any Key Employee who has accepted an offer of employment with, or who is employed by, an Acquirer to terminate his or her employment relationship with the Acquirer.

Provided, however, a violation of this Paragraph V.C will not occur if:

1. The employee's employment has been terminated by the Acquirer;

2. Respondents advertise for employees in newspapers, trade publications, or other media not targeted specifically at any one or more of the employees of the Acquirer; or

3. Respondents hire an employee who has applied for employment with Respondents, provided that such application was not solicited or induced in violation of this Order.

VI. Asset Maintenance

IT IS FURTHER ORDERED that, pending divestiture of the Polyurethane Foam Assets, Respondents shall operate the Polyurethane Foam Assets in the ordinary course of business consistent with past practices, and shall:

A. Take such actions as are necessary to maintain the full economic viability, marketability, and competitiveness of the Polyurethane Foam Assets, to minimize any risk of loss of competitive potential of the Polyurethane Foam Assets, to operate the Polyurethane Foam Assets in a manner consistent with applicable laws and regulations, and to prevent the destruction, removal, wasting, deterioration, or impairment of the Polyurethane Foam Assets (including regular repair and maintenance efforts), except for ordinary wear and tear. Respondents shall not sell, transfer, encumber, terminate the operations of, or otherwise impair the Polyurethane Foam Assets (other than in the manner prescribed in this Order), nor take any action that lessens the full economic viability, marketability, or competitiveness of the Polyurethane Foam Assets; and

B. Conduct or cause to be conducted the Polyurethane Foam Business in the regular and ordinary course of business and in accordance with past practice and as may be necessary to preserve the full economic viability, marketability, and competitiveness of the Polyurethane Foam Business, and shall use best efforts to preserve the relationships and goodwill with suppliers, customers, employees, governmental authorities, vendors, landlords, creditors, agents, and others having business relationships with the Polyurethane Foam Business;

Provided, however, that Respondents shall not be in violation of this Paragraph VI if Respondents take actions (i) as explicitly permitted or required by any Divestiture Agreement, or (ii) that have been requested or agreed-to by an Acquirer, in writing, and approved in advance by the Monitor (in consultation with Commission staff), in all cases to facilitate the Acquirer's acquisition of the Polyurethane Foam Assets and consistent with the purposes of the Order.

VII. Additional Obligations

IT IS FURTHER ORDERED that:

A. Respondents, in consultation with the proposed Acquirer, for the purposes of ensuring an orderly transition, shall:

1. Develop and implement a detailed transition plan to ensure that the commencement of the operation of the Polyurethane Foam Business by the Acquirer is not delayed or impaired by the Respondents;

2. Designate employees of Respondents knowledgeable about the operation of the Polyurethane Foam Assets and Polyurethane Foam Business, who will be responsible for communicating directly with the Acquirer, and the Monitor (if one has been appointed), for the purposes of assisting in the transfer to the Acquirer of the Polyurethane Foam Assets and Polyurethane Foam Business;

3. Allow the Acquirer reasonable access to all Business Information related to the Polyurethane Foam Assets and Polyurethane Foam Business and to employees who possess or are able to locate such information; and

4. Establish projected timelines for accomplishing all tasks necessary to effectuate the transition to the Acquirer in an efficient and timely manner.

B. Respondents shall:

1. Not provide, disclose, or otherwise make available any Confidential Business Information to any person, except as required or permitted by this Order, the Order to Maintain Assets, or a Divestiture Agreement;

2. Not use any Confidential Business Information for any reason or purpose, other than as required or permitted by this Order, the Order to Maintain Assets, or a Divestiture Agreement;

3. To the extent practicable, maintain Confidential Business Information separate and apart from other data or information of the Respondents; and

4. Following the Acquisition Date, ensure that Confidential Business Information is not shared with Respondents' employees engaged in polyurethane foam production or sales activities in any of the Relevant Areas, other than employees who had access to the information prior to the Acquisition Date in the normal course of business and subject to the provisions of VII.B.1 and VII.B.2 above.

Provided, however, that nothing in this Paragraph VII shall prevent Respondents from retaining and using any tangible or intangible property that Respondents retain the right to use pursuant to this Order (including Shared Intellectual Property), provided further that to the extent that the use of such property involves disclosure of Confidential Business Information to another person, Respondents shall require such person to maintain the confidentiality of such Confidential Business Information under terms no less restrictive than Respondents' obligations under this Order.

C. Respondents shall devise and implement measures to protect against the storage, distribution, and use of Confidential Business Information that is not permitted by this Order, the Order to Maintain Assets, or any Divestiture Agreement. These measures shall include, but not be limited to, restrictions placed on access by persons to information available or stored on any of Respondents' computers or computer networks.

D. No later than 10 days after the Divestiture Date, and no less than annually for 3 years after the Divestiture Date, Respondents shall provide written notification of the restrictions on the use and disclosure of the Confidential Business Information by Respondents' personnel to all of its officers, directors, employees, or agents who may have possession or access to such Confidential Business Information. Respondents shall require such personnel to acknowledge in writing or electronically their receipt and understanding of these written instructions, and shall maintain custody of these written instructions and acknowledgments for inspection upon request by the Commission.

E. Notwithstanding this Paragraph VII of this Order, and subject to the Order to Maintain Assets, Respondent may use Confidential Business Information:

1. For the purpose of performing Respondents' obligations under this Order, the Order to Maintain Assets, or the Divestiture Agreements; and

2. For purposes of complying with financial reporting requirements, obtaining legal advice, ensuring compliance with legal and regulatory requirements, prosecuting or defending legal claims, conducting investigations, or as otherwise required by law.

VIII. Monitor

IT IS FURTHER ORDERED that:

A. Edward J. Buthusiem shall serve as the Monitor pursuant to the agreement executed by the Monitor and Respondents, and attached as Appendix IV ("Monitor Agreement") and Non-Public Appendix IV-1 ("Monitor Compensation"). The Monitor is appointed to monitor Respondents' compliance with the terms of this Order, the Order to Maintain Assets, and the Divestiture Agreement.

B. No later than 1 day after the Order to Maintain Assets is issued, Respondents shall, pursuant to the Monitor Agreement, confer on the Monitor all rights, powers, and authorities necessary to permit the Monitor to monitor Respondents' compliance with the terms of this Order, the Order to Maintain Assets, and the Divestiture Agreement, in a manner consistent with the purposes of the orders.

C. 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 divestiture and related requirements of this Order, the Order to Maintain Assets, and the Divestiture 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 the orders.

2. The Monitor shall act in consultation with the Commission or its staff, and shall serve as an independent third party and not as an employee or agent of the Respondents or of the Commission.

3. The Monitor shall serve until 30 days after Respondents have satisfied all obligations under Paragraph II and IV of this Order, or until such other time as may be determined by the Commission or its staff.

D. 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 its obligations under this Order, the Order to Maintain Assets, and the Divestiture Agreement.

E. 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, the Order to Maintain Assets, and the Divestiture Agreement.

F. 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 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 Monitor's duties and responsibilities.

G. Respondents shall indemnify the Monitor and hold the Monitor harmless against any losses, claims, damages, liabilities, or expenses arising out of, or in connection with, the performance of the Monitor's duties, including all reasonable fees of counsel and other reasonable expenses incurred in connection with the preparations for, or defense of, any claim, whether or not resulting in any liability, except to the extent that such losses, claims, damages, liabilities, or expenses result from gross negligence, willful or wanton acts, or bad faith by the Monitor. For purposes of this Paragraph VIII.G, the term "Monitor" shall include all persons retained by the Monitor pursuant to Paragraph VIII.F of this Order.

H. Respondents shall report to the Monitor in accordance with the requirements of this Order or the Order to Maintain Assets, and as otherwise provided in the Monitor Agreement approved by the Commission. The Monitor shall evaluate the reports submitted by the Respondents with respect to the performance of Respondents' obligations under this Order and the Order to Maintain Assets. Within 30 days from the date the Monitor receives the first such report, and every 90 days thereafter (and otherwise as the Commission or its staff may request), the Monitor shall report in writing to the Commission concerning performance by Respondents of their obligations under the orders.

I. Respondents 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 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.

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 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 10 days after the 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.

2. Not later than 10 days after the appointment of the substitute Monitor, Respondents 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 Respondents' compliance with the relevant terms of this Order, the Order to Maintain Assets, and the Divestiture Agreement in a manner consistent with the purposes of the orders and in consultation with the Commission.

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 this 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.

IX. Divestiture Trustee

IT IS FURTHER ORDERED that:

A. If Respondents have not fully complied with the obligations of Paragraph II of this Order, the Commission may appoint one or more Divestiture Trustees to divest any or all of the Polyurethane Foam Assets, enter agreements for Transition Assistance, grant the Shared Intellectual Property License, 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 IX shall preclude the Commission or the Attorney General from seeking civil penalties or any other relief available to it, including

one or more court-appointed Divestiture Trustees, 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 may select one or more Divestiture Trustees, subject to the consent of Respondents, which consent shall not be unreasonably withheld. The Commission may appoint one Divestiture Trustee or separate Divestiture Trustees to divest one or more of the Polyurethane Foam Assets, enter agreements for Transition Assistance, grant the Shared Intellectual Property License, and perform Respondents' other obligations in a manner that satisfies the requirements of this Order. Any 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 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. Not later than 10 days after the appointment of a Divestiture Trustee, Respondents shall execute a trust agreement for any divestitures required by this Order 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. Any failure by Respondents to comply with a trust agreement approved by the Commission shall be a violation of 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 divestitures required by, and satisfy the additional obligations (including obligations to provide Transition Assistance and grant the Shared Intellectual Property License) imposed by, this Order.

b. The Divestiture Trustee shall have 1 year after the date the Commission approves each trust agreement described herein to accomplish the divestitures required by this Order, which shall be subject to the prior approval of the Commission. If, however, at the end of the 1 year period, the Divestiture Trustee has submitted a plan to satisfy the divestiture obligations of this Order, or believes that such obligations can be achieved within a reasonable time, the period may be extended by the Commission, or, in the case of a

court-appointed Divestiture Trustee, by the court; *provided, however,* that the Commission may extend the period only 2 times.

c. Subject to any demonstrated legally recognized privilege, any 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 any Divestiture Trustee may request and shall cooperate with the Divestiture Trustee. Respondents shall take no action to interfere with or impede any Divestiture Trustee's accomplishment of the divestiture. Any delays caused by Respondents shall extend the time under this Paragraph IX for a time period equal to the delay, as determined by the Commission or, for a court-appointed Divestiture Trustee, by the court.

d. Any Divestiture Trustee shall use commercially reasonable efforts to negotiate the most favorable price and terms available in each contract that is submitted to the Commission, subject to Respondents' absolute and unconditional obligation to divest expeditiously and at no minimum price. The divestitures shall be made in the manner that receives the prior approval of the Commission and to an Acquirer that receives the prior approval of the Commission as required by this Order; *provided, however,* if any Divestiture Trustee receives bona fide offers for any asset to be divested 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 5 days after receiving notification of the Commission's approval.

e. Any 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. Any 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. Any Divestiture Trustee shall account for all monies derived from the divestitures and all expenses incurred. After approval by the Commission of the account of the Divestiture Trustee, including fees for the Divestiture

Trustee's services, all remaining monies shall be paid at the direction of Respondents, and the Divestiture Trustee's power shall be terminated. The compensation of any 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 any 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. Any Divestiture Trustee shall have no obligation or authority to operate or maintain the relevant assets required to be divested by this Order.

h. Any Divestiture Trustee shall report in writing to Respondents and to the Commission every 30 days concerning the Divestiture Trustee's efforts to accomplish the divestitures.

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

C. If the Commission determines that any 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 IX.

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 any Divestiture Trustee, issue such additional orders or directions as may be necessary or appropriate to accomplish the divestitures required by this Order.

X. Prior Notice

IT IS FURTHER ORDERED that:

A. For a period of 10 years from the date this Order is issued, Respondents FXI and One Rock Capital shall not, without providing advance written notification to the Commission in the manner described in this Paragraph X, acquire any assets of, or any financial, ownership, or leasehold interest in, any facility that has operated as a polyurethane foam production facility within 12 months prior to the date of such proposed acquisition, in any 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 FXI and One Rock Capital and not of any other party to the transaction. Respondents FXI and One Rock Capital shall provide the Notification to the Commission at least 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 FXI and One Rock Capital shall not consummate the transaction until 30 days after submitting such additional information or documentary material. Early termination of the waiting periods in this Paragraph X may be requested and, where appropriate, granted by letter from staff of the Bureau of Competition. *Provided, however*, that prior notification shall not be required by this Paragraph X 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.

XI. Compliance Reports

IT IS FURTHER ORDERED that:

A. Respondent FXI shall:

1. Notify Commission staff via email at bccompliance@ftc.gov of:

   a. The Acquisition Date, no later than 5 days after the Acquisition Date; and

   b. The Divestiture Date, no later than 5 days after the Divestiture Date;

2. Submit the complete Divestiture Agreement to the Commission at ElectronicFilings@ftc.gov and bccompliance@ftc.gov no later than 30 days after the Divestiture Date.

B. Respondents FXI and One Rock Capital shall file verified written reports ("compliance reports") in accordance with the following:

1. Respondents FXI and One Rock Capital shall submit an interim compliance report 30 days after the Order is issued, and additional interim reports every 30 days thereafter until Respondents have fully complied with the provisions of Paragraph II and IV of this Order; annual compliance reports one year after the date this Order is issued, and annually for the next 9 years on the anniversary of that date; and additional compliance reports as the Commission or its staff may request;

2. Each compliance report shall set forth in detail the manner and form in which Respondents intend to comply, are complying, and have complied with this Order. Each compliance report shall contain sufficient information and documentation to enable the Commission to determine independently whether Respondents are in compliance with the Order. Conclusory statements that Respondents have complied with their obligations under the Order are insufficient. Respondents FXI and One Rock Capital shall include in their reports, among other information or documentation that may be necessary to demonstrate compliance, a full description of the measures Respondents have implemented or plan to implement to ensure that they have complied or will comply with each paragraph of the Order, a description of all substantive contacts or negotiations for the divestitures and the identities of all parties contacted, and such supporting materials shall be retained and produced later if needed.

3. Respondents FXI and One Rock Capital shall verify each compliance report in the manner set forth in 28 U.S.C. § 1746 by the Chief Executive Officer or another officer or employee specifically authorized to perform this function. Respondents shall submit an original and 2 copies of each compliance report as required by Commission Rule 2.41(a), 16 C.F.R. § 2.41(a), including a paper original submitted to the Secretary of the Commission and electronic copies to the Secretary at ElectronicFilings@ftc.gov and to the Compliance Division at bccompliance@ftc.gov. In addition, Respondents FXI and One Rock Capital shall provide a copy of each compliance report to the Monitor if the Commission has appointed one in this matter.

XII. Change in Respondent

IT IS FURTHER ORDERED that Respondents FXI and One Rock Capital shall notify the Commission at least 30 days prior to:

A. Any proposed dissolution of FXI Holdings, Inc. or One Rock Capital Partners II, LP;

B. Any proposed acquisition, merger or consolidation of FXI Holdings, Inc. or One Rock Capital Partners II, LP; or

C. Any other change in Respondents FXI and One Rock Capital, including assignment and the creation, sale, or dissolution of subsidiaries, if such change may affect compliance obligations arising out of this Order.

XIII. Access

IT IS FURTHER ORDERED that, for purposes of determining or securing compliance with this Order, and subject to any legally recognized privilege, upon written request and 5 days' notice to the relevant Respondent, made to its principal place of business as identified in this Order, registered office of its United States subsidiary, or its headquarters office, the notified 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 business and other records and all documentary material and electronically stored information as defined in Commission Rules 2.7(a)(1) and (2), 16 C.F.R. § 2.7(a)(1) and (2), 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 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.

XIV. Purpose

IT IS FURTHER ORDERED that the purpose of this Order is to remedy the harm to competition the Commission alleged in its Complaint and ensure an Acquirer can operate the Polyurethane Foam Business in a manner equivalent in all material respects to the manner in which Respondents operated the Polyurethane Foam Business prior to the Acquisition.

XV. Term

IT IS FURTHER ORDERED that this Order shall terminate on April 20, 2030.

APPENDIX I

Future Foam Divestiture Agreement

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

APPENDIX II

Key Employees

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

APPENDIX III

Excluded Assets

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

APPENDIX IV

MONITOR AGREEMENT

This Monitor Agreement (this "Agreement"), entered into this 29th day of January, 2020, by and among Berkeley Research Group, LLC, a Delaware limited liability company ("BRG"), which has consented to the appointment of Edward J. Buthusiem, director of BRG's Healthcare Analytics Practice, to serve as the Monitor under this agreement (collectively, "Monitor"), One Rock Capital Partners II, LP, a Delaware limited partnership, and FXI Holdings, Inc., a Delaware corporation ("Respondents") (Monitor and Respondents together, the "Parties") provides as follows:

WHEREAS the Federal Trade Commission (the "Commission"), in the Matter of One Rock Capital Partners II, LP, FXI Holdings, Inc., Bain Capital Fund XI, LP, and Innocor, Inc., FTC File No. 191-0087, has accepted or will shortly accept for public comment an Agreement Containing Consent Orders incorporating a Decision and Order and an Order to Maintain Assets (collectively, the "Orders"), which, among other things, requires Respondents to divest certain polyurethane foam production facilities, as defined in the Orders, and contemplates the appointment of a Monitor to monitor Respondents' compliance with its obligations under the Orders;

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

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

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

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

NOW, THEREFORE, the Parties agree as follows:

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

ARTICLE I

1.1 Powers of the Monitor. Monitor shall have all of the powers and responsibilities conferred upon Monitor by the Orders, including but not limited to monitoring Respondents' compliance with the divestiture, asset maintenance obligations, and other related requirements of the Orders. The Monitor shall serve as an independent third party and not as an employee or agent of Respondents or the Commission.

1.2 Access to Relevant Information and Facilities. Subject to any demonstrated legally recognized privilege, Monitor shall have full and complete access to Respondents' personnel, books, documents, records kept in the normal course of business, facilities and technical information, and such other relevant information as Monitor may reasonably request, related to Respondents' compliance with the obligations of Respondents 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. Respondents shall cooperate with any reasonable request of Monitor. Monitor shall give Respondents reasonable notice of any request for such access or such information and shall attempt to schedule any access or requests for information in such a manner as will not unreasonably interfere with Respondents' operations. At the request of the Monitor, Respondents shall promptly arrange meetings and discussions, including tours of relevant facilities, at reasonable times and locations between the Monitor and employees of Respondents who have knowledge relevant to the proper discharge of its responsibilities under the Orders.

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

1.4 Confidentiality. Monitor shall:

(a) maintain the confidentiality of all confidential information provided to the Monitor by Respondents, the acquirer of the assets to be divested, any supplier or customer of Respondents, or the Commission ("Confidential Information"), and shall use such information only for the purpose of discharging its obligations as Monitor and not for any other purpose, including, without limitation, any other business, scientific, technological, or personal purpose. Monitor may disclose Confidential Information only to (i) persons employed by or working with Monitor pursuant to the Orders or (ii) persons employed at the Commission;

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

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

(d) for a period of ten (10) years after the termination of this Agreement, maintain the confidentiality of all other aspects of the performance of its duties under this Agreement and not disclose any Confidential Information relating thereto; and

(e) upon the termination of the Monitor's duties under this Agreement, the Monitor shall consult with the Commission's staff regarding disposition of any written and

electronic materials (including materials that Respondents provided to the Monitor) in the possession or control of the Monitor that relate to the Monitor's duties, and the Monitor shall dispose of such materials, which may include sending such materials to the Commission's staff, as directed by the staff. In response to a request by Respondents to return or destroy materials that Respondents provided to the Monitor, the Monitor shall inform the Commission's staff of such request and, if the Commission's staff do not object, shall comply with Respondents' request.

(f) For the purpose of this Agreement, information shall not be considered confidential or proprietary to the extent that it is or becomes part of the public domain (other than as the result of any action by the Monitor or by any employee, agent, affiliate or consultant of the Monitor), or to the extent that the recipient of such information can demonstrate that such information was already known to the recipient at the time of receipt from a source other than the Monitor, Respondents, or any director, officer, employee, agent, consultant or affiliate of the Monitor or Respondents, when such source was not known to recipient after due inquiry to be restricted from making such disclosure to such recipient.

ARTICLE II

2.1 Retention and Payment of Counsel, Consultants, and other Assistants. Monitor shall have the authority to employ, at the cost and expense of the Respondents, such attorneys, consultants, accountants, and other representatives and assistants as are reasonably necessary to carry out the Monitor's duties and responsibilities pursuant to the Orders. Prior to engaging any such parties and prior to commissioning additional work to be performed by a party who has already been so engaged, Monitor shall notify Respondents of its intention to do so, and provide an estimate of the anticipated costs.

2.2 Monitor Compensation. Respondents shall pay Monitor in accordance with the fee schedule and procedure attached as Confidential Appendix A for all reasonable time spent in the performance of the Monitor's duties, including all monitoring activities related to the efforts of the acquirer of the assets to be divested, all work in connection with the negotiation and preparation of this Agreement, and all reasonable and necessary travel time.

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

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

2.3 Monitor's Indemnification. Respondents shall indemnify and hold harmless Monitor and its employees and agents 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 Monitor's gross negligence or willful misconduct.

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

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

ARTICLE III

3.1 Termination. This Agreement shall terminate the earlier of: (a) the expiration or termination of the Orders; (b) Respondents' 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 Respondents and to the Commission, upon resignation of the Monitor; or (d) when the Monitor completes its Final Report pursuant to the Decision and Order; provided, however, that the Commission may require that Respondents extend this Agreement as may be necessary or appropriate to accomplish the purposes of the Orders. If this Agreement is terminated for any reason, the confidentiality obligations set forth in this Agreement will remain in force, as will the provisions of Articles 2.2 and 2.3 of this Agreement.

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

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

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

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

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

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

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

3.9 Duplicate Originals. This Agreement may be executed in several counterparts, each of which shall be deemed an original, but all of which together shall constitute one and the same document.

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

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

Monitor

Edward J. Buthusiem

Edward J. Buthusiem
Managing Director
Berkeley Research Group, LLC

Respondents

FXI Holdings, Inc.

Harold Earley
President and Chief Executive Officer
FXI Holdings, Inc.

R. Scott Spielvogel
Managing Partner, One Rock Capital Partners, GP, LLC,
the general partner of One Rock Capital Partners II, LP

Analysis to Aid Public Comment

APPENDIX IV-1

Monitor Compensation

[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 FXI Holdings, Inc. ("FXI"), One Rock Capital Partners II, LP ("One Rock Capital"), Innocor Inc. ("Innocor") and Bain Capital Fund XI, LP ("Bain"), subject to final approval, an Agreement Containing Consent Order ("Consent Agreement") designed to remedy the anticompetitive effects that would likely result from FXI's proposed acquisition of Innocor. The proposed Decision and Order ("Order") contained in the Consent Agreement requires FXI and Innocor to divest three polyurethane foam pouring plants to Future Foam, Inc. ("Future Foam").

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

On March 4, 2019, FXI and Innocor signed an Agreement and Plan of Merger by which FXI's parent company, One Rock Capital, would acquire 100% of the voting securities of Innocor for approximately $850 million (the "Acquisition"). The proposed Acquisition would combine two leading producers of polyurethane foam in the United States. The Commission's Complaint alleges that the proposed Acquisition, if consummated, would violate Section 7 of the Clayton act, as amended, 15 U.S.C. § 18, and Section 5 of the FTC Act, as amended, 15 U.S.C. § 45, by substantially lessening competition in several regional markets across the United States for low-density conventional polyurethane foam ("Low-Density Foam"). The proposed Consent Agreement would remedy the alleged violations by preserving the competition that otherwise would be lost in this market as a result of the proposed Acquisition.

THE PARTIES

Headquartered in Media, Pennsylvania, FXI is a polyurethane foam producer, providing a full range of polyurethane foam products including conventional, visco, and high resiliency foam. Polyurethane foam is used in a variety of end-uses, including home furnishing, packaging, and automotive applications. FXI operates foam-pouring facilities across the United States, including in the Pacific Northwest, the Midwest States, and Mississippi.

Innocor, headquartered in Red Bank, New Jersey, also produces a full range of polyurethane foam products including conventional, visco, and high resiliency foam for home furnishing, packaging, and other end uses. Like FXI, Innocor operates foam-pouring facilities across the United States, including in the Pacific Northwest, the Midwest States, and Mississippi.

THE RELEVANT PRODUCT AND MARKET STRUCTURE

The relevant product market in which to assess the competitive effects of the proposed acquisition is Low-Density Foam for home furnishing uses. Polyurethane foam consists of various grades and densities with different properties and end uses. Both FXI and Innocor sell Low-Density Foam, commonly referred to as "light and white," to furniture manufacturers either directly or through third party fabricators. When used in home furnishing products, such as mattresses, mattress toppers, pet beds, pillows, chairs, and couches, Low-Density Foam serves as padding or cushioning. There are no reasonably interchangeable substitutes for Low-Density Foam in home furnishing applications.

Regional geographic markets are appropriate to assess the competitive effects of the proposed Acquisition because of the importance of proximity to producers. Low-Density Foam is bulky, and involves shipping a large volume of air, so the cost of shipping is high relative to the value of the product. These high shipping costs limit the ability of distant producers to compete against local suppliers and result in regional competition. Foam producers like FXI and Innocor operate regional pouring facilities that service customers in the surrounding areas. In this matter, there are three relevant geographic markets for Low-Density Foam: the Pacific Northwest, the Midwest States, and Mississippi. The Pacific Northwest includes Oregon, Washington. The Midwest States include Indiana, Michigan, and Ohio.

The combination of FXI and Innocor would create the largest supplier of Low-Density Foam in the United States. The combined firm would have a market share above 50% in each of the Pacific Northwest, Midwest States, and Mississippi markets. FXI and Innocor face varying levels of competition in these regional markets. FXI and Innocor are the only firms that pour foam in the Pacific Northwest. In the Midwest States, FXI, Innocor, and Carpenter each have foam-pouring facilities, while in Mississippi FXI, Innocor, Carpenter and Elite each operate foam-pouring facilities. Future Foam does not currently pour foam in any of these markets.

The proposed FXI/Innocor combination would result in highly concentrated markets for Low-Density Foam to become even more concentrated, increasing the Herfindahl-Hirschman Index ("HHI") by more than 1500 in three regional markets – the Pacific Northwest, the Midwest States, and Mississippi. This increase in concentration far exceeds the thresholds set out in the Horizontal Merger Guidelines for raising a presumption that the Acquisition would create or enhance market power.

EFFECTS OF THE ACQUSITION

Absent a divestiture, the proposed acquisition is likely to harm customers of Low-Density Foam in the Pacific Northwest, Midwest States, and Mississippi markets. FXI and Innocor compete directly against each other for Low-Density Foam sales in each of the relevant markets,

and customers have benefited from that competition. By eliminating head-to-head competition between FXI and Innocor, the proposed Acquisition likely would lead to unilateral effects in the form of higher prices and reduced innovation.

The proposed acquisition is also likely to increase the likelihood of coordination and parallel accommodating conduct among the remaining competitors in the relevant markets. There is a history of alleged anticompetitive conduct within the polyurethane foam industry, raising heightened concerns about further consolidation. The industry also shows an existing vulnerability to coordination, including significant awareness of interdependence among the suppliers, actions taken in recognition of that interdependence, and sufficient transparency among the producers to support coordination. Further consolidation is likely to increase the incentives and ability of the remaining firms to coordinate.

ENTRY

Entry into the Low-Density Foam markets would not be timely, likely, or sufficient in magnitude, character, and scope to deter or counteract the anticompetitive effects of the proposed Acquisition. A new entrant with a single pouring plant would face significant barriers to entry, such as higher procurement costs for critical inputs, including the various chemicals, which make up a substantial portion of the cost of polyurethane foam. No new polyurethane foam pouring plants have opened in the Pacific Northwest, the Midwest States or Mississippi for many years. In fact, the number of plants in these regions has steadily decreased as industry participants have consolidated and closed numerous overlapping plants.

THE CONSENT AGREEMENT

The Consent Agreement eliminates the competitive concerns raised by the proposed Acquisition by requiring the merging parties to divest foam-pouring plants located in Kent, Washington; Elkhart, Indiana; and Tupelo, Mississippi to Future Foam, a privately held competitor based in Council Bluffs, Iowa. Future Foam is a leading producer of low-density conventional foam but currently has a limited presence in the Pacific Northwest, Mississippi, and the Midwest States. The divestiture package consists of the following assets and rights: FXI's Kent, Washington polyurethane foam plant, Innocor's Elkhart, Indiana plant, and Innocor's Tupelo, Mississippi plant, including each plant's production facilities, warehouses, storage facilities, equipment, offices, fabricating operations, transportation assets, and all other related businesses, operations and assets; formulas, technologies and other intangible rights and property relating to the facilities; and licenses to shared intellectual property. Additionally, the Order requires that, at the request of Future Foam, FXI must provide transitional assistance for up to twelve months following the divestiture date. These services include logistical and administrative support. The Order also includes other standard terms designed to ensure the viability of the divested business. The provisions of the proposed Consent Agreement positions Future Foam to become an effective competitor in the markets for Low-Density Foam in the Pacific Northwest, the Midwest States, and Mississippi in order to maintain the competition that currently exists.

Under the Order, FXI is required to divest the three plants no later than 10 days from the close of its acquisition of Innocor. If the Commission determines that Future Foam is not an

acceptable acquirer, or that the manner of the divestitures is not acceptable, the Order requires FXI to either unwind the sale of rights and assets to Future Foam and then divest the assets to a Commission-approved acquirer within 120 days of the date the Order becomes final, or modify the divestiture to Future Foam in the manner the Commission determines is necessary to satisfy the requirements of the Order.

The Order also requires a monitor to oversee FXI's compliance with the obligations set forth in the Order. If FXI does not fully comply with the divestiture and other requirements of the Order, the Commission may appoint a Divestiture Trustee to divest the three facilities and perform FXI's other obligations consistent with the Order. The Order also requires that FXI and One Rock Capital shall not, without providing advance written notification to the Commission, acquire any polyurethane foam production plant in the states of Indiana, Michigan, Mississippi, Ohio, Oregon, and Washington for a period of ten years from the date the Order is issued.

The purpose of this analysis is to facilitate public comment on the Consent Agreement to aid the Commission in determining whether it should make the Consent Agreement final. This analysis is not an official interpretation of the proposed Consent Agreement and does not modify its terms in any way.

Complaint

IN THE MATTER OF

RAG-STIFTUNG,
EVONIK INDUSTRIES AG,
EVONIK CORPORATION,
EVONIK INTERNATIONAL HOLDING B.V.,
ONE EQUITY PARTNERS SECONDARY FUND L.P.,
ONE EQUITY PARTNERS V, L.P.,
LEXINGTON CAPITAL PARTNERS VII (AIV I), L.P.,
PEROXYCHEM HOLDING COMPANY LLC,
PEROXYCHEM HOLDINGS, L.P.,
PEROXYCHEM HOLDINGS LLC,
PEROXYCHEM LLC,
AND
PEROXYCHEM COOPERATIEF U.A.

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. 9384; File No. 191 0029
Complaint, August 2, 2019 – Decision, April 29, 2020

This case addresses the $625 million acquisition by RAG-Stiftung, Evonik Industries AG, Evonik Corporation, and Evonik International Holding B.V. of certain assets of PeroxyChem Holding Company LLC, PeroxyChem Holdings, L.P., PeroxyChem Holdings LLC, PeroxyChem LLC, and PeroxyChem Cooperatief U.A. 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 hydrogen peroxide in North America. On February 7, 2020, Respondents RAG-Stiftung, Evonik Industries AG, Evonik Corporation, and Evonik International Holding B.V.; and Respondents One Equity Partners Secondary Fund, L.P. and One Equity Partners V, L.P., Lexington Capital Partners VI (AIV I), L.P., and PeroxyChem Holding Company LLC, PeroxyChem Holdings, L.P., PeroxyChem Holdings LLC, PeroxyChem LLC, and PeroxyChem Cooperatief U.A., moved to withdraw the matter from adjudication pursuant to Rule 3.26(c). The Commission dismissed the Complaint.

Participants

For the *Commission*: *Michael Blevins, Steven Dahm, Amy Dobrzynski, Josh Goodman, Frances Anne Johnson, Michael Lovinger, Lily Rudy, Stephen Santulli,* and *Cecelia Waldeck.*

For the *Respondents*: *Jan Rybnicek* and *Paul Yde, Freshfields Bruckhaus Deringer US LLP; Mike Cowie, Dechert LLP.*

COMPLAINT

Pursuant to the provisions of the Federal Trade Commission Act ("FTC Act"), and by the virtue of the authority vested in it by the FTC Act, the Federal Trade Commission ("Commission"),

having reason to believe that Respondents RAG-Stiftung, Evonik Industries AG, Evonik Corporation, and Evonik International Holding B.V., (collectively, "Evonik"), One Equity Partners Secondary Fund, L.P. and One Equity Partners V, L.P., (collectively, "One Equity Partners"), Lexington Capital Partners VII (AIV I), L.P., and PeroxyChem Holding Company LLC, PeroxyChem Holdings, L.P., PeroxyChem Holdings LLC, PeroxyChem LLC, and PeroxyChem Cooperatief U.A., (collectively, "PeroxyChem") have executed an acquisition agreement (the "Acquisition") in violation of Section 5 of the FTC Act, as amended, 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. Respondents Evonik and PeroxyChem are two of only five hydrogen peroxide producers in North America. Hydrogen peroxide is a commodity chemical used for oxidation, sterilization, and bleaching, and for most end uses there are no effective substitutes. Hydrogen peroxide producers sell to customers in various industries, including pulp and paper, food packaging, agriculture, chemical synthesis, mining and gas, and personal care. The pulp and paper industry uses most of the hydrogen peroxide produced in North America, primarily for bleaching pulp and deinking recycled paper. This case does not concern electronics-grade hydrogen peroxide, which requires additional manufacturing steps and is not a substitute for other forms hydrogen peroxide.

2. Respondents compete vigorously for customers, especially in regional markets in the Pacific Northwest and the Southern and Central United States. In the Pacific Northwest, the Acquisition would combine two of only three significant hydrogen peroxide producers in the region. In the Southern and Central United States, the Acquisition would combine the two largest hydrogen peroxide producers by nameplate production capacity, and two of the three largest hydrogen peroxide suppliers by sales. The Acquisition would create a firm with a dominant share and significantly increase market concentration in each regional market.

3. Post-Acquisition, Evonik would control more than half of the market, based on capacity and sales, for the production and sale of hydrogen peroxide in the Pacific Northwest, where Solvay would be the only other hydrogen peroxide producer with a meaningful presence. In the Southern and Central United States, post-Acquisition, Evonik would control nearly half of the market, based on capacity and sales, for the production and sale of hydrogen peroxide, with only Solvay, Arkema, and Nouryon remaining.

4. Under the 2010 U.S. Department of Justice and Federal Trade Commission Horizontal Merger Guidelines ("Merger Guidelines"), a post-acquisition market-concentration level above 2,500 points, as measured by the Herfindahl-Hirschman Index ("HHI"), and an increase in market concentration of more than 200 points renders an acquisition presumptively unlawful. Based on both capacity and sales, in both the Pacific Northwest and the Southern and Central United States, the Acquisition would significantly increase concentration in already

concentrated markets, well beyond the thresholds set forth in the Merger Guidelines. Thus, under the Merger Guidelines, the Acquisition is presumptively unlawful in both the Pacific Northwest and the Southern and Central United States.

5. The Acquisition would substantially lessen competition for the production and sale of hydrogen peroxide in at least two ways. First, the Acquisition will increase the likelihood of coordination in a market already vulnerable to coordination, functioning as an oligopoly, and with a long history of price-fixing, including guilty pleas, litigation, and substantial fines and settlements. The hydrogen peroxide industry is already characterized by significant market transparency, strong interdependence among a few major competitors, low demand elasticity, and high entry barriers. Several hydrogen peroxide suppliers previously admitted to illegally fixing prices at a time when there were six major suppliers in North America. After the Acquisition, there will be only two suppliers remaining in the Pacific Northwest and four suppliers remaining in the Southern and Central United States. In each of the two relevant geographic markets, the Acquisition removes one of only a few competitors, thereby strengthening and reinforcing the existing oligopolistic market dynamics and making coordination amongst the few remaining suppliers easier. The Acquisition will thus increase the likelihood of coordinated effects in both the Pacific Northwest and the Southern and Central United States.

6. Second, the Acquisition would eliminate significant head-to-head competition between Evonik and PeroxyChem in the Pacific Northwest and the Southern and Central United States. In both regional markets, customers benefit from head-to-head competition amongst a small handful of hydrogen peroxide suppliers, including the merging parties. The Acquisition would substantially reduce that competition. Direct competition between Evonik and PeroxyChem has repeatedly resulted in lower prices for customers. If consummated, the Acquisition threatens significant harm to hydrogen peroxide customers in both the Pacific Northwest and the Southern and Central United States by eliminating this direct competition.

7. New entry or expansion by existing hydrogen peroxide producers would not be timely, likely, or sufficient to counteract the anticompetitive effects of the Acquisition. There are significant barriers to entry for potential producers of hydrogen peroxide. These include the need for substantial capital investment and the likelihood that it would take multiple years to build a new hydrogen peroxide production plant. These barriers make entry or expansion difficult, and incapable of constraining the merged entity. Expansion or repositioning by the remaining firms sufficient to offset the Acquisition's anticompetitive effects is also unlikely. Nor are increases in hydrogen peroxide imports or repositioning by other chemical producers likely to offset the anticompetitive effects of the Acquisition.

8. Respondents cannot show cognizable, merger-specific efficiencies that would offset the likely and substantial competitive harm resulting from the Acquisition.

II. JURISDICTION

9. Respondents 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.

10. The Acquisition constitutes an acquisition subject to Section 7 of the Clayton Act, 15 U.S.C. § 18.

III. RESPONDENTS

11. Respondent RAG-Stiftung owns Respondent Evonik Industries AG, a large chemicals manufacturer, headquartered in Essen, North Rhine-Westphalia, Germany. Respondent Evonik Corporation is a wholly owned subsidiary of Evonik Industries AG, and is based in New Jersey. Respondent Evonik International Holding B.V. is a wholly owned subsidiary of Evonik Industries AG, and is based in the Netherlands. In 2006, RAG-Stiftung acquired Degussa, a long-time hydrogen peroxide producer, and ultimately renamed the company Evonik. Evonik had worldwide revenue of €14.4 billion in 2017. Evonik has three North American hydrogen peroxide production plants located in Mobile, Alabama; Gibbons, Alberta; and Maitland, Ontario.

12. Respondent One Equity Partners Secondary Fund, L.P. holds all of the limited partnership interests of Respondent One Equity Partners V, L.P. Respondent Lexington Capital Partners VIII (AIV I), L.P. indirectly holds a majority of the limited partnership interests in One Equity Partners Secondary Fund, L.P. One Equity Partners is the private investment arm of J.P. Morgan Chase & Co., which owns Respondent PeroxyChem Holding Company LLC, a leading global manufacturer of several chemicals, including hydrogen peroxide, based in Philadelphia, Pennsylvania. PeroxyChem Holding Company LLC owns Respondent PeroxyChem Holdings LLC, Respondent PeroxyChem Holdings, L.P., Respondent PeroxyChem LLC, and Respondent PeroxyChem Cooperatief. One Equity Partners acquired FMC Global Peroxygens, a long-time hydrogen peroxide producer, in 2014, renaming the business PeroxyChem. PeroxyChem has two hydrogen peroxide production plants in North America, in Bayport, Texas and Prince George, British Columbia. PeroxyChem also recently opened a plant in Saratoga Springs, New York. That plant purifies hydrogen peroxide produced at PeroxyChem's Bayport facility to create electronics-grade hydrogen peroxide.

IV. THE ACQUISITION

13. Pursuant to an Agreement and Plan of Merger dated November 7, 2018, Evonik proposes to acquire 100% of the voting securities of PeroxyChem for approximately $625 million in cash.

V. RELEVANT MARKETS

14. The production and sale of hydrogen peroxide to customers in (1) the Pacific Northwest and (2) the Southern and Central United States constitute relevant antitrust markets.

A. Relevant Product Market

15. The relevant product market in which to assess the effects of the Acquisition is hydrogen peroxide. Hydrogen peroxide is an oxidizing agent with diverse uses such as bleaching pulp, chemical synthesis, and sterilizing food packaging. The primary use of hydrogen peroxide produced in North America is for bleaching in the pulp and paper industry.

16. The relevant product market at issue in this case does not include electronics-grade hydrogen peroxide. Electronics-grade hydrogen peroxide is used by semiconductor manufacturers as a cleaning and etching agent to remove contaminants from semiconductor wafers that go into cell phones, computers, and other advanced electronic devices. Electronics-grade hydrogen peroxide requires additional purification capabilities that vary by hydrogen peroxide producer, and not all hydrogen peroxide producers are capable of producing electronics-grade hydrogen peroxide. Hydrogen peroxide is not a substitute for electronics-grade hydrogen peroxide.

17. Hydrogen peroxide is a commodity chemical. The primary raw materials in manufacturing hydrogen peroxide are natural gas and hydrogen. The hydrogen peroxide production process in North America is comprised of three steps: 1) hydrogenation, 2) oxidation, and 3) extraction. This process results in crude hydrogen peroxide, which is then diluted, filtered, and stabilized depending on customer end-use.

18. There are no reasonably interchangeable substitutes for hydrogen peroxide, and customers could not realistically switch to other chemicals in the face of a small but significant non-transitory increase in price. For pulp and paper customers, who purchase the majority of hydrogen peroxide in North America, mills are set up to use specific chemicals in the bleaching process. These customers could not switch to a different bleaching chemical without purchasing new equipment and re-formulating the bleaching process, which would be costly and could take several years to implement. Similarly, there are no effective substitutes for hydrogen peroxide for other end-use applications.

B. Relevant Geographic Markets

19. Respondents compete in regional markets for the production and sale of hydrogen peroxide to customers. Accordingly, it is appropriate to analyze the competitive effects of the Acquisition in certain regional markets in which Respondents compete. There is also likely to be harm to customers that are outside of these geographic markets.

20. The relevant regional geographic markets in which to assess the Acquisition's effects are: (1) the Pacific Northwest and (2) the Southern and Central United States.

21. Hydrogen peroxide is delivered to customers predominantly by rail or truck. There are high transportation costs associated with delivering hydrogen peroxide, particularly relative to the value of the product itself. As a result, hydrogen peroxide producers deliver from plants that are relatively nearer to customers because – when all else is equal – it is more cost-effective to deliver at shorter distances. While hydrogen peroxide producers use terminals to deliver further distances, this usage increases the cost of delivery.

22. Respondents, like the other major North American hydrogen peroxide producers, analyze the industry by geographic regions, routinely treating the Pacific Northwest and the Southern and Central United States as separate regions.

23. Evonik and PeroxyChem individually negotiate prices with customers and price differently based on customers' locations. When hydrogen peroxide producers negotiate with a multiregional customer, the customer's prices typically vary by region.

24. Customers within one of the relevant regional geographic markets are unlikely to purchase hydrogen peroxide outside of that market and transport it themselves, given the cost of delivery and the importance of proximity. Further, customers could not defeat a price increase by purchasing indirectly from or through other customers (*i.e.*, arbitrage).

25. Competitive conditions for the production and sale of hydrogen peroxide differ by region. Evonik and PeroxyChem each compete to serve customers in the Pacific Northwest and the Southern and Central United States, where clusters of hydrogen peroxide customers are located. Additionally, Evonik and PeroxyChem each have plants in the Pacific Northwest and the Southern and Central United States.

26. The Pacific Northwest consists of approximately Washington, Oregon, Montana, Idaho, and Wyoming in the United States, along with British Columbia, Alberta, Manitoba, and Saskatchewan in Canada.

27. The Southern and Central United States consists of approximately Alabama, Arkansas, Arizona, California, Colorado, the District of Columbia, Delaware, Florida, Georgia, Illinois, Indiana, Iowa, Kansas, Kentucky, Louisiana, Maryland, Michigan, Minnesota, Missouri, Mississippi, North Carolina, North Dakota, Nebraska, New Mexico, Nevada, Ohio, Oklahoma, South Carolina, South Dakota, Tennessee, Texas, Utah, Virginia, Wisconsin, and West Virginia.

VI. MARKET CONCENTRATION AND THE ACQUISITION'S PRESUMPTIVE ILLEGALITY

28. Post-Acquisition, the combined entity would have a dominant share of sales to customers in both the Pacific Northwest and the Southern and Central United States, and the Acquisition would greatly increase concentration in these already concentrated markets.

29. Other than Evonik and PeroxyChem, only one other hydrogen peroxide producer has significant sales in the Pacific Northwest: Solvay. Following the Acquisition, the merged entity will be the largest hydrogen peroxide producer in the Pacific Northwest, with more than half of the production capacity and sales in the region.

30. In the Southern and Central United States, Evonik and PeroxyChem compete with Solvay, Arkema, and Nouryon. By nameplate production capacity, Evonik and PeroxyChem are the two largest hydrogen peroxide producers, and are two of the top three suppliers of hydrogen peroxide by sales. Following the Acquisition, the merged entity will be the largest hydrogen peroxide producer in the area, with nearly half of the production capacity and sales in the region.

31. The Merger Guidelines and courts often measure concentration using HHIs. HHIs are calculated by totaling the squares of the market shares of every firm in the relevant market pre- and post-Acquisition. Under the Merger Guidelines, an acquistion is presumed likely to create or enhance market power – and is presumptively illegal – when the post-acquisition HHI exceeds 2,500 and the acquisition increases the HHI by more than 200 points.

32. The market for hydrogen peroxide in each relevant regional market is already concentrated. Post-Acquisition, each regional market would be substantially more concentrated than it is today.

33. In the Pacific Northwest, post-Acquisition Evonik would control more than half of the production capacity and sales in the relevant market. Post-Acquisition, the HHI in the relevant market far exceeds the 2,500 points that demonstrate that a market is highly concentrated. Moreover, the Acquisition would increase HHIs in an already highly concentrated market by significantly more points than required for a presumption that the Acquisition is likely to enhance market power.

34. In the Southern and Central United States, post-Acquisition Evonik would control nearly half of the production capacity and sales in the market. Post-Acquisition, the HHI in the relevant market would exceed the 2,500 points that demonstrate that a market is highly concentrated. Moreover, the Acquisition would increase HHIs in an already concentrated market by significantly more points than required for a presumption that the Acquisition is likely to enhance market power.

35. Thus, in both relevant markets, the Acquisition would result in concentration well above the amount necessary to establish a presumption of competitive harm.

36. Therefore, the Acquisition is presumptively unlawful.

VII. ANTICOMPETITIVE EFFECTS

A. The Acquisition Would Increase the Likelihood of Anticompetitive Coordination

37. The markets for the production and sale of hydrogen peroxide to customers already demonstrate numerous characteristics that make them vulnerable to coordinated conduct. These characteristics include a commodity product; a highly concentrated market structure with a limited number of competitors; significant transparency regarding the competitive and strategic decisions of rival firms; customers with long-term, stable supplier relationships allowing for easy detection of deviations from past practices; low elasticity of demand; and a history of strong interdependent behavior.

38. Given these characteristics, it is not surprising that the industry has a history of price fixing, including guilty pleas, private litigation, and substantial fines and settlements. Evonik's predecessor, Degussa, entered into an antitrust leniency agreement with the U.S. Department of Justice for its cooperation with a criminal antitrust investigation into illegal price fixing involving hydrogen peroxide. As part of the same criminal price-fixing case, Solvay and AkzoNobel (now Nouryon) entered plea agreements which summarized the facts underlying the anticompetitive behavior among the hydrogen peroxide producers:

> [Solvay] . . . participated in a conspiracy among major hydrogen peroxide producers, the primary purpose of which was to suppress and eliminate competition by fixing the price of hydrogen peroxide sold in the United States and elsewhere. In furtherance of the conspiracy, the defendant, through certain of its former officers, directors, and employees, engaged in discussions and attended meetings with representatives of other major hydrogen peroxide producers. During these discussions and meetings, agreements were reached to fix the price of hydrogen peroxide sold in the United States and elsewhere.

39. The major North American hydrogen peroxide producers have considerable visibility into their competitors' business. Competitors track a wealth of information about each other—including plant-by-plant production capacities, production and inventory levels, costs, and customer locations served—by monitoring public statements and gathering competitive information from customers, distributors and others throughout the industry.

40. North American hydrogen peroxide producers also have significant awareness of their competitors' pricing. The major costs to produce hydrogen peroxide are natural gas and electricity, which allows hydrogen peroxide producers to estimate production costs at competitor plants. Further, when responding to competitive bids, hydrogen peroxide producers factor in transportation costs from their competitors' hydrogen peroxide production plants. Hydrogen peroxide producers also learn about competitor pricing during the competitive bid process for customers, whether formal or informal.

41. Having competed against each other in an oligopolistic market environment for many years, the major North American hydrogen peroxide producers recognize their mutual interdependence and aligned incentives. For years, hydrogen peroxide producers have engaged in parallel pricing behavior and other types of parallel accommodating conduct, including refraining from competing aggressively to win new business for fear of provoking a competitive response from a rival. By eliminating a key competitor, the Acquisition may exacerbate the anticompetitive effects of this interdependence.

42. Allowing Evonik to acquire PeroxyChem will increase the likelihood of anticompetitive coordination by eliminating a large, independent competitor. In the Pacific Northwest, the Acquisition creates a duopoly, leaving Evonik and Solvay as the only hydrogen peroxide producers remaining in the region. In the Southern and Central United States, the Acquisition establishes a firm controlling nearly half of the production capacity and sales in the region. Previous industry conduct demonstrates that hydrogen peroxide producers were successfully able to fix prices with six firms competing in North America. The Acquisition would

reduce the number of remaining firms to two in the Pacific Northwest and four in the Southern and Central United States, making coordination among the remaining firms both easier and more likely to increase.

B. The Acquisition Would Eliminate Vital Head-to-Head Competition Between Evonik and PeroxyChem

43. The Acquisition would eliminate significant direct, head-to-head competition between Respondents. Customers benefit substantially from the competition between Evonik and PeroxyChem in the form of lower prices. The Acquisition would substantially reduce that competition.

44. Evonik and PeroxyChem compete for customers in both the Pacific Northwest and the Southern and Central United States, to the direct benefit of customers. Evonik and PeroxyChem track rival firms' price movements and respond to competition by offering better prices. This competition enables customers to pit hydrogen peroxide producers against each other in negotiations to obtain lower prices and increased discounts. Customers benefit from having more hydrogen peroxide producers in the region from which to obtain competitive pricing.

45. Post-Acquisition, Evonik would face less meaningful competition in both regional markets than it does today. Evonik would not need to compete as aggressively on price to win or retain the business of many customers. Other hydrogen peroxide producers will be unable to make up for the competition lost as a result of the Acquisition.

46. The only remaining hydrogen peroxide producer with a significant presence in the Pacific Northwest is Solvay. Customers in the Pacific Northwest are often unwilling to use hydrogen peroxide producers with plants outside the Pacific Northwest—Arkema and Nouryon—due to their distance from customer locations, which results in higher delivered prices and an increased risk of supply issues. Further, Arkema and Nouryon generally do not bid on customers' business in the Pacific Northwest.

47. The only remaining hydrogen peroxide producers in the Southern and Central United States are Solvay, Arkema, and Nouryon. However, post-Acquisition, Evonik would control nearly half of the production capacity and sales in the region. Solvay, Arkema, and Nouryon do not have sufficient capacity to mitigate the anticompetitive effects of the Acquisition in the Southern and Central United States. Further, for certain customers, some of these suppliers are not viable options due to smaller production capacities.

VIII. LACK OF COUNTERVAILING FACTORS

A. Barriers to Entry and Expansion

48. Respondents cannot demonstrate that new entry or expansion by existing firms would be timely, likely, or sufficient to offset the anticompetitive effects of the Acquisition.

49. The hydrogen peroxide market is characterized by substantial barriers to entry. Building a new hydrogen peroxide plant would take multiple years and a large capital investment. Thus, sufficiently timely entry is unlikely to occur in response to the Acquisition's anticompetitive effects in the Pacific Northwest or the Southern and Central United States to prevent significant anticompetitive harm.

50. Expansion or repositioning by the remaining firms that would defeat anticompetitive effects in the hydrogen peroxide markets in the Pacific Northwest or the Southern and Central United States is also unlikely. While Solvay expanded production of hydrogen peroxide at its Longview, Washington plant in 2016, there has been no other substantial increase in hydrogen peroxide capacity in the last decade. Further, any expansion would require a large capital investment. Thus, expansion would not be timely, likely, or sufficient in the Pacific Northwest or the Southern and Central United States to counteract the anticompetitive effects of the Acquisition.

51. Other industrial chemical producers are unlikely to reposition. The same barriers to entry and expansion by existing hydrogen peroxide producers hold true for industrial chemical manufacturers.

52. There are no significant imports of hydrogen peroxide into North America, and North American hydrogen peroxide producers do not view imports as a competitive threat. Further, customers do not view imports as a viable option for hydrogen peroxide due to supply chain challenges and transportation costs.

B. Efficiencies

53. Respondents cannot demonstrate cognizable merger-specific efficiencies that would be sufficient to rebut the strong presumption and evidence of the Acquisition's likely significant anticompetitive effects in the relevant markets.

IX. VIOLATION

Count I – Illegal Agreement

54. The allegations of Paragraphs 1 through 53 above are incorporated by reference as though fully set forth herein.

55. The Acquisition 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

56. The allegations of Paragraphs 1 through 53 above are incorporated by reference as though fully set forth herein.

57. The Acquisition, if consummated, may substantially lessen competition in the relevant market 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 22nd day of January, 2020, 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 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 Evonik and PeroxyChem were offering and planning to offer prior to the Acquisition.

2. A prohibition against any transaction between Evonik and PeroxyChem 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, Evonik and PeroxyChem 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 PeroxyChem as a viable, independent competitor in the relevant market.

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 second day of August, 2019.

By the Commission, Chairman Simons recused.

Final Order

ORDER RETURNING MATTER TO ADJUDICATION AND DISMISSING COMPLAINT

On February 11, 2020, this matter was withdrawn from adjudication pursuant to Rule 3.26(c) of the Commission's Rules of Practice, 16 C.F.R. § 3.26(c). The Commission has now determined to return this matter to adjudication for the sole purpose of dismissing the Complaint. Accordingly,

IT IS ORDERED that this matter be, and it hereby is, returned to adjudication; and

IT IS FURTHER ORDERED that the Complaint in this matter be, and it hereby is, dismissed.

By the Commission, Commissioners Chopra and Slaughter dissenting.

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-4714; File No. 191 0074
Complaint, May 11, 2020 – Decision, May 11, 2020

This consent order addresses Aaron's Inc.'s violation of Section 5 of the Federal Trade Commission Act by negotiating and executing reciprocal purchase and non-compete agreements that had the capacity, tendency, and potential effect of restraining competition unreasonably and injuring consumers. The complaint alleges that Respondent entered into a small number of reciprocal purchase agreements from June 2015 to May 2018 that explicitly required the selling party to exit and remain out of the market for a specified period. The reciprocal purchase and non-compete agreements unreasonably restrained brick-and-mortar rent-to-own retail industry in the geographic markets. The consent order requires Respondent to not enter into a reciprocal purchase agreement nor any non-competition agreement that was part of a reciprocal purchase agreement. Future franchise agreements must specifically prohibit Respondent from entering into a reciprocal purchase agreement with a competitor.

Participants

For the *Commission*: *Eric Edmondson, Stuart Hirschfeld, Joe Lipinsky*, and *Connor Shively.*

For the *Respondents*: *Norman Armstrong, Jr., King & Spalding.*

COMPLAINT

Pursuant to the provisions of the Federal Trade Commission Act, and by virtue of the authority vested in it by said Act, the Federal Trade Commission ("Commission"), having reason to believe that Aaron's Inc. ("Aaron's"), a corporation, hereinafter sometimes referred to as "Respondent," has violated the provisions of said Act, 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 in that respect as follows:

Nature of the Case

1. This action concerns purchase agreements of consumer rental contracts between Aaron's and other rent-to-own ("RTO") companies that were executed between 2015 and 2018.

2. In the traditional brick and mortar retail RTO industry, each RTO company operates stores that compete in small geographic markets. Each store derives income through rental contracts executed with its customers. When an RTO company chooses to close a store, it must decide what to do with the store's active consumer rental contracts. If the RTO company has a store nearby, it will transfer the closed store's consumer rental contracts to its nearby store. However, when the RTO company does not have a store nearby, it will attempt to sell the closed

store's consumer rental contracts to a competing RTO company that has a store in close proximity to the closing store. This unilateral decision to sell a closed store's consumer rental contracts to a competitor is common in the RTO industry.

3. The conduct challenged in this complaint involves the instances when Aaron's did not make a unilateral decision to sell a closed store's consumer rental contracts to a competitor. Aaron's instead entered into reciprocal purchase agreements whereby Aaron's agreed to close an RTO store or stores and sell the closed store's or stores' consumer rental contracts to an RTO competitor, contingent on that RTO competitor agreeing to close a different RTO store or stores and sell those closed store's or stores' consumer rental contracts to Aaron's.

4. These reciprocal purchase agreements included reciprocal non-compete agreement clauses, whereby Aaron's and the RTO competitor agreed not to compete within a specified geographic market for a specific time-period, typically three years, in the area or areas where the stores were closed.

5. The reciprocal purchase agreements with reciprocal non-compete agreement clauses constitute an unfair method of trade, violating Section 5 of the Federal Trade Commission Act, 15 U.S.C. § 45.

Respondent

6. Respondent Aaron's is a corporation organized, existing, and doing business under and by virtue of the laws of the United States, with its headquarters and principal place of business located at 400 Galleria Parkway S.E., Suite 300, Atlanta, GA 30339.

Jurisdiction

7. At all times relevant herein, Aaron's has been, and is now, a corporation as "corporation" is defined in Section 4 of the Federal Trade Commission Act, 15 U.S.C. § 44.

8. The acts and practices of Aaron's, including the acts and practices alleged herein, are in commerce or affect commerce, as "commerce" is defined in Section 4 of the Federal Trade Commission Act, 15 U.S.C. § 44.

Overview of the Traditional Brick and Mortar Rent-to-Own Industry

9. The traditional brick and mortar RTO industry focuses on renting durable goods, such as furniture, appliances, and electronic goods, to customers who lack access to traditional credit. RTOs operate large-format stores carrying a selection of new and returned merchandise.

10. The primary traditional brick and mortar RTO customers are "unbanked" individuals who have little to no access to traditional credit. Customers do not need to satisfy a credit check or have a bank account to qualify for RTO contracts. Previously rented items are typically refurbished and re-rented at the same weekly or monthly rate as new items, but for shorter contract terms.

11. As the industry name connotes, consumers do not buy the merchandise outright, but rather take possession after entering rental contracts with the RTO firm. The contracts are formally structured as short-term contracts (typically one week or one month) that renew when the consumer makes the current lease payment. The customer only acquires ownership of the merchandise at the end of all the renewals, which is typically in 12 to 24 months.

12. Due to the nature of these at-will, short-term leases, each RTO transaction creates a stream of recurring revenue that may terminate at any time, should a customer choose to return the rented merchandise before the end of all the renewals.

13. Customers often make payments in-person at the RTO store where they entered into the consumer rental contract. When an RTO company closes a store, it must decide what to do with the recurring revenue stream from the existing rental contracts. Often, the RTO company will transfer contracts to one of its other nearby locations, but if the new location is more than a few miles away from the original store, consumers may be unwilling or unable to continue making payments, and they are likely to return the merchandise. Thus, when an RTO company does not have another store near the closing store, it will often sell the contracts to a competitor with a nearby store rather than risk losing the value of these existing contracts by attempting to transfer them to one of its own more distant stores.

14. Since the number of RTO stores has fallen significantly in the past two decades, the unilateral sale of active rental contracts to competitors through agreements, which typically include non-compete agreement clauses, has been relatively common.

The Reciprocal Purchase and Non-Compete Agreements

15. From June 2015 to May 2018, Aaron's entered into a small number of reciprocal purchase agreements. These agreements codified the contingent and reciprocal nature of the simultaneous sales transactions using the following (or similar) language:

> Reciprocal Purchase Agreements. Aaron and [ ] acknowledge that they have entered into a separate agreement whereby [ ] has agreed to purchase certain assets [active rental contracts] belonging to and used by Aaron in its rental business at certain Aaron locations, all as is specifically provided therein ("[ ] Purchase Agreement"). Aaron and [ ] agree that the Aaron Purchase Agreement and the [ ] Purchase Agreement are mutual and conditioned upon the other, and that [ ] and Aaron shall simultaneously perform their obligations under both agreements on their respective Effective Dates, or not at all.

16. The reciprocal purchase agreements also explicitly require the selling party to exit and remain out of the market for a specified period, using the following (or similar) language:

> Non-competition. [ ] agrees to not engage in any rent-to-own, rental purchase, or other substantially similar business including the renting or selling of rims and tires, either directly or indirectly, for its or their own account or for another, during the

Non-Compete Time and within the Non-Compete Territory specified in the Addendum, if any.

Non-Compete Time: [ ] agrees that the Non-Compete time will be Three (3) years following the Effective Date.

Non-Compete Territory: [ ] agrees that the Non-Compete Territory will be within a Ten (10) mile radius of the Rental Locations, except the following items shall be deemed excluded from the Non-Compete Territory and non-compete obligations of [ ], even if they are located within the Non-Compete Territory: (i) any existing store location of [ ] as of the Effective Date and (ii) any kiosk location operated by [ ] within a third-party retailer, whether currently existing or hereafter acquired or established.

Anticompetitive Effects of the Reciprocal Purchase and Non-Compete Agreements

17. The relevant product market or line of commerce in which to analyze the competitive effects of Aaron's challenged conduct is the traditional brick and mortar retail RTO business.

18. The relevant geographic market for traditional brick and mortar retail RTO business consists of a small radius, such as two miles around an urban RTO store or ten miles for a rural RTO store.

19. Aaron's conduct, as alleged herein, had the capacity, tendency, and potential effect of restraining competition unreasonably and injuring consumers and others in the following ways, among others:

a. Unreasonably restraining brick-and-mortar RTO retail industry competition in the geographic markets impacted by the reciprocal purchase and non-compete agreements through store closures that may not have occurred absent the reciprocal purchase agreements, leading to:

i. Impairing quality and service competition in the affected geographic markets; and

ii. Reducing the number of locations and product selection available to consumers.

20. The reciprocal purchase and non-compete agreements have the effect of allocating geographic markets between existing horizontal competitors.

Lack of Procompetitive Efficiencies

21. Aaron's did not offer procompetitive efficiencies that outweigh the anticompetitive effects of certain Reciprocal Asset Purchase Agreements.

22. Any legitimate objectives of Aaron's conduct as alleged were achievable through less restrictive means.

Violations Alleged

23. As set forth above, Aaron's violated Section 5 of the Federal Trade Commission Act, as amended, 15 U.S.C. § 45, by negotiating and executing these reciprocal purchase and non-compete agreements.

24. The acts and practices of Aaron's, as alleged herein, constitute unfair methods of competition in or affecting commerce in violation of Section 5 of the Federal Trade Commission Act, as amended, 15 U.S.C. § 45. Such acts and practices, or the effects thereof, will continue or recur in the absence of appropriate relief.

IN WITNESS WHEREOF, the Federal Trade Commission, having caused this Complaint to be signed by the Secretary and its official seal affixed, at Washington, D.C., this eleventh day of May 2020, issues its complaint against Respondent.

By the Commission, Commissioners Chopra and Slaughter dissenting.

DECISION AND ORDER

The Federal Trade Commission ("Commission"), having initiated an investigation of certain acts and practices of Aaron's Inc. ("Respondent"), Rent-A-Center, Inc., and Buddy's Newco, LLC, and Respondent having been furnished thereafter with a copy of the draft Complaint that counsel for the Commission proposed to present to the Commission for its consideration and which, if issued by the Commission, would charge Respondent with violations of Section 5 of the Federal Trade Commission Act, as amended, 15 U.S.C. § 45; and

Respondent, its attorneys, and counsel for the Commission having thereafter executed an Agreement Containing Consent Order ("Consent Agreement"), containing an admission by Respondent of all the jurisdictional facts set forth in the aforesaid draft Complaint, a statement that the signing of 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 it had reason to believe that Respondent has violated the said Act, and that a Complaint should issue stating its charges in that respect, and having accepted the executed Consent Agreement and placed such Consent Agreement on the public record for a period of thirty (30) days for the receipt and

consideration of public comments, now in further conformity with the procedure described in Commission Rule 2.34, 16 C.F.R. § 2.34, the Commission hereby makes the following jurisdictional findings and issues the following Decision and Order ("Order"):

1. Respondent Aaron's Inc., is a corporation organized, existing, and doing business under and by virtue of the laws of the State of Georgia, with its headquarters and principal place of business located at 400 Galleria Parkway SE, Suite 300, Atlanta, Georgia 30339.

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. "Aaron's" or "Respondent" means Aaron's Inc., its directors, officers, partners, employees, agents, representatives, successors, and assigns; and the joint ventures, subsidiaries, partnerships, divisions, groups, and affiliates controlled by Aaron's Inc., and the respective directors, officers, employees, agents, representatives, successors, and assigns of each.

B. "Buddy's" means Buddy's Newco, LLC, d/b/a Buddy's Home Furnishings, is a limited liability company organized, existing, and doing business under and by virtue of the laws of the State of Delaware, with its principal address at 4705 S. Apopka Vineland Road, Suite 206, Orlando, Florida 32819.

C. "RAC" means Rent-A-Center, Inc., a corporation organized, existing, and doing business under and by virtue of the laws of the State of Delaware, with its principal address at 5501 Headquarters Drive, Plano, Texas 75024.

D. "Commission" means the Federal Trade Commission.

E. "Aaron's Franchisee" means a Third Party business owner who operates a RTO Retail Center under the Aaron's corporate trademark or associated brands.

F. "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*.

G. "Board Member" means a member of the board of directors or board of managers for a specified entity.

H. "Competitor" means any Third Party that, directly or through a subsidiary, owns operates, or is a franchisor of, one or more RTO Retail Centers in the United States, including Buddy's and RAC.

I. "Consent Agreement" means the Agreement Containing Consent Order.

J. "Consumer Rental Contracts" means contracts that provide a consumer with a consumer good through a leasing arrangement that terminates when the consumer acquires ownership or the lessor takes repossession of the consumer good. Consumer Rental Contracts are also referred to as rent-to-own contracts, rental purchase agreements, and lease-to-own agreements.

K. "Executive Team" means Board Members, CEO, President, Executive Vice President, and General Counsel of Respondent, and all employees of Respondent in a senior management position with decision-making authority over Respondent's business operations.

L. "Non-Competition Agreement" means any agreement or covenant not to operate an RTO Retail Center within a specified geographic area for a specified period.

M. "Third Party" means any natural person, partnership, corporation, association, trust, joint venture, or other business or legal entity other than Respondent.

N. "Reciprocal Purchase Agreement" means a contingent agreement or series of contingent agreements through which Respondent or an Aaron's Franchisee agrees to close a RTO Retail Center and sell its Consumer Rental Contracts to a Competitor or its franchisee, and that Competitor or its franchisee agrees to close a different RTO Retail Center and sell its Consumer Rental Contracts to Respondent or an Aaron's Franchisee.

O. "RTO Retail Center" means a store with a physical location that primarily offers consumer goods through Consumer Rental Contracts.

II.

IT IS FURTHER ORDERED that:

A. Respondent shall not, directly or indirectly, enter into, solicit, invite, facilitate, or enable any Third Party to enter into, a Reciprocal Purchase Agreement.

B. Respondent shall not enforce, in whole or part, any Non-Competition Agreement that was part of, or contingent on, a Reciprocal Purchase Agreement.

C. In any future franchise agreement or any renewal of an existing franchise agreement, Respondent shall specifically prohibit the Aaron's Franchisee from entering into a Reciprocal Purchase Agreement with a Third Party.

III.

IT IS FURTHER ORDERED that no employee, officer, Board Member or other representative of Respondent shall serve as a Board Member or officer for a Competitor and Respondent shall not permit any employee, officer, Board Member or other representative of a Competitor to serve as a Board Member for Respondent.

IV.

IT IS FURTHER ORDERED that Respondent shall establish and maintain an antitrust compliance program that sets forth the policies and procedures Respondent has implemented to comply with the Order and the Antitrust Laws. The antitrust compliance program shall include:

A. Designation and retention of an antitrust compliance officer, who may be an existing employee of Respondent, to supervise the design, maintenance, and operation of the program;

B. Training the Executive Team regarding Respondent's obligations under this Order and the Antitrust Laws:

1. Within 30 days after this Order becomes final,

2. At least annually during the term of the Order, and

3. Within 30 days of when an individual first becomes a member of the Executive Team;

C. Policies and procedures for employees and representatives of Respondent to ask questions about, and report violations of, this Order and the Antitrust Laws confidentially and without fear of retaliation of any kind;

D. Policies and procedures for disciplining employees and representatives of Respondent for failure to comply with this Order and the Antitrust Laws; and

E. Retention of documents and records sufficient to record Respondent's compliance with its obligations under this Paragraph IV of this Order, including but not limited to records showing that employees and representatives of Respondent have received all trainings required under this Order during the preceding 2 years.

V.

IT IS FURTHER ORDERED that Respondent shall file verified written reports ("compliance reports") in accordance with the following:

A. Respondent shall submit:

1. An interim compliance report 60 days after the Order is issued;

2. Annual compliance reports each year on the anniversary of entry of the Order for a period of ten (10) years; and

3. Additional compliance reports as the Commission or its staff may request;

B. Each compliance report shall set forth in detail the manner and form in which Respondent intends to comply, is complying, and has complied with this Order. Each compliance report shall contain sufficient information and documentation to enable the Commission to determine independently whether Respondent is complying with the Order. Conclusory statements that Respondent has complied with its obligations under the Order are insufficient. Respondent shall include in its reports, among other information or documentation that may be necessary to demonstrate compliance:

1. The identity and job title of the antitrust compliance officer;

2. A description of how Respondent is complying with Paragraph II.B of the Order with respect to each Reciprocal Purchase Agreement in existence prior to the date of this Order and include, if applicable, any amendments, appendices, exhibits, schedules and modifications made thereto; and

3. With each annual compliance report, provide an electronic Excel spreadsheet listing each RTO Retail Center for which either 1) Respondent or an Aaron's Franchisee sold the RTO Retail Center's Consumer Rental Contracts to a Competitor or franchisee of a Competitor, or 2) Respondent or an Aaron's Franchisee acquired the RTO Retail Center's Consumer Rental Contracts of a Competitor or franchisee of a Competitor and provide the following information regarding each listed RTO Retail Center:

a. Whether Respondent or an Aaron's Franchisee acquired or sold Consumer Rental Contracts and the identity of the affiliated RTO Retail Center;

b. The address of the RTO Retail Center;

c. The name of all other parties to the transaction, and if another party was a franchisee, the name of the franchisor of that party;

d. Whether Respondent or an Aaron's Franchisee has entered into a Non-Competition Agreement in connection with the transaction; and

e. A short summary of the relevant terms of the transaction including, but not limited to: (i) the purchase price and/or valuation of assets; (ii) the closing date of the transaction; and (iii) if Respondent or an Aaron's Franchisee acquired or sold Consumer Rental Contracts

from multiple RTO Retail Centers in the same transaction, the addresses of the other RTO Retail Centers.

C. Respondent shall verify each compliance report in the manner set forth in 28 U.S.C. § 1746 by the Chief Executive Officer or another officer or employee specifically authorized to perform this function. Respondent shall submit an original and 2 copies of each compliance report as required by Commission Rule 2.41(a), 16 C.F.R. § 2.41(a), including a paper original submitted to the Secretary of the Commission and electronic copies to the Secretary at ElectronicFilings@ftc.gov and to the Compliance Division at bccompliance@ftc.gov. In addition, Respondent shall provide a copy of each compliance report to the Monitor if the Commission has appointed one in this matter.

VI.

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

A. The proposed dissolution of Aaron's Inc.;

B. The proposed acquisition, merger, or consolidation of Aaron's Inc; 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 purposes of determining or securing compliance with this Order, and subject to any legally recognized privilege, upon written request and five (5) days' notice to the relevant Respondent, made to its principal place of business as identified in this Order, registered office of its United States subsidiary, or its headquarters office, the notified 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 business and other records and all documentary material and electronically stored information as defined in Commission Rules 2.7(a)(1) and (2), 16 C.F.R. § 2.7(a)(1) and (2), 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 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.

VIII.

IT IS FURTHER ORDERED that in connection with any legal proceeding brought by the Commission against Buddy's or RAC alleging that Respondent or an Aaron's Franchisee entered illegal Reciprocal Purchase Agreements, Respondent shall:

A. Agree to service of process of all Commission subpoenas issued under Rule 3.34 of the Commission Rules of Practice, 16 C.F.R. ¶ 3.34; and

B. Negotiate in good faith with the Commission to provide a declaration, affidavit, and/or sponsoring witness, if necessary, to establish the authenticity and admissibility of any documents and/or data that Respondent produces or has produced to the Commission.

IX.

IT IS FINALLY ORDERED that this Order shall terminate on May 11, 2040.

By the Commission, Commissioners Chopra and Slaughter dissenting.

STATEMENT OF CHAIRMAN JOSEPH J. SIMONS AND COMMISSIONER NOAH JOSHUA PHILLIPS

Today, the Commission votes to place a proposed settlement out for public comment to settle charges that three rent-to-own companies—Buddy's, Aaron's, and Rent-A-Center—entered into anticompetitive reciprocal purchase agreements, which in short hand have been referred to as store "swap" agreements. After a nearly ten-month investigation, agency staff identified a series of swap agreements that allegedly had the effect of allocating geographic markets among rent-to-own store competitors. Staff also found that these swap agreements contained non-compete provisions that prohibited the party transferring the contracts from reentering the market for three years. The proposed settlement would, if finalized, (i) prohibit these companies from swapping any more stores, (ii) abrogate related non-compete agreements among the companies, freeing them to compete more aggressively, and (iii) ban any individual associated with either Buddy's or Aaron's from serving on the board of directors of the other company. We believe this relief, which is tailored to both the nature of the challenged conduct and the governing law, would remedy the legal violation and prevent its recurrence.

Concurring Statement

Commissioner Chopra argues that proposed settlements in this matter are inadequate. We disagree. The settlements fully resolve the competitive concerns identified by staff and impose a significant margin of "fencing-in" relief.[1] A few points merit comment:

- Although staff only found a few swaps that they alleged were anticompetitive, the Commission's settlements bar the parties from entering into *all* such swap agreements among the three largest rent-to-own companies in the United States.[2] This outcome saves the agency resources that would be required to examine each individual future swap agreement to determine its competitive intent and effect.

- Because we only have evidence that a few swap agreements were anticompetitive, notifying all customers and employees affected by any swap agreement would be over-inclusive because a majority of those notified likely would not have been affected by any anticompetitive conduct.

- Unlike situations involving ongoing safety concerns, ongoing health concerns, hidden lack of performance, exposure to recurring charges, and preventing further dissemination of deceptive claims, where notice works to protect consumers, notice here would not protect consumers from any further harm. The settlement, which bans the parties from entering into future swap agreements, ensures that customers and employees suffer no further harm from this conduct. As a result, we believe publicizing the settlement and putting it out for public comment is sufficient notice to the public.

- Although Brian Kahn, the Managing Partner of Vintage Capital Management, the private equity firm that owns Buddy's, sat on Aaron's Board of Directors, that board interlock ended four years ago when Mr. Kahn stepped down from the Aaron's board. As a result, we do not believe adding a count under Section 8 of the Clayton Act, which would typically require the offending parties to end the interlock, adds anything to the settlement. Nor do we believe a Section 5 count alleging the same fact pattern is warranted.

1 Fencing-in relief bars a defendant from conduct beyond that which is alleged or found to be unlawful. The purpose of such relief is prophylactic, to reduce the risk that the defendant will violate the law going forward.

2 Notably, the swap agreements were not of a type that so obviously raised concerns that they were hidden. Aaron's listed store swaps in multiple SEC filings and a press release. *See* http://investor.aarons.com/node/17201/html; https://www.prnewswire.com/news-releases/aarons-inc-reports-second-quarter-2015-results-300118252.html; https://sec.report/Document/0000706688-15-000156/.

As Commissioner Chopra notes, many customers of rent-to-own stores are among those least able to defend themselves against anticompetitive and illegal commercial practices. That is why the Commission has a long history of addressing harmful practices in this industry.[3] The Commission continues to be aggressive in rooting out anticompetitive conduct, and it will impose remedies where necessary to prevent future anticompetitive conduct and redress harms. We think the Commission's proposed orders strike the right balance by barring potentially anticompetitive conduct and conserving the Commission's resources to investigate other conduct.

3 *See e.g., In re Aaron's Inc.,* Docket No. C-4442 (March 11, 2014) (prohibiting use of surreptitious tracking software on computers rented by RTO retail chain); James M. Lacko, Signe-Mary McKernan & Manoj Hastak, *Survey of Rent-to-Own Customers: Fed. Trade Comm'n Bureau of Econ. Staff Report* (April 2000), *available at* http://www.ftc.gov/reports/renttoown/renttoownr.pdf; *Rent-to-Own Transactions*, *Before the Subcomm. on Fin. Inst. and Consumer Credit, Comm. on Fin. Serv.* (July 26, 2011) (prepared statement of the Fed. Trade Comm'n), *available at* https://www.ftc.gov/public-statements/2011/07/prepared-statement-federal-trade-commission-rent-own-transactions; Fed. Trade Comm'n, *Rent-to-Own: Costly Convenience* (March 2015), https://www.consumer.ftc.gov/articles/0524-rent-own-costly-convenience.

Dissenting Statement

DISSENTING STATEMENT OF COMMISSIONER ROHIT CHOPRA

Summary

- The FTC uncovered evidence that three major rent-to-own players engaged in a market allocation scheme to close down stores that suppressed competition, but the agency is *not* asserting that this conduct was per se unlawful.

- The proposed settlement deprives affected families of direct notification by the companies of their wrongdoing. This goes against a core element of competitive markets: the dissemination of truthful information.

- There is clear evidence that a senior executive served on the board of a competitor. The Commission's complaint should have charged this was unlawful.

I dissent from the Commission's vote regarding three no-money, no-fault proposed orders with the big three major players in the rent-to-own business: Rent-a-Center, Inc. (NASDAQ: RCII), Aaron's, Inc. (NYSE: AAN), and Buddy's Newco, LLC. While I am pleased that we have uncovered difficult-to-detect misconduct, I am concerned our remedy is insufficient, that the analytical basis of the proposed settlements is flawed, and that the Commission is doing little to deter similar misconduct by others.

Background

Rent-a-Center, Aaron's, and Buddy's typically target low-income families seeking items for their homes, such as furniture or electronics. Unlike traditional installment sales contracts, rent-to-own companies "rent" an item to a consumer, who can then take ownership if all the required payments are made after a certain period of time. If the consumer is unable to make payments, they must return the good. Due to this unusual structure, rent-to-own companies have actually threatened customers who fail to make their payments with criminal theft.[1] The companies can even profit when a customer fails to complete the term, because the total price paid by the consumer over time may be far higher than the retail price for the goods.[2]

This business model has resulted in consumers paying significantly high prices. Making matters worse, the industry has tended to prey on vulnerable populations, especially military families.[3] The industry has been on the FTC's radar for at least two decades, though the agency

1 Brian Highsmith & Margot Saunders, NATIONAL CONSUMER LAW CENTER, THE RENT-TO-OWN-RACKET: USING CRIMINAL COURTS TO COERCE PAYMENTS FROM VULNERABLE FAMILIES (Feb. 2019), https://www.nclc.org/images/pdf/criminal-justice/report-rent-to-own-racket.pdf.

2 This is because the total cost of ownership is often far greater than the cash price of the merchandise. While the monthly payments may be low, a consumer only acquires ownership at the end of all scheduled payments, which typically last 12 to 24 months. When a consumer makes many payments but fails to complete the term, the rent-to-own company keeps the goods.

3 *See* Written Testimony of Assistant Director Hollister K. Petraeus on behalf of the Consumer Financial Protection Bureau, Before the U.S. Senate Committee on Banking, Housing, and Urban Affairs (Nov. 3, 2011),

has struggled to address the risks posed by this business model.[4] Given the pre-existing concerns about abuse in the rent-to-own industry, it is even more worrisome that dwindling competition might further diminish the limited leverage that families have when signing a contract.

The Scheme Alleged in the Complaint

The FTC's investigation uncovered evidence of a market allocation scheme between rent-to-own chains with competing stores in multiple geographic markets: one competitor would agree to close a store and sell customer contracts in one geographic market in exchange for a competitor closing one of its stores and selling its customer contracts in another geographic market. The companies did not hold an open auction to sell off stores or inventory.

As noted in the Commission's Analysis to Aid Public Comment, the agency has evidence to suggest that there were stores that would not have otherwise been closed, including stores that were profitable. The companies also added non-compete provisions to the agreements to prevent a competitor from re-emerging in a local market for three years.

While not a primary focus of the agency's investigation, there was another troubling element with respect to Buddy's and Aaron's in this matter. Vintage Capital Management, a private equity outfit with a controlling interest in Buddy's, also was, at one time, a very large shareholder of Aaron's.[5] Mr. Brian Kahn, the managing partner and founder of Vintage Capital Management, served as a member of the board of directors of Aaron's at the same time his fund controlled Buddy's.[6] Some of the alleged market allocation schemes took place during the time of Mr. Kahn's service on Aaron's board.[7]

Analysis of Complaint and Remedy

When competitors agree to close stores in ways that lead to a division of local markets, this will typically be profitable for the companies and harmful to the consumers and employees whose

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https://www.consumerfinance.gov/about-us/newsroom/testimony-of-hollister-k-petraeus-before-the-senate-committee- on-banking-housing-and-urban-affairs/.

4 *See* James M. Lacko et al., FED. TRADE COMM'N, BUREAU OF ECON. STAFF REP'T: SURVEY OF RENT-TO-OWN CUSTOMERS (Apr. 2000), https://www.ftc.gov/reports/survey-rent-own-customers. The FTC even caught Aaron's illegally spying on consumers via rental computers. *See* Press Release, Fed. Trade Comm'n, Aaron's Rent-To-Own Chain Settles FTC Charges That it Enabled Computer Spying by Franchisees (Oct. 22, 2013), https://www.ftc.gov/news-events/press-releases/2013/10/aarons-rent-own-chain-settles-ftc-charges-it-enabled-computer.

5 Press Release, Aaron's Inc., Aaron's, Inc. Reaches Agreement With Vintage Capital Management; Brian R. Kahn and Matthew E. Avril to Join Aaron's Board of Directors (May 13, 2014), http://investor.aarons.com/news-releases/news-release-details/aarons-inc-reaches-agreement-vintage-capital-management.

6 *Id. See also* MORRISON & FOERSTER LLP, *Aaron's Inc. and Vintage Capital Management, Inc.: Chronology of Events Surrounding Unsolicited Offer* at 4 (2014), http://media.mofo.com/files/uploads/Images/UV-Aarons-Vintage-Capital.pdf.

7 Aaron's Compl. ¶15.

lives are disrupted by store closures. I acknowledge that agencies like the FTC do not have unlimited resources. We cannot always investigate every detail of potential misconduct.

However, in this matter, the Commission did not analyze customer contract performance after the store closures, or analyze employee terminations and other critical information that would help to determine the harm inflicted on the public and the companies' ill-gotten gains. The investigation did not focus on whether the companies made any misrepresentations to employees about the rationale for the store closures or other details about closures and layoffs. We also do not know whether customers were deceived when told why they could no longer make payments at the original location where they signed their contract. It is reasonable to assume that some customers faced financial hardships from the market allocation scheme, but we cannot know precisely given the scope of our investigation.

With all of these unknowns, the Commission should not jump to a conclusion that the alleged unlawful conduct was victimless. Instead, we must approach a resolution that takes into account this uncertainty. There are several aspects here worth briefly discussing.

Notice to Victims. The Commission is not seeking any notifications to the employees or customers affected by potentially illegal store closures. Requiring a notice to employees and customers, even if it includes those that may not have been harmed, has important benefits, especially if any employee or customer was deceived or harmed in ways that we were unable to uncover.

A core benefit of notice is the dissemination of truthful information, which helps instill proper incentives in the marketplace. This is especially important in no-money, no-fault settlements like the ones here, because it allows market forces to impose some degree of accountability on wrongdoing firms: harmed consumers may prefer to do business with law-abiding companies instead of ones that flout the law.

Promoting the dissemination of truthful information is foundational to functioning markets and has been a bedrock of FTC policy for decades. Fulfilling that policy goal in a case like this one requires virtually no effort on the Commission's part – it is standard practice for lawbreakers to be ordered to conduct the notifications themselves,[8] with virtually no public resources. The statement by Chairman Simons and Commissioner Phillips appears to go against this principle, by advocating that the Commission deprive customers and employees from being notified directly by the companies about their misconduct, out of fear of being "overinclusive."

Overlapping Control. When a senior executive can sit on the board of a competitor and learn about its business strategy, this can lead to significant anticompetitive effects. For example, if a senior executive learns about the locations of planned store openings of a competitor through an affiliation on that competitor's board, she may advise the other company she is affiliated with

8 *See e.g.*, *Fed. Trade Comm'n v. Cure Encapsulations, Inc.* FTC File No. 1723113 (Feb. 19, 2019); *Fed. Trade Comm'n v. Applied Food Sciences Inc.*, FTC File No. 1423054 (Sept. 10, 2014); *In re Henry Schein Practice Solutions, Inc*, Docket No. C-4575 (May 23, 2016).

to open locations in different markets to avoid competition. This is precisely the rationale behind the ban on interlocking directorates in Section 8 of the Clayton Act.

While the proposed orders against Buddy's and Aaron's ban overlaps on their boards, neither Mr. Kahn nor Vintage Capital Management are subject to these requirements. It is not clear whether the relief is adequate. While I appreciate that there is a ban in overlapping boards,[9] the Commission should have pursued a count charging Buddy's and Aaron's with engaging in an unfair method of competition in violation of the Section 5 of the Federal Trade Commission Act, pursuant to the Commission's 2015 Statement of Enforcement Principles.[10]

There is uncertainty in the market about compliance with the ban on overlapping boards.[11] Some may argue that limited liability companies (LLCs) are not bound by the Clayton Act's ban that applies to corporations. By not pleading a count condemning this overlap, the FTC has missed an opportunity to demonstrate that these overlaps are unlawful.

Per Se Liability. The Commission is not asserting that the store closure scheme was per se unlawful. Instead, the agency analyzed the scheme in a way that allowed the companies to attempt to justify why the conduct was not anticompetitive. While there is fairly limited case law guiding the appropriate legal analysis of the specific fact pattern here, the conduct has the same competitive effect as a straightforward market allocation scheme, which courts treat as per se unlawful. As the FTC and Department of Justice's Antitrust Guidelines for Collaborations Among Competitors describes, agreements to "share or divide markets by allocating customers, suppliers, territories or lines of commerce. . ." have been held per se illegal.[12]

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9 I view the proposed order's ban on future interlocks as the bare minimum the Commission could possibly include in a remedy. Although the ban is broader than what Section 8 requires, since it applies regardless of the Section 8 statutory exemptions that would apply, the order would otherwise merely require Aaron's and Buddy's to abide by the law.

10 While our investigation did not make a conclusive determination as to whether Mr. Kahn's actions were a violation of Section 8 of the Clayton Act's ban on interlocking directorates, the conduct meets the standards outlined in the Commission's 2015 Statement of Enforcement Principles on the use of the agency's 'stand alone' authority to prohibit unfair methods of competition under Section 5. *See* https://www.ftc.gov/public-statements/2015/08/statement-enforcement-principles-regarding-unfair-methods-competition.

11 Makan Delrahim, Assistant Att'y Gen., U.S. Dep't of Just., Keynote Address at Fordham University School of Law, Antitrust in the Financial Sector: Hot Issues and Global Perspectives (May 1, 2019) (noting that "[t]he use of the term "corporation" in the statute has raised many questions about whether Section 8 applies to non-incorporated entities such as [LLCs] or other structures. Section 8 pre-dates the use of LLCs, and certainly predates the widespread acceptance of structures like limited liability corporations as an alternative corporate form to a traditional "corporation." To date, courts have not directly addressed this question, although we believe the harm can be the same regardless of the forms of the entities."), https://www.justice.gov/opa/speech/file/1159346/download.

12 FED. TRADE COMM'N, & U.S. DEP'T OF JUST., ANTITRUST GUIDELINES FOR COLLABORATIONS AMONG COMPETITORS at 3 (Apr. 2000) (citing *Palmer v. BRG of Georgia, Inc.*, 498 U.S. 46 (1990) (market allocation)), https://www.ftc.gov/sites/default/files/documents/public_events/joint-venture-hearings-antitrust-guidelines-collaboration-among-competitors/ftcdojguidelines-2.pdf.

The reason per se liability applies to these types of agreements is simple: certain agreements are so likely to harm competition and have no significant benefits that they do not warrant the time and expense necessary for a detailed rule of reason inquiry into their effects.[13] A rule of reason analysis is much costlier than a per se analysis, typically requiring expert testimony and evidence measuring anticompetitive effects. The level of detail in the analysis varies depending on the nature of the agreement and market circumstances.[14]

For defendants, the difference between per se and rule of reason analysis is enormous, since under a per se analysis only the existence of an agreement need be proved by a plaintiff – no justifications are allowed. Applying the wrong analysis to an allegedly illegal agreement can wreak havoc on our legal system and lead to poor outcomes.

For example, if companies sense that certain conduct is no longer likely to be treated as per se unlawful, they are more likely to engage in the conduct. Well-resourced companies can concoct justifications for their alleged conduct after they've been caught, with a net low risk of sanctions, creating an incentive for behavior that is almost always anticompetitive. This gives them an advantage over smaller and newer businesses that may not have the same guile and can also harm consumers and the companies' own employees in the process. Using a bright-line rule relying on per se liability in this case provides clear guidance to firms subject to that rule and also limits the transaction costs of enforcement.[15]

Conclusion

The proposed settlements are clearly inadequate. Because the Commission has voted to place the proposed orders on the public record for comment, I too look forward to any input the public may have on how the agency can improve the proposed orders and prevent repeating similar mistakes.

When wrongdoers wish to end an investigation by settlement, the FTC must be mindful of all of the potential harms inflicted on the public, rather than simply assuming there were none. When uncertainty is always analyzed in favor of the wrongdoer, this is a recipe for weak enforcement that does little to deter market distortions and undermines fair competition.

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13 *See Continental TV, Inc. v. GTE Sylvania Inc*., 433 U.S. 36, 50 n. 16 (1977).

14 *See California Dental Ass'n v. FTC*, 526 U.S. 756, 781 (1999) ("What is required . . . is an enquiry meet for the case, looking to the circumstances, details, and logic of a restraint").

15 *See* Jonathan B. Baker, *Taking the Error Out of "Error Cost" Analysis: What's Wrong with Antitrust's Right*, 80 ANTITRUST L.J. 1, 31 (2015).

ANALYSIS OF CONSENT ORDER TO AID PUBLIC COMMENT

I. Introduction

The Federal Trade Commission ("Commission") has accepted, subject to final approval, an Agreement Containing Consent Order with Aaron's, Inc. ("Aaron's"), an Agreement Containing Consent Order with Buddy's Newco, LLC ("Buddy's"), and an Agreement Containing Consent Order with Rent-A-Center, Inc. ("RAC") ("Consent Agreements"). The proposed Consent Agreements are intended to remedy anticompetitive effects resulting from reciprocal purchase agreements made between Aaron's, Buddy's, and RAC, and certain of their competitors in the brick-and-mortar rent-to-own ("RTO") industry.

Pursuant to the reciprocal purchase agreements, Aaron's, Buddy's, and RAC sold consumer rental contracts to nearby competitors contingent on Aaron's, Buddy's, or RAC acquiring that competitor's consumer rental contracts in another geographic area. These reciprocal purchase agreements, called swap agreements ("Swap Agreements") by the RTO industry, also included non-competition agreements whereby Aaron's, Buddy's, or RAC and the nearby competitors each agreed to close stores associated with the consumer rental contacts being sold and to not open new stores within a specified distance for a limited amount of time. Not all swap agreements violate the antitrust laws. Swap agreements between competitors that that generate significant procompetitive benefits for consumers, such as more efficient distribution or creation of a new product, may not violate the law. The Swap Agreements and ancillary non-competition agreements at issue in the present case, however, likely reduced competition between Aaron's, Buddy's, RAC, and their competitors in the RTO industry in several local markets in the United States, reducing consumer choice and depriving consumers of the benefits of price and quality competition.

Under the Consent Agreements, Aaron's and Buddy's agree that they will no longer enter into Swap Agreements and will not take any steps to enforce any non-competition agreements associated with the Swap Agreements. The proposed Decision and Order ("Order") in each Consent Agreement preserves competition in the RTO industry by prohibiting such Swap Agreements and enforcement of ancillary non-competition agreements.

II. The Parties

A. Aaron's, Inc.

Aaron's is headquartered in Atlanta, Georgia. As of December 2018, Aaron's, the second largest operator of RTO stores, has 1,689 stores, comprised of 1,312 company-operated stores and 377 independently owned franchised stores operating in 47 states. Aaron's estimates its 2018 fiscal year revenues were roughly $3.8 billion with over $196 million in net earnings.

B. Buddy's Newco, LLC

Buddy's, doing business as Buddy's Home Furnishings, is a limited liability company headquartered in Orlando, Florida. Buddy's operates approximately 300 franchised and corporate stores throughout the Continental United States.

C. Rent-A-Center, Inc.

Rent-A-Center, Inc. is a corporation headquartered in Plano, Texas. RAC has approximately 2,800 company-owned stores and 225 RAC franchised stores throughout the United States.

III. The Complaints

A. Background

In the RTO business, consumers do not buy merchandise outright, but rather take possession after entering into rental contracts with an RTO company. The contracts are short- term contracts (typically one week or one month) that renew when the consumer makes the lease payment. The rental contracts are at-will; consumers may terminate the contracts and return the merchandise without penalty. The rental contracts create a recurring revenue stream for the RTO company. If an RTO store closes, the RTO company will either transfer the store's rental contracts to another of its own stores, or sell them to a nearby competitor.

A large percentage of RTO customers travel to the RTO store associated with their rental contract to make their weekly or monthly payments. If an RTO company seeks to close a store and transfer the store's contracts to another, more distant store, the consumer may terminate the rental contract rather than traveling to the more distant store. The greater the distance between the receiving store and the closing store, the greater the likelihood that the consumer will terminate the contract. Therefore, if an RTO company does not have another store near the closing store, it may opt to sell its rental contracts to a competitor that has an RTO store in close proximity to the closing store.

B. The Challenged Conduct

Between 2015 and 2018, Aaron's, Buddy's, and RAC entered into several Swap Agreements with one another and with other RTO operators. These agreements typically covered stores in multiple different markets. Each Swap Agreement consists of two related transactions. In one transaction, a competitor closes one or more RTO stores and sells the closing stores' consumer rental contracts to Aaron's, Buddy's, or RAC, which have RTO stores near the competitor's soon-to-close stores. In the other transaction, the facts are reversed: Aaron's, Buddy's, or RAC closes one or more of its RTO stores and sells the soon-to-close stores' consumer rental contracts to the competitor which has RTO stores nearby. The sales of the rental contracts by Aaron's, Buddy's, or RAC is explicitly contingent on the purchase of the competitor's rental contracts. Parties to the Swap Agreement also sign non-compete agreements, usually for a three-year period, for the areas in the immediate vicinity of the closed stores.

C. Effects of the Challenged Conduct

The Commission's Complaints do not allege that Swap Agreements are *per se* illegal because the circumstances surrounding their formation and execution indicate that these are not naked market allocation agreements. However, the evidence indicates that at least some of the Swap Agreements entered into by Buddy's, Aaron's, and RAC, had the purpose and effect of facilitating each party's ability to induce its competitor to exit a market. Such agreements are a form of restraint that reduces competition and creates a clear threat of consumer harm. Consumers in the affected geographic areas lost any benefits of price and quality competition resulting from the closing of RTO stores and had fewer options for rental merchandise. Moreover, the evidence indicates that Aaron's, Buddy's, and RAC closed stores that might not have been closed but for the Swap Agreements. Aaron's, Buddy's, and RAC failed to produce sufficient evidence to rebut the presumption that the Swap Agreements are unreasonably anticompetitive. As a result, the FTC has issued its Complaints and entered into the Consent Agreements, which remedy the harm to competition.

IV. The Agreement Containing Consent Order

The proposed Orders fully address Aaron's, Buddy's, and RAC's past actions and contain important fencing in and notification provisions. The Orders prohibit Aaron's, Buddy's, and RAC from entering into any future Swap Agreements and from enforcing any non-compete clauses that are still in effect from past Swap Agreements. The Orders also prohibit any Aaron's or Buddy's representatives from serving on the Board of Directors of any of their competitors, or any competitor's representatives from serving on the Aaron's or Buddy's Board. RAC's Order does not contain this prohibition because, unlike Buddy's and Aaron's, there is no evidence that a RAC representative has previously served on a competitors' Board of Directors. The Orders require Aaron's and Buddy's to establish antitrust compliance programs, while RAC must establish a compliance program related to its Order. Finally, all the Orders impose reporting requirements, and the Orders will terminate in 20 years.

The Commission does not intend this analysis to constitute an official interpretation of the proposed Orders or to modify their terms in any way.

Complaint

IN THE MATTER OF

BUDDY'S NEWCO, LLC
D/B/A
BUDDY'S HOME FURNISHINGS

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

Docket No. C-4715; File No. 191 0074
Complaint, May 11, 2020 – Decision, May 11, 2020

This consent order addresses Buddy's Newco, LLC's violation of Section 5 of the Federal Trade Commission Act by negotiating and executing reciprocal purchase and non-compete agreements that had the capacity, tendency, and potential effect of restraining competition unreasonably and injuring consumers. The complaint alleges that Respondent entered into a small number of reciprocal purchase agreements from June 2015 to May 2018 that explicitly required the selling party to exit and remain out of the market for a specified period. The reciprocal purchase and non-compete agreements unreasonably restrained brick-and-mortar rent-to-own retail industry in the geographic markets. The consent order requires Respondent to not enter into a reciprocal purchase agreement nor any non-competition agreement that was part of a reciprocal purchase agreement. Future franchise agreements must specifically prohibit Respondent from entering into a reciprocal purchase agreement with a competitor.

Participants

For the *Commission*: *Eric Edmondson, Stuart Hirschfeld, Joe Lipinsky*, and *Connor Shively.*

For the *Respondents*: *Robby Robertson, DLA Piper.*

COMPLAINT

Pursuant to the provisions of the Federal Trade Commission Act, and by virtue of the authority vested in it by said Act, the Federal Trade Commission ("Commission"), having reason to believe that Buddy's Newco, LLC ("Buddy's"), a corporation, hereinafter sometimes referred to as "Respondent," has violated the provisions of said Act, 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 in that respect as follows:

Nature of the Case

1. This action concerns purchase agreements of consumer rental contracts between Buddy's and other rent-to-own ("RTO") companies that were executed between 2015 and 2018.

2. In the traditional brick and mortar retail RTO industry, each RTO company operates stores that compete in small geographic markets. Each store derives income through rental contracts executed with its customers. When an RTO company chooses to close a store, it must decide what to do with the store's active consumer rental contracts. If the RTO company has

a store nearby, it will transfer the closed store's consumer rental contracts to its nearby store. However, when the RTO company does not have a store nearby, it will attempt to sell the closed store's consumer rental contracts to a competing RTO company that has a store in close proximity to the closing store. This unilateral decision to sell a closed store's consumer rental contracts to a competitor is common in the RTO industry.

3. The conduct challenged in this complaint involves the instances when Buddy's did not make a unilateral decision to sell a closed store's consumer rental contracts to a competitor. Buddy's instead entered into reciprocal purchase agreements whereby Buddy's agreed to close an RTO store or stores and sell the closed store's or stores' consumer rental contracts to an RTO competitor, contingent on that RTO competitor agreeing to close a different RTO store or stores and sell those closed store's or stores' consumer rental contracts to Buddy's.

4. These reciprocal purchase agreements included reciprocal non-compete agreement clauses, whereby Buddy's and the RTO competitor agreed not to compete within a specified geographic market for a specific time-period, typically three years, in the area or areas where the stores were closed.

5. The reciprocal purchase agreements with reciprocal non-compete agreement clauses constitute an unfair method of trade, violating Section 5 of the Federal Trade Commission Act, 15 U.S.C. § 45.

Respondent

6. Respondent Buddy's is a limited liability company organized, existing, and doing business under and by virtue of the laws of the United States, with its headquarters and principal place of business located at 4705 Apopka Vineland Road, Suite 206, Orlando, FL 32819.

Jurisdiction

7. At all times relevant herein, Buddy's has been, and is now, a corporation as "corporation" is defined in Section 4 of the Federal Trade Commission Act, 15 U.S.C. § 44.

8. The acts and practices of Buddy's, including the acts and practices alleged herein, are in commerce or affect commerce, as "commerce" is defined in Section 4 of the Federal Trade Commission Act, 15 U.S.C. § 44.

Overview of the Traditional Brick and Mortar Rent-to-Own Industry

9. The traditional brick and mortar RTO industry focuses on renting durable goods, such as furniture, appliances, and electronic goods, to customers who lack access to traditional credit. RTOs operate large-format stores carrying a selection of new and returned merchandise.

10. The primary traditional brick and mortar RTO customers are "unbanked" individuals who have little to no access to traditional credit. Customers do not need to satisfy a credit check or have a bank account to qualify for RTO contracts. Previously rented items are

typically refurbished and re-rented at the same weekly or monthly rate as new items, but for shorter contract terms.

11. As the industry name connotes, consumers do not buy the merchandise outright, but rather take possession after entering rental contracts with the RTO firm. The contracts are formally structured as short-term contracts (typically one week or one month) that renew when the consumer makes the current lease payment. The customer only acquires ownership of the merchandise at the end of all the renewals, which is typically in 12 – 24 months.

12. Due to the nature of these at-will, short-term leases, each RTO transaction creates a stream of recurring revenue that may terminate at any time, should a customer choose to return the rented merchandise before the end of all the renewals.

13. Customers often make payments in-person at the RTO store where they entered into the consumer rental contract. When an RTO company closes a store, it must decide what to do with the recurring revenue stream from the existing rental contracts. Often, the RTO company will transfer contracts to one of its other nearby locations, but if the new location is more than a few miles away from the original store, consumers may be unwilling or unable to continue making payments, and they are likely to return the merchandise. Thus, when an RTO company does not have another store near the closing store, it will often sell the contracts to a competitor with a nearby store rather than risk losing the value of these existing contracts by attempting to transfer them to one of its own more distant stores.

14. Since the number of RTO stores has fallen significantly in the past two decades, the unilateral sale of active rental contracts to competitors through agreements, which typically include non-compete agreement clauses, has been relatively common.

The Reciprocal Purchase and Non-Compete Agreements

15. From June 2015 to May 2018, Buddy's entered into a small number of reciprocal purchase agreements. These agreements codified the contingent and reciprocal nature of the simultaneous sales transactions using the following (or similar) language:

> In addition to and contemporaneously with this [name of Buddy's franchisee, defined as Purchaser] Purchase Agreement, [ ] and Purchaser acknowledge that they have entered into a separate but related Agreement of Sale (the "[ ] Purchase Agreement") pursuant to which [ ] has agreed to purchase certain assets belonging to and used by Purchaser (defined therein as "Seller") in its rental business at certain Purchaser location(s), all as specifically set forth in such [ ] Purchase Agreement (collectively, the "Purchase Agreements") represent separate parts of an overall agreement between [ ] and Purchaser regarding the respective subject matter of each of the Purchase Agreements. [ ] and Purchaser agree that their performance obligations under each of the Purchase Agreements are expressly conditioned upon both parties' performance under both of the Purchase Agreements and that they shall each perform their obligations under both Purchase Agreements, or not at all. For avoidance of doubt, in the event of the termination

of either of the Purchase Agreements, the other Purchase Agreement shall automatically terminate as well, shall be considered void ab initio, and the parties shall take all actions reasonably necessary to return to the status quo immediately prior to entering into the Purchase Agreements.

16. The reciprocal purchase agreements also explicitly require the selling party to exit and remain out of the market for a specified period, using the following (or similar) language:

> Non-competition. [ ] agrees to not engage in any rent-to-own, rental purchase, or other substantially similar business including the renting or selling of electronics, computers, appliances, residential or office furniture, and rims and tires, either directly or indirectly, for its or their own account or for another, during the Non-Compete Time and within the Non-Compete Territory specified in the Addendum, if any.
>
> **Non-Compete Time:** [ ] agrees that the Non-Compete time will be three (3) years following the Effective Date.
>
> **Non-Compete Territory:** [ ] agrees that the Non-Compete Territory will be within a five (5) mile radius of the Rental Locations.

Anticompetitive Effects of the Reciprocal Purchase and Non-Compete Agreements

17. The relevant product market or line of commerce in which to analyze the competitive effects of Buddy's challenged conduct is the traditional brick and mortar retail RTO business.

18. The relevant geographic market for traditional brick and mortar retail RTO business consists of a small radius, such as two miles around an urban RTO store or ten miles for a rural RTO store.

19. Buddy's conduct, as alleged herein, had the capacity, tendency, and potential effect of restraining competition unreasonably and injuring consumers and others in the following ways, among others:

b. Unreasonably restraining brick-and-mortar RTO retail industry competition in the geographic markets impacted by the reciprocal purchase and non-compete agreements through store closures that may not have occurred absent the reciprocal purchase agreements, leading to:

i. Impairing quality and service competition in the affected geographic markets; and

ii. Reducing the number of locations and product selection available to consumers.

20. The reciprocal purchase and non-compete agreements have the effect of allocating geographic markets between existing horizontal competitors.

Lack of Procompetitive Efficiencies

21. Buddy's did not offer procompetitive efficiencies that outweigh the anticompetitive effects of certain Reciprocal Asset Purchase Agreements.

22. Any legitimate objectives of Buddy's conduct as alleged were achievable through less restrictive means.

Violations Alleged

23. As set forth above, Buddy's violated Section 5 of the Federal Trade Commission Act, as amended, 15 U.S.C. § 45, by negotiating and executing these reciprocal purchase and non-compete agreements.

24. The acts and practices of Buddy's, as alleged herein, constitute unfair methods of competition in or affecting commerce in violation of Section 5 of the Federal Trade Commission Act, as amended, 15 U.S.C. § 45. Such acts and practices, or the effects thereof, will continue or recur in the absence of appropriate relief.

IN WITNESS WHEREOF, the Federal Trade Commission, having caused this Complaint to be signed by the Acting Secretary and its official seal affixed, at Washington, D.C., this eleventh day of May 2020, issues its complaint against Respondent.

By the Commission, Commissioners Chopra and Slaughter dissenting.

DECISION AND ORDER

The Federal Trade Commission ("Commission"), having initiated an investigation of certain acts and practices of Buddy's Newco LLC ("Respondent"), Aaron's Inc., and Rent-A-Center, Inc., and Respondent having been furnished thereafter with a copy of the draft Complaint that counsel for the Commission proposed to present to the Commission for its consideration and which, if issued by the Commission, would charge Respondent with violations of Section 5 of the Federal Trade Commission Act, as amended, 15 U.S.C. § 45; and

Respondent, its attorneys, and counsel for the Commission having thereafter executed an Agreement Containing Consent Order ("Consent Agreement"), containing an admission by Respondent of all the jurisdictional facts set forth in the aforesaid draft Complaint, a statement that the signing of 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 it had reason to believe that Respondent has violated the said Act, and that a Complaint should issue stating its charges in that respect, and having accepted the executed Consent Agreement and placed such Consent Agreement on the public record for a period of thirty (30) days for the receipt and consideration of public comments, now in further conformity with the procedure described in Commission Rule 2.34, 16 C.F.R. § 2.34, the Commission hereby makes the following jurisdictional findings and issues the following Decision and Order ("Order"):

1. Respondent Buddy's Newco, LLC, d/b/a Buddy's Home Furnishings, is a limited liability company organized, existing, and doing business under and by virtue of the laws of the State of Delaware, with its headquarters and principal place of business located at 4705 S. Apopka Vineland Road, Suite 206, Orlando, Florida 32819.

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. "Buddy's" or "Respondent" means Buddy's Newco, LLC, its directors, officers, partners, employees, agents, representatives, successors, and assigns; and the joint ventures, subsidiaries, partnerships, divisions, groups, and affiliates controlled by Buddy's Newco LLC, and the respective directors, officers, employees, agents, representatives, successors, and assigns of each.

B. "Aaron's" means Aaron's Inc., a corporation organized existing, and doing business under and by virtue of the laws of the State of Georgia, with its headquarters and principal place of business located at 400 Galleria Parkway SE, Suite 300, Atlanta, Georgia 30339.

C. "RAC" means Rent-A-Center, Inc., a corporation organized, existing, and doing business under and by virtue of the laws of the State of Delaware, with its principal address at 5501 Headquarters Drive, Plano, Texas 75024.

D. "Commission" means the Federal Trade Commission.

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. "Board Member" means a member of the board of directors or board of managers for a specified entity.

G. "Buddy's Franchisee" means a Third Party business owner who operates a RTO Retail Center under the Buddy's corporate trademark or associated brands.

H. "Competitor" means any Third Party, other than a Buddy's Franchisee, that, directly or through a subsidiary, owns operates, or is a franchisor of, one or more RTO Retail Centers in the United States, including Aaron's and RAC.

I. "Consent Agreement" means the Agreement Containing Consent Order.

J. "Consumer Rental Contracts" means contracts that provide a consumer with a consumer good through a leasing arrangement that terminates when the consumer acquires ownership or the lessor takes repossession of the consumer good. Consumer Rental Contracts are also referred to as rent-to-own contracts, rental purchase agreements, or lease-to-own agreements.

K. "Executive Team" means Board Members, CEO, President, Executive Vice President, and General Counsel of Respondent, and all employees of Respondent in a senior management position with decision-making authority over Respondent's business operations.

L. "Non-Competition Agreement" means any agreement or covenant not to operate an RTO Retail Center within a specified geographic area for a specified period.

M. "Third Party" means any natural person, partnership, corporation, association, trust, joint venture, or other business or legal entity other than Respondent.

N. "Reciprocal Purchase Agreement" means a contingent agreement or series of contingent agreements through which Respondent or a Buddy's Franchisee agrees to close a RTO Retail Center and sell its Consumer Rental Contracts to a Competitor or its franchisee, and that Competitor or its franchisee agrees to close a different RTO Retail Center and sell its Consumer Rental Contracts to Respondent or a Buddy's Franchisee.

O. "RTO Retail Center" means a store with a physical location that primarily offers consumer goods through Consumer Rental Contracts.

II.

IT IS FURTHER ORDERED that:

A. Respondent shall not, directly or indirectly, enter into, solicit, invite, facilitate, or enable any Third Party to enter into, a Reciprocal Purchase Agreement.

B. Respondent shall not enforce, in whole or part, any Non-Competition Agreement that was part of, or contingent on, a Reciprocal Purchase Agreement.

C. In any future franchise agreement or any renewal of an existing franchise agreement, Respondent shall specifically prohibit the Buddy's Franchisee from entering into a Reciprocal Purchase Agreement with a Competitor or a Competitor's franchisee.

III.

IT IS FURTHER ORDERED that no employee, officer, Board Member or other representative of Respondent shall serve as a Board Member or officer for a Competitor and Respondent shall not permit any employee, officer, Board Member or other representative of a Competitor to serve as a Board Member for Respondent.

IV.

IT IS FURTHER ORDERED that Respondent shall establish and maintain an antitrust compliance program that sets forth the policies and procedures Respondent has implemented to comply with the Order and the Antitrust Laws. The antitrust compliance program shall include:

A. Designation and retention of an antitrust compliance officer, who may be an existing employee of Respondent, to supervise the design, maintenance, and operation of the program;

B. Training the Executive Team regarding Respondent's obligations under this Order and the Antitrust Laws:

1. Within 30 days after this Order becomes final,

2. At least annually during the term of the Order, and

3. Within 30 days of when an individual first becomes a member of the Executive Team;

C. Policies and procedures for employees and representatives of Respondent to ask questions about, and report violations of, this Order and the Antitrust Laws confidentially and without fear of retaliation of any kind;

D. Policies and procedures for disciplining employees and representatives of Respondent for failure to comply with this Order and the Antitrust Laws; and

E. Retention of documents and records sufficient to record Respondent's compliance with its obligations under this Paragraph IV of this Order, including but not limited to records showing that employees and representatives of Respondent have received all trainings required under this Order during the preceding 2 years.

V.

IT IS FURTHER ORDERED that Respondent shall file verified written reports ("compliance reports") in accordance with the following:

A. Respondent shall submit:

1. An interim compliance report 60 days after the Order is issued;

2. Annual compliance reports each year on the anniversary of entry of the Order for a period of ten (10) years; and

3. Additional compliance reports as the Commission or its staff may request;

B. Each compliance report shall set forth in detail the manner and form in which Respondent intends to comply, is complying, and has complied with this Order. Each compliance report shall contain sufficient information and documentation to enable the Commission to determine independently whether Respondent is complying with the Order. Conclusory statements that Respondent has complied with its obligations under the Order are insufficient. Respondent shall include in its reports, among other information or documentation that may be necessary to demonstrate compliance:

1. The identity and job title of the antitrust compliance officer;

2. A description of how Respondent is complying with Paragraph II.B of the Order with respect to each Reciprocal Purchase Agreement in existence prior to the date of this Order and include, if applicable, any amendments, appendices, exhibits, schedules and modifications made thereto;

3. With each annual compliance report, provide an electronic Excel spreadsheet listing each RTO Retail Center for which either 1) Respondent or a Buddy's Franchisee closed a RTO Retail Center and sold that RTO Retail Center's Consumer Rental Contracts to a Competitor or franchisee of a Competitor, or 2) Respondent or a Buddy's Franchisee acquired the Consumer Rental Contracts of a RTO Retail Center that was closed by a Competitor or franchisee of a Competitor and provide the following information regarding each listed RTO Retail Center:

a. Whether Respondent or a Buddy's Franchisee acquired or sold Consumer Rental Contracts and the identity of the affiliated RTO Retail Center;

b. The address of the RTO Retail Center;

c. The name of all other parties to the transaction, and if another party was a franchisee, the name of the franchisor of that party;

d. Whether Respondent or a Buddy's Franchisee has entered into a Non-Competition Agreement in connection with the transaction; and

e. A short summary of the relevant terms of the transaction including, but not limited to: (i) the purchase price and/or valuation of assets; (ii) the closing date of the transaction; and (iii) if Respondent or a Buddy's Franchisee acquired or sold Consumer Rental Contracts from multiple RTO Retail Centers in the same transaction, the addresses of the other RTO Retail Centers.

C. Respondent shall verify each compliance report in the manner set forth in 28 U.S.C. § 1746 by the Chief Executive Officer or another officer or employee specifically authorized to perform this function. Respondent shall submit an original and 2 copies of each compliance report as required by Commission Rule 2.41(a), 16 C.F.R. § 2.41(a), including a paper original submitted to the Secretary of the Commission and electronic copies to the Secretary at ElectronicFilings@ftc.gov and to the Compliance Division at bccompliance@ftc.gov. In addition, Respondent shall provide a copy of each compliance report to the Monitor if the Commission has appointed one in this matter.

VI.

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

A. The proposed dissolution of Buddy's Newco, LLC;

B. The proposed acquisition, merger, or consolidation of Buddy's Newco, LLC; 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 purposes of determining or securing compliance with this Order, and subject to any legally recognized privilege, upon written request and five (5) days' notice to the relevant Respondent, made to its principal place of business as identified in this Order, registered office of its United States subsidiary, or its headquarters office, the notified 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 business and other records and all documentary material and electronically stored information as defined in Commission Rules 2.7(a)(1) and (2), 16 C.F.R. § 2.7(a)(1) and (2), 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 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.

VIII.

IT IS FURTHER ORDERED that in connection with any legal proceeding brought by the Commission against Aaron's or RAC alleging that Respondent or a Buddy's Franchisee entered illegal Reciprocal Purchase Agreements, Respondent shall:

A. Agree to service of process of all Commission subpoenas issued under Rule 3.34 of the Commission Rules of Practice, 16 C.F.R. ¶ 3.34; and

B. Negotiate in good faith with the Commission to provide a declaration, affidavit, and/or sponsoring witness, if necessary, to establish the authenticity and admissibility of any documents and/or data that Respondent produces or has produced to the Commission.

IX.

IT IS ORDERED that this Order shall terminate on May 11, 2040.

By the Commission, Commissioners Chopra and Slaughter dissenting.

Concurring Statement

STATEMENT OF CHAIRMAN JOSEPH J. SIMONS AND COMMISSIONER NOAH JOSHUA PHILLIPS

Today, the Commission votes to place a proposed settlement out for public comment to settle charges that three rent-to-own companies—Buddy's, Aaron's, and Rent-A-Center—entered into anticompetitive reciprocal purchase agreements, which in short hand have been referred to as store "swap" agreements. After a nearly ten-month investigation, agency staff identified a series of swap agreements that allegedly had the effect of allocating geographic markets among rent-to-own store competitors. Staff also found that these swap agreements contained non-compete provisions that prohibited the party transferring the contracts from reentering the market for three years. The proposed settlement would, if finalized, (i) prohibit these companies from swapping any more stores, (ii) abrogate related non-compete agreements among the companies, freeing them to compete more aggressively, and (iii) ban any individual associated with either Buddy's or Aaron's from serving on the board of directors of the other company. We believe this relief, which is tailored to both the nature of the challenged conduct and the governing law, would remedy the legal violation and prevent its recurrence.

Commissioner Chopra argues that proposed settlements in this matter are inadequate. We disagree. The settlements fully resolve the competitive concerns identified by staff and impose a significant margin of "fencing-in" relief.[1] A few points merit comment:

- Although staff only found a few swaps that they alleged were anticompetitive, the Commission's settlements bar the parties from entering into *all* such swap agreements among the three largest rent-to-own companies in the United States.[2] This outcome saves the agency resources that would be required to examine each individual future swap agreement to determine its competitive intent and effect.

- Because we only have evidence that a few swap agreements were anticompetitive, notifying all customers and employees affected by any swap agreement would be over- inclusive because a majority of those notified likely would not have been affected by any anticompetitive conduct.

- Unlike situations involving ongoing safety concerns, ongoing health concerns, hidden lack of performance, exposure to recurring charges, and preventing further dissemination of deceptive claims, where notice works to protect consumers, notice here would not protect consumers from any further harm. The settlement, which bans the parties from entering into future swap agreements, ensures that customers and employees suffer no further harm from this conduct. As a result, we believe

1 Fencing-in relief bars a defendant from conduct beyond that which is alleged or found to be unlawful. The purpose of such relief is prophylactic, to reduce the risk that the defendant will violate the law going forward.

2 Notably, the swap agreements were not of a type that so obviously raised concerns that they were hidden. Aaron's listed store swaps in multiple SEC filings and a press release. *See* http://investor.aarons.com/node/17201/html; https://www.prnewswire.com/news-releases/aarons-inc-reports-second-quarter-2015-results-300118252.html; https://sec.report/Document/0000706688-15-000156/.

publicizing the settlement and putting it out for public comment is sufficient notice to the public.

- Although Brian Kahn, the Managing Partner of Vintage Capital Management, the private equity firm that owns Buddy's, sat on Aaron's Board of Directors, that board interlock ended four years ago when Mr. Kahn stepped down from the Aaron's board. As a result, we do not believe adding a count under Section 8 of the Clayton Act, which would typically require the offending parties to end the interlock, adds anything to the settlement. Nor do we believe a Section 5 count alleging the same fact pattern is warranted.

As Commissioner Chopra notes, many customers of rent-to-own stores are among those least able to defend themselves against anticompetitive and illegal commercial practices. That is why the Commission has a long history of addressing harmful practices in this industry.[3] The Commission continues to be aggressive in rooting out anticompetitive conduct, and it will impose remedies where necessary to prevent future anticompetitive conduct and redress harms. We think the Commission's proposed orders strike the right balance by barring potentially anticompetitive conduct and conserving the Commission's resources to investigate other conduct.

3 *See e.g., In re Aaron's Inc.,* Docket No. C-4442 (March 11, 2014) (prohibiting use of surreptitious tracking software on computers rented by RTO retail chain); James M. Lacko, Signe-Mary McKernan & Manoj Hastak, *Survey of Rent-to-Own Customers: Fed. Trade Comm'n Bureau of Econ. Staff Report* (April 2000), *available at* http://www.ftc.gov/reports/renttoown/renttoownr.pdf; *Rent-to-Own Transactions*, *Before the Subcomm. on Fin. Inst. and Consumer Credit, Comm. on Fin. Serv.* (July 26, 2011) (prepared statement of the Fed. Trade Comm'n), *available at* https://www.ftc.gov/public-statements/2011/07/prepared-statement-federal-trade-commission-rent-own-transactions; Fed. Trade Comm'n, *Rent-to-Own: Costly Convenience* (March 2015), https://www.consumer.ftc.gov/articles/0524-rent-own-costly-convenience.

DISSENTING STATEMENT OF COMMISSIONER ROHIT CHOPRA

Summary

- The FTC uncovered evidence that three major rent-to-own players engaged in a market allocation scheme to close down stores that suppressed competition, but the agency is *not* asserting that this conduct was per se unlawful.

- The proposed settlement deprives affected families of direct notification by the companies of their wrongdoing. This goes against a core element of competitive markets: the dissemination of truthful information.

- There is clear evidence that a senior executive served on the board of a competitor. The Commission's complaint should have charged this was unlawful.

I dissent from the Commission's vote regarding three no-money, no-fault proposed orders with the big three major players in the rent-to-own business: Rent-a-Center, Inc. (NASDAQ: RCII), Aaron's, Inc. (NYSE: AAN), and Buddy's Newco, LLC. While I am pleased that we have uncovered difficult-to-detect misconduct, I am concerned our remedy is insufficient, that the analytical basis of the proposed settlements is flawed, and that the Commission is doing little to deter similar misconduct by others.

Background

Rent-a-Center, Aaron's, and Buddy's typically target low-income families seeking items for their homes, such as furniture or electronics. Unlike traditional installment sales contracts, rent-to-own companies "rent" an item to a consumer, who can then take ownership if all the required payments are made after a certain period of time. If the consumer is unable to make payments, they must return the good. Due to this unusual structure, rent-to-own companies have actually threatened customers who fail to make their payments with criminal theft.[1] The companies can even profit when a customer fails to complete the term, because the total price paid by the consumer over time may be far higher than the retail price for the goods.[2]

This business model has resulted in consumers paying significantly high prices. Making matters worse, the industry has tended to prey on vulnerable populations, especially military families.[3] The industry has been on the FTC's radar for at least two decades, though the agency

1 Brian Highsmith & Margot Saunders, NATIONAL CONSUMER LAW CENTER, THE RENT-TO-OWN-RACKET: USING CRIMINAL COURTS TO COERCE PAYMENTS FROM VULNERABLE FAMILIES (Feb. 2019), https://www.nclc.org/images/pdf/criminal-justice/report-rent-to-own-racket.pdf.

2 This is because the total cost of ownership is often far greater than the cash price of the merchandise. While the monthly payments may be low, a consumer only acquires ownership at the end of all scheduled payments, which typically last 12 to 24 months. When a consumer makes many payments but fails to complete the term, the rent-to-own company keeps the goods.

3 *See* Written Testimony of Assistant Director Hollister K. Petraeus on behalf of the Consumer Financial Protection Bureau, Before the U.S. Senate Committee on Banking, Housing, and Urban Affairs (Nov. 3, 2011),

has struggled to address the risks posed by this business model.[4] Given the pre-existing concerns about abuse in the rent-to-own industry, it is even more worrisome that dwindling competition might further diminish the limited leverage that families have when signing a contract.

The Scheme Alleged in the Complaint

The FTC's investigation uncovered evidence of a market allocation scheme between rent-to-own chains with competing stores in multiple geographic markets: one competitor would agree to close a store and sell customer contracts in one geographic market in exchange for a competitor closing one of its stores and selling its customer contracts in another geographic market. The companies did not hold an open auction to sell off stores or inventory.

As noted in the Commission's Analysis to Aid Public Comment, the agency has evidence to suggest that there were stores that would not have otherwise been closed, including stores that were profitable. The companies also added non-compete provisions to the agreements to prevent a competitor from re-emerging in a local market for three years.

While not a primary focus of the agency's investigation, there was another troubling element with respect to Buddy's and Aaron's in this matter. Vintage Capital Management, a private equity outfit with a controlling interest in Buddy's, also was, at one time, a very large shareholder of Aaron's.[5] Mr. Brian Kahn, the managing partner and founder of Vintage Capital Management, served as a member of the board of directors of Aaron's at the same time his fund controlled Buddy's.[6] Some of the alleged market allocation schemes took place during the time of Mr. Kahn's service on Aaron's board.[7]

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https://www.consumerfinance.gov/about-us/newsroom/testimony-of-hollister-k-petraeus-before-the-senate-committee- on-banking-housing-and-urban-affairs/.

4 *See* James M. Lacko et al., FED. TRADE COMM'N, BUREAU OF ECON. STAFF REP'T: SURVEY OF RENT-TO-OWN CUSTOMERS (Apr. 2000), https://www.ftc.gov/reports/survey-rent-own-customers. The FTC even caught Aaron's illegally spying on consumers via rental computers. *See* Press Release, Fed. Trade Comm'n, Aaron's Rent-To-Own Chain Settles FTC Charges That it Enabled Computer Spying by Franchisees (Oct. 22, 2013), https://www.ftc.gov/news-events/press-releases/2013/10/aarons-rent-own-chain-settles-ftc-charges-it-enabled-computer.

5 Press Release, Aaron's Inc., Aaron's, Inc. Reaches Agreement With Vintage Capital Management; Brian R. Kahn and Matthew E. Avril to Join Aaron's Board of Directors (May 13, 2014), http://investor.aarons.com/news-releases/news-release-details/aarons-inc-reaches-agreement-vintage-capital-management.

6 *Id. See also* MORRISON & FOERSTER LLP, *Aaron's Inc. and Vintage Capital Management, Inc.: Chronology of Events Surrounding Unsolicited Offer* at 4 (2014), http://media.mofo.com/files/uploads/Images/UV-Aarons-Vintage-Capital.pdf.

7 Aaron's Compl. ¶15.

Analysis of Complaint and Remedy

When competitors agree to close stores in ways that lead to a division of local markets, this will typically be profitable for the companies and harmful to the consumers and employees whose lives are disrupted by store closures. I acknowledge that agencies like the FTC do not have unlimited resources. We cannot always investigate every detail of potential misconduct.

However, in this matter, the Commission did not analyze customer contract performance after the store closures, or analyze employee terminations and other critical information that would help to determine the harm inflicted on the public and the companies' ill-gotten gains. The investigation did not focus on whether the companies made any misrepresentations to employees about the rationale for the store closures or other details about closures and layoffs. We also do not know whether customers were deceived when told why they could no longer make payments at the original location where they signed their contract. It is reasonable to assume that some customers faced financial hardships from the market allocation scheme, but we cannot know precisely given the scope of our investigation.

With all of these unknowns, the Commission should not jump to a conclusion that the alleged unlawful conduct was victimless. Instead, we must approach a resolution that takes into account this uncertainty. There are several aspects here worth briefly discussing.

Notice to Victims. The Commission is not seeking any notifications to the employees or customers affected by potentially illegal store closures. Requiring a notice to employees and customers, even if it includes those that may not have been harmed, has important benefits, especially if any employee or customer was deceived or harmed in ways that we were unable to uncover.

A core benefit of notice is the dissemination of truthful information, which helps instill proper incentives in the marketplace. This is especially important in no-money, no-fault settlements like the ones here, because it allows market forces to impose some degree of accountability on wrongdoing firms: harmed consumers may prefer to do business with law-abiding companies instead of ones that flout the law.

Promoting the dissemination of truthful information is foundational to functioning markets and has been a bedrock of FTC policy for decades. Fulfilling that policy goal in a case like this one requires virtually no effort on the Commission's part – it is standard practice for lawbreakers to be ordered to conduct the notifications themselves,[8] with virtually no public resources. The statement by Chairman Simons and Commissioner Phillips appears to go against this principle, by advocating that the Commission deprive customers and employees from being notified directly by the companies about their misconduct, out of fear of being "overinclusive."

8 *See e.g.*, *Fed. Trade Comm'n v. Cure Encapsulations, Inc.* FTC File No. 1723113 (Feb. 19, 2019); *Fed. Trade Comm'n v. Applied Food Sciences Inc.*, FTC File No. 1423054 (Sept. 10, 2014); *In re Henry Schein Practice Solutions, Inc*, Docket No. C-4575 (May 23, 2016).

Overlapping Control. When a senior executive can sit on the board of a competitor and learn about its business strategy, this can lead to significant anticompetitive effects. For example, if a senior executive learns about the locations of planned store openings of a competitor through an affiliation on that competitor's board, she may advise the other company she is affiliated with to open locations in different markets to avoid competition. This is precisely the rationale behind the ban on interlocking directorates in Section 8 of the Clayton Act.

While the proposed orders against Buddy's and Aaron's ban overlaps on their boards, neither Mr. Kahn nor Vintage Capital Management are subject to these requirements. It is not clear whether the relief is adequate. While I appreciate that there is a ban in overlapping boards,[9] the Commission should have pursued a count charging Buddy's and Aaron's with engaging in an unfair method of competition in violation of the Section 5 of the Federal Trade Commission Act, pursuant to the Commission's 2015 Statement of Enforcement Principles.[10]

There is uncertainty in the market about compliance with the ban on overlapping boards.[11] Some may argue that limited liability companies (LLCs) are not bound by the Clayton Act's ban that applies to corporations. By not pleading a count condemning this overlap, the FTC has missed an opportunity to demonstrate that these overlaps are unlawful.

Per Se Liability. The Commission is not asserting that the store closure scheme was per se unlawful. Instead, the agency analyzed the scheme in a way that allowed the companies to attempt to justify why the conduct was not anticompetitive. While there is fairly limited case law guiding the appropriate legal analysis of the specific fact pattern here, the conduct has the same competitive effect as a straightforward market allocation scheme, which courts treat as per se unlawful. As the FTC and Department of Justice's Antitrust Guidelines for Collaborations Among Competitors

9 I view the proposed order's ban on future interlocks as the bare minimum the Commission could possibly include in a remedy. Although the ban is broader than what Section 8 requires, since it applies regardless of the Section 8 statutory exemptions that would apply, the order would otherwise merely require Aaron's and Buddy's to abide by the law.

10 While our investigation did not make a conclusive determination as to whether Mr. Kahn's actions were a violation of Section 8 of the Clayton Act's ban on interlocking directorates, the conduct meets the standards outlined in the Commission's 2015 Statement of Enforcement Principles on the use of the agency's 'stand alone' authority to prohibit unfair methods of competition under Section 5. *See* https://www.ftc.gov/public-statements/2015/08/statement-enforcement-principles-regarding-unfair-methods-competition.

11 Makan Delrahim, Assistant Att'y Gen., U.S. Dep't of Just., Keynote Address at Fordham University School of Law, Antitrust in the Financial Sector: Hot Issues and Global Perspectives (May 1, 2019) (noting that "[t]he use of the term "corporation" in the statute has raised many questions about whether Section 8 applies to non-incorporated entities such as [LLCs] or other structures. Section 8 pre-dates the use of LLCs, and certainly predates the widespread acceptance of structures like limited liability corporations as an alternative corporate form to a traditional "corporation." To date, courts have not directly addressed this question, although we believe the harm can be the same regardless of the forms of the entities."), https://www.justice.gov/opa/speech/file/1159346/download.

describes, agreements to "share or divide markets by allocating customers, suppliers, territories or lines of commerce. . ." have been held per se illegal.[12]

The reason per se liability applies to these types of agreements is simple: certain agreements are so likely to harm competition and have no significant benefits that they do not warrant the time and expense necessary for a detailed rule of reason inquiry into their effects.[13] A rule of reason analysis is much costlier than a per se analysis, typically requiring expert testimony and evidence measuring anticompetitive effects. The level of detail in the analysis varies depending on the nature of the agreement and market circumstances.[14]

For defendants, the difference between per se and rule of reason analysis is enormous, since under a per se analysis only the existence of an agreement need be proved by a plaintiff – no justifications are allowed. Applying the wrong analysis to an allegedly illegal agreement can wreak havoc on our legal system and lead to poor outcomes.

For example, if companies sense that certain conduct is no longer likely to be treated as per se unlawful, they are more likely to engage in the conduct. Well-resourced companies can concoct justifications for their alleged conduct after they've been caught, with a net low risk of sanctions, creating an incentive for behavior that is almost always anticompetitive. This gives them an advantage over smaller and newer businesses that may not have the same guile and can also harm consumers and the companies' own employees in the process. Using a bright-line rule relying on per se liability in this case provides clear guidance to firms subject to that rule and also limits the transaction costs of enforcement.[15]

Conclusion

The proposed settlements are clearly inadequate. Because the Commission has voted to place the proposed orders on the public record for comment, I too look forward to any input the public may have on how the agency can improve the proposed orders and prevent repeating similar mistakes.

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12 FED. TRADE COMM'N, & U.S. DEP'T OF JUST., ANTITRUST GUIDELINES FOR COLLABORATIONS AMONG COMPETITORS at 3 (Apr. 2000) (citing *Palmer v. BRG of Georgia, Inc.*, 498 U.S. 46 (1990) (market allocation)), https://www.ftc.gov/sites/default/files/documents/public_events/joint-venture-hearings-antitrust-guidelines-collaboration-among-competitors/ftcdojguidelines-2.pdf.

13 *See Continental TV, Inc. v. GTE Sylvania Inc.*, 433 U.S. 36, 50 n. 16 (1977).

14 *See California Dental Ass'n v. FTC*, 526 U.S. 756, 781 (1999) ("What is required . . . is an enquiry meet for the case, looking to the circumstances, details, and logic of a restraint").

15 *See* Jonathan B. Baker, *Taking the Error Out of "Error Cost" Analysis: What's Wrong with Antitrust's Right*, 80 ANTITRUST L.J. 1, 31 (2015).

When wrongdoers wish to end an investigation by settlement, the FTC must be mindful of all of the potential harms inflicted on the public, rather than simply assuming there were none. When uncertainty is always analyzed in favor of the wrongdoer, this is a recipe for weak enforcement that does little to deter market distortions and undermines fair competition.

ANALYSIS OF CONSENT ORDER TO AID PUBLIC COMMENT

I. Introduction

The Federal Trade Commission ("Commission") has accepted, subject to final approval, an Agreement Containing Consent Order with Aaron's, Inc. ("Aaron's"), an Agreement Containing Consent Order with Buddy's Newco, LLC ("Buddy's"), and an Agreement Containing Consent Order with Rent-A-Center, Inc. ("RAC") ("Consent Agreements"). The proposed Consent Agreements are intended to remedy anticompetitive effects resulting from reciprocal purchase agreements made between Aaron's, Buddy's, and RAC, and certain of their competitors in the brick-and-mortar rent-to-own ("RTO") industry.

Pursuant to the reciprocal purchase agreements, Aaron's, Buddy's, and RAC sold consumer rental contracts to nearby competitors contingent on Aaron's, Buddy's, or RAC acquiring that competitor's consumer rental contracts in another geographic area. These reciprocal purchase agreements, called swap agreements ("Swap Agreements") by the RTO industry, also included non-competition agreements whereby Aaron's, Buddy's, or RAC and the nearby competitors each agreed to close stores associated with the consumer rental contacts being sold and to not open new stores within a specified distance for a limited amount of time. Not all swap agreements violate the antitrust laws. Swap agreements between competitors that that generate significant procompetitive benefits for consumers, such as more efficient distribution or creation of a new product, may not violate the law. The Swap Agreements and ancillary non-competition agreements at issue in the present case, however, likely reduced competition between Aaron's, Buddy's, RAC, and their competitors in the RTO industry in several local markets in the United States, reducing consumer choice and depriving consumers of the benefits of price and quality competition.

Under the Consent Agreements, Aaron's and Buddy's agree that they will no longer enter into Swap Agreements and will not take any steps to enforce any non-competition agreements associated with the Swap Agreements. The proposed Decision and Order ("Order") in each Consent Agreement preserves competition in the RTO industry by prohibiting such Swap Agreements and enforcement of ancillary non-competition agreements.

II. The Parties

A. Aaron's, Inc.

Aaron's is headquartered in Atlanta, Georgia. As of December 2018, Aaron's, the second largest operator of RTO stores, has 1,689 stores, comprised of 1,312 company-operated stores and 377 independently owned franchised stores operating in 47 states. Aaron's estimates its 2018 fiscal year revenues were roughly $3.8 billion with over $196 million in net earnings.

B. Buddy's Newco, LLC

Buddy's, doing business as Buddy's Home Furnishings, is a limited liability company headquartered in Orlando, Florida. Buddy's operates approximately 300 franchised and corporate stores throughout the Continental United States.

C. Rent-A-Center, Inc.

Rent-A-Center, Inc. is a corporation headquartered in Plano, Texas. RAC has approximately 2,800 company-owned stores and 225 RAC franchised stores throughout the United States.

III. The Complaints

A. Background

In the RTO business, consumers do not buy merchandise outright, but rather take possession after entering into rental contracts with an RTO company. The contracts are short- term contracts (typically one week or one month) that renew when the consumer makes the lease payment. The rental contracts are at-will; consumers may terminate the contracts and return the merchandise without penalty. The rental contracts create a recurring revenue stream for the RTO company. If an RTO store closes, the RTO company will either transfer the store's rental contracts to another of its own stores, or sell them to a nearby competitor.

A large percentage of RTO customers travel to the RTO store associated with their rental contract to make their weekly or monthly payments. If an RTO company seeks to close a store and transfer the store's contracts to another, more distant store, the consumer may terminate the rental contract rather than traveling to the more distant store. The greater the distance between the receiving store and the closing store, the greater the likelihood that the consumer will terminate the contract. Therefore, if an RTO company does not have another store near the closing store, it may opt to sell its rental contracts to a competitor that has an RTO store in close proximity to the closing store.

B. The Challenged Conduct

Between 2015 and 2018, Aaron's, Buddy's, and RAC entered into several Swap Agreements with one another and with other RTO operators. These agreements typically covered

stores in multiple different markets. Each Swap Agreement consists of two related transactions. In one transaction, a competitor closes one or more RTO stores and sells the closing stores' consumer rental contracts to Aaron's, Buddy's, or RAC, which have RTO stores near the competitor's soon-to-close stores. In the other transaction, the facts are reversed: Aaron's, Buddy's, or RAC closes one or more of its RTO stores and sells the soon-to-close stores' consumer rental contracts to the competitor which has RTO stores nearby. The sales of the rental contracts by Aaron's, Buddy's, or RAC is explicitly contingent on the purchase of the competitor's rental contracts. Parties to the Swap Agreement also sign non-compete agreements, usually for a three-year period, for the areas in the immediate vicinity of the closed stores.

C. Effects of the Challenged Conduct

The Commission's Complaints do not allege that Swap Agreements are *per se* illegal because the circumstances surrounding their formation and execution indicate that these are not naked market allocation agreements. However, the evidence indicates that at least some of the Swap Agreements entered into by Buddy's, Aaron's, and RAC, had the purpose and effect of facilitating each party's ability to induce its competitor to exit a market. Such agreements are a form of restraint that reduces competition and creates a clear threat of consumer harm. Consumers in the affected geographic areas lost any benefits of price and quality competition resulting from the closing of RTO stores and had fewer options for rental merchandise. Moreover, the evidence indicates that Aaron's, Buddy's, and RAC closed stores that might not have been closed but for the Swap Agreements. Aaron's, Buddy's, and RAC failed to produce sufficient evidence to rebut the presumption that the Swap Agreements are unreasonably anticompetitive. As a result, the FTC has issued its Complaints and entered into the Consent Agreements, which remedy the harm to competition.

IV. The Agreement Containing Consent Order

The proposed Orders fully address Aaron's, Buddy's, and RAC's past actions and contain important fencing in and notification provisions. The Orders prohibit Aaron's, Buddy's, and RAC from entering into any future Swap Agreements and from enforcing any non-compete clauses that are still in effect from past Swap Agreements. The Orders also prohibit any Aaron's or Buddy's representatives from serving on the Board of Directors of any of their competitors, or any competitor's representatives from serving on the Aaron's or Buddy's Board. RAC's Order does not contain this prohibition because, unlike Buddy's and Aaron's, there is no evidence that a RAC representative has previously served on a competitors' Board of Directors. The Orders require Aaron's and Buddy's to establish antitrust compliance programs, while RAC must establish a compliance program related to its Order. Finally, all the Orders impose reporting requirements, and the Orders will terminate in 20 years.

The Commission does not intend this analysis to constitute an official interpretation of the proposed Orders or to modify their terms in any way.

Complaint

IN THE MATTER OF

RENT-A-CENTER, INC.

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

Docket No. C-4716; File No. 191 0074
Complaint, May 11, 2020 – Decision, May 11, 2020

This consent order addresses Rent-A-Center, Inc.'s violation of Section 5 of the Federal Trade Commission Act by negotiating and executing reciprocal purchase and non-compete agreements that had the capacity, tendency, and potential effect of restraining competition unreasonably and injuring consumers. The complaint alleges that Respondent entered into a small number of reciprocal purchase agreements from June 2015 to May 2018 that explicitly required the selling party to exit and remain out of the market for a specified period. The reciprocal purchase and non-compete agreements unreasonably restrained brick-and-mortar rent-to-own retail industry in the geographic markets. The consent order requires Respondent to not enter into a reciprocal purchase agreement nor any non-competition agreement that was part of a reciprocal purchase agreement. Future franchise agreements must specifically prohibit Respondent from entering into a reciprocal purchase agreement with a competitor.

Participants

For the *Commission*: *Eric Edmondson, Stuart Hirschfeld, Joe Lipinsky*, and *Connor Shively.*

For the *Respondents*: *Neely Agin, Winston & Strawn.*

COMPLAINT

Pursuant to the provisions of the Federal Trade Commission Act, and by virtue of the authority vested in it by said Act, the Federal Trade Commission ("Commission"), having reason to believe that Rent-A-Center, Inc. ("RAC"), a corporation, hereinafter sometimes referred to as "Respondent," has violated the provisions of said Act, 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 in that respect as follows:

Nature of the Case

1. This action concerns purchase agreements of consumer rental contracts between RAC and other rent-to-own ("RTO") companies that were executed between 2015 and 2018.

2. In the traditional brick and mortar retail RTO industry, each RTO company operates stores that compete in small geographic markets. Each store derives income through rental contracts executed with its customers. When an RTO company chooses to close a store, it must decide what to do with the store's active consumer rental contracts. If the RTO company has a store nearby, it will transfer the closed store's consumer rental contracts to its nearby store. However, when the RTO company does not have a store nearby, it will attempt to sell the closed store's consumer rental contracts to a competing RTO company that has a store in close proximity

to the closing store. This unilateral decision to sell a closed store's consumer rental contracts to a competitor is common in the RTO industry.

3. The conduct challenged in this complaint involves the instances when RAC did not make a unilateral decision to sell a closed store's consumer rental contracts to a competitor. RAC instead entered into reciprocal purchase agreements whereby RAC agreed to close an RTO store or stores and sell the closed store's or stores' consumer rental contracts to an RTO competitor, contingent on that RTO competitor agreeing to close a different RTO store or stores and sell those closed store's or stores' consumer rental contracts to RAC.

4. These reciprocal purchase agreements included reciprocal non-compete agreement clauses, whereby RAC and the RTO competitor agreed not to compete within a specified geographic market for a specific time-period, typically three years, in the area or areas where the stores were closed.

5. The reciprocal purchase agreements with reciprocal non-compete agreement clauses constitute an unfair method of trade, violating Section 5 of the Federal Trade Commission Act, 15 U.S.C. § 45.

Respondent

6. Respondent Rent-A-Center, Inc., is a corporation organized, existing, and doing business under and by virtue of the laws of the State of Delaware, with its principal address at 5501 Headquarters Drive, Plano, Texas 75024.

Jurisdiction

7. At all times relevant herein, RAC has been, and is now, a corporation as "corporation" is defined in Section 4 of the Federal Trade Commission Act, 15 U.S.C. § 44.

8. The acts and practices of RAC, including the acts and practices alleged herein, are in commerce or affect commerce, as "commerce" is defined in Section 4 of the Federal Trade Commission Act, 15 U.S.C. § 44.

Overview of the Traditional Brick and Mortar Rent-to-Own Industry

9. The traditional brick and mortar RTO industry focuses on renting durable goods, such as furniture, appliances, and electronic goods, to customers who lack access to traditional credit. RTOs operate large-format stores carrying a selection of new and returned merchandise.

10. The primary traditional brick and mortar RTO customers are "unbanked" individuals who have little to no access to traditional credit. Customers do not need to satisfy a credit check or have a bank account to qualify for RTO contracts. Previously rented items are typically refurbished and re-rented at the same weekly or monthly rate as new items, but for shorter contract terms.

11. As the industry name connotes, consumers do not buy the merchandise outright, but rather take possession after entering rental contracts with the RTO firm. The contracts are formally structured as short-term contracts (typically one week or one month) that renew when the consumer makes the current lease payment. The customer only acquires ownership of the merchandise at the end of all the renewals, which is typically in 12 – 24 months.

12. Due to the nature of these at-will, short-term leases, each RTO transaction creates a stream of recurring revenue that may terminate at any time, should a customer choose to return the rented merchandise before the end of all the renewals.

13. Customers often make payments in-person at the RTO store where they entered into the consumer rental contract. When an RTO company closes a store, it must decide what to do with the recurring revenue stream from the existing rental contracts. Often, the RTO company will transfer contracts to one of its other nearby locations, but if the new location is more than a few miles away from the original store, consumers may be unwilling or unable to continue making payments, and they are likely to return the merchandise. Thus, when an RTO company does not have another store near the closing store, it will often sell the contracts to a competitor with a nearby store rather than risk losing the value of these existing contracts by attempting to transfer them to one of its own more distant stores.

14. Since the number of RTO stores has fallen significantly in the past two decades, the unilateral sale of active rental contracts to competitors through agreements, which typically include non-compete agreement clauses, has been relatively common.

The Reciprocal Purchase and Non-Compete Agreements

15. From June 2015 to May 2018, RAC entered into a small number of reciprocal purchase agreements. These agreements codified the contingent and reciprocal nature of the simultaneous sales transactions using the following (or similar) language:

> Reciprocal Purchase Agreements. RAC and [ ] acknowledge that they have entered into a separate agreement whereby [ ] has agreed to purchase certain assets [active rental contracts] belonging to and used by RAC in its rental business at certain RAC locations, all as is specifically provided therein ("[ ] Purchase Agreement"). RAC and [ ] agree that the RAC Purchase Agreement and the [ ] Purchase Agreement are mutual and conditioned upon the other, and that [ ] and RAC shall simultaneously perform their obligations under both agreements on their respective Effective Dates, or not at all.

16. The reciprocal purchase agreements also explicitly require the selling party to exit and remain out of the market for a specified period, using the following (or similar) language:

> Non-competition. [ ] agrees to not engage in any rent-to-own, rental purchase, or other substantially similar business including the renting or selling of rims and tires, either directly or indirectly, for its or their own account or for another, during the

Non-Compete Time and within the Non-Compete Territory specified in the Addendum, if any.

Non-Compete Time: [ ] agrees that the Non-Compete time will be Three (3) years following the Effective Date.

Non-Compete Territory: [ ] agrees that the Non-Compete Territory will be within a Ten (10) mile radius of the Rental Locations, except the following items shall be deemed excluded from the Non-Compete Territory and non-compete obligations of [ ], even if they are located within the Non-Compete Territory: (i) any existing store location of [ ] as of the Effective Date and (ii) any kiosk location operated by [ ] within a third-party retailer, whether currently existing or hereafter acquired or established.

Anticompetitive Effects of the Reciprocal Purchase and Non-Compete Agreements

17. The relevant product market or line of commerce in which to analyze the competitive effects of RAC's challenged conduct is the traditional brick and mortar retail RTO business.

18. The relevant geographic market for traditional brick and mortar retail RTO business consists of a small radius, such as two miles around an urban RTO store or ten miles for a rural RTO store.

19. RAC's conduct, as alleged herein, had the capacity, tendency, and potential effect of restraining competition unreasonably and injuring consumers and others in the following ways, among others:

a. Unreasonably restraining brick-and-mortar RTO retail industry competition in the geographic markets impacted by the reciprocal purchase and non-compete agreements through store closures that may not have occurred absent the reciprocal purchase agreements, leading to:

i. Impairing quality and service competition in the affected geographic markets; and

ii. Reducing the number of locations and product selection available to consumers.

20. The reciprocal purchase and non-compete agreements have the effect of allocating geographic markets between existing horizontal competitors.

Lack of Procompetitive Efficiencies

21. RAC did not offer procompetitive efficiencies that outweigh the anticompetitive effects of certain Reciprocal Asset Purchase Agreements.

22. Any legitimate objectives of RAC's conduct as alleged were achievable through less restrictive means.

Violations Alleged

23. As set forth above, RAC violated Section 5 of the Federal Trade Commission Act, as amended, 15 U.S.C. § 45, by negotiating and executing these reciprocal purchase and non-compete agreements.

24. The acts and practices of RAC, as alleged herein, constitute unfair methods of competition in or affecting commerce in violation of Section 5 of the Federal Trade Commission Act, as amended, 15 U.S.C. § 45. Such acts and practices, or the effects thereof, will continue or recur in the absence of appropriate relief.

IN WITNESS WHEREOF, the Federal Trade Commission, having caused this Complaint to be signed by the Acting Secretary and its official seal affixed, at Washington, D.C., this eleventh day of May 2020, issues its complaint against Respondent.

By the Commission, Commissioners Chopra and Slaughter dissenting.

DECISION AND ORDER

The Federal Trade Commission ("Commission"), having initiated an investigation of certain acts and practices of Rent-A-Center, Inc. ("Respondent"), Aaron's Inc., and Buddy's Newco, LLC, and Respondent having been furnished thereafter with a copy of the draft Complaint that counsel for the Commission proposed to present to the Commission for its consideration and which, if issued by the Commission, would charge Respondent with violations of Section 5 of the Federal Trade Commission Act, as amended, 15 U.S.C. § 45; and

Respondent, its attorneys, and counsel for the Commission having thereafter executed an Agreement Containing Consent Order ("Consent Agreement"), containing an admission by Respondent of all the jurisdictional facts set forth in the aforesaid draft Complaint, a statement that the signing of 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 it had reason to believe that Respondent has violated the said Act, and that a Complaint should issue stating its charges in that respect, and having accepted the executed Consent Agreement and placed such Consent Agreement on the public record for a period of thirty (30) days for the receipt and

consideration of public comments, now in further conformity with the procedure described in Commission Rule 2.34, 16 C.F.R. § 2.34, the Commission hereby makes the following jurisdictional findings and issues the following Decision and Order ("Order"):

1. Respondent Rent-A-Center, Inc., is a corporation organized, existing, and doing business under and by virtue of the laws of the State of Delaware, with its principal address at 5501 Headquarters Drive, Plano, Texas 75024.

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. "RAC" or "Respondent" means Rent-A-Center, Inc., its directors, officers, partners, employees, agents, representatives, successors, and assigns; and the joint ventures, subsidiaries, partnerships, divisions, groups, and affiliates controlled by Rent-A-Center, Inc., and the respective directors, officers, employees, agents, representatives, successors, and assigns of each.

B. "Aaron's" means Aaron's Inc., a corporation organized existing, and doing business under and by virtue of the laws of the State of Georgia, with its headquarters and principal place of business located at 400 Galleria Parkway SE, Suite 300, Atlanta, Georgia 30339.

C. "Buddy's" means Buddy's Newco, LLC, d/b/a Buddy's Home Furnishings, a limited liability company 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 located at 4705 S. Apopka Vineland Road, Suite 206, Orlando, Florida 32819.

D. "Commission" means the Federal Trade Commission.

E. "Competitor" means any Third Party, other than a RAC Franchisee, that, directly or through a subsidiary, owns operates, is a franchisor of, or is a franchisee of, one or more RTO Retail Centers in the United States, including Aaron's and Buddy's; *provided, however,* this term does not include a Third Party solely engaged in a Virtual RTO Business.

F. "Consent Agreement" means the Agreement Containing Consent Order.

G. "Consumer Rental Contracts" means contracts that provide a consumer with a consumer good through a leasing arrangement that terminates when the consumer acquires full ownership, returns the merchandise, or the lessor takes repossession of the consumer good prior to the lessee obtaining full ownership. Consumer Rental Contracts are also referred to as rent-to-own contracts, rental purchase agreements, or lease-to-own agreements.

H. "Executive Team" means the CEO, President, Executive Vice President, and General Counsel of Respondent, and all vice president-level employees of Respondent with operational decision-making authority over Respondent's RTO Retail Centers.

I. "Non-Competition Agreement" means any agreement or covenant not to operate an RTO Retail Center within a specified geographic area for a specified period.

J. "Third Party" means any natural person, partnership, corporation, association, trust, joint venture, or other business or legal entity other than Respondent.

K. "RAC Franchisee" means a Third Party business owner who operates an RTO Retail Center under the RAC corporate trademark or associated brands.

L. "Reciprocal Purchase Agreement" means an agreement, or a series of interdependent agreements, through which Respondent or a RAC Franchisee agrees to close or sell one or more of its RTO Retail Centers and sell the associated Consumer Rental Contracts to a Competitor, and that Competitor agrees to close or sell one or more of its RTO Retail Centers and sell the associated Consumer Rental Contracts to Respondent or a RAC Franchisee; *provided, however,* this term does not include transactions whereby Respondent's, or a RAC Franchisee's, purchase from, or sale to, a Competitor of an RTO Retail Center and associated Consumer Rental Contracts is not contractually interdependent or contingent on a reciprocal transaction.

M. "RTO Retail Center" means a brick and mortar retail location that primarily offers consumer goods through Consumer Rental Contracts; *provided, however,* this term does not include operations associated with a Virtual RTO Business.

N. "Virtual RTO Business" means the business of offering on-site Consumer Rental Contract purchase solutions at the point-of-sale at brick and mortar retail locations other than RTO Retail Centers.

II.

IT IS FURTHER ORDERED that:

A. Respondent shall not, directly or indirectly: (1) enter into a Reciprocal Purchase Agreement; or (2) solicit, invite, facilitate, or enable any Third Party to enter into, a Reciprocal Purchase Agreement.

B. Respondent shall not enforce, in whole or part, any Non-Competition Agreement that was part of, or contingent on, a Reciprocal Purchase Agreement.

C. In any future franchise agreement or any renewal of an existing franchise agreement, Respondent shall specifically prohibit the RAC Franchisee from entering into a Reciprocal Purchase Agreement with a Competitor.

III.

IT IS FURTHER ORDERED that Respondent shall establish and maintain a compliance program that sets forth the policies and procedures Respondent has implemented to comply with this Order. The compliance program shall include:

A. Designation and retention of a compliance officer, who may be an existing employee of Respondent, to supervise the design, maintenance, and operation of the program. Respondent may appoint successive compliance officers as needed;

B. Training the Executive Team regarding Respondent's obligations under this Order:

1. Within 30 days after this Order becomes final,

2. At least annually during the term of the Order, and

3. Within 30 days of when an individual first becomes a member of the Executive Team;

C. Policies and procedures for employees and representatives of Respondent to ask questions about, and report violations of, this Order confidentially and without fear of retaliation of any kind;

D. Policies and procedures for disciplining employees and representatives of Respondent for failure to comply with this Order; and

E. Retention of documents and records sufficient to record Respondent's compliance with its obligations under this Paragraph III of this Order, including but not limited to records showing that employees and representatives of Respondent have received all trainings required under this Order during the preceding 2 years.

IV.

IT IS FURTHER ORDERED that Respondent shall file verified written reports ("compliance reports") in accordance with the following:

A. Respondent shall submit:

1. An interim compliance report 60 days after the Order is issued;

2. Annual compliance reports each year on the anniversary of entry of the Order for a period of 10 years; and

3. Additional compliance reports as the Commission or its staff may request;

B. Each compliance report shall set forth in detail the manner and form in which Respondent intends to comply, is complying, and has complied with this Order. Each compliance report shall contain sufficient information and documentation to enable the Commission to determine independently whether Respondent is complying with the Order. Conclusory statements that Respondent has complied with its obligations under the Order are insufficient. Respondent shall include in its reports, among other information or documentation that may be necessary to demonstrate compliance:

1. The identity and job title of the compliance officer;

2. A description of how Respondent is complying with Paragraph II.B of the Order with respect to each Reciprocal Purchase Agreement in existence prior to the date of this Order and include, if applicable, any amendments, appendices, exhibits, schedules and modifications made thereto;

3. With each annual compliance report, provide an electronic Excel spreadsheet listing each RTO Retail Center for which either 1) Respondent or a RAC Franchisee sold an RTO Retail Center's Consumer Rental Contracts to a Competitor, or 2) Respondent or a RAC Franchisee acquired a Competitor's Consumer Rental Contracts and provide the following information regarding each listed RTO Retail Center:

a. Whether Respondent or a RAC Franchisee acquired or sold Consumer Rental Contracts and the identity of the affiliated RTO Retail Center;

b. The address of the RTO Retail Center;

c. The name of all other parties to the transaction, and if another party was a franchisee, the name of the franchisor of that party;

d. Whether Respondent or a RAC Franchisee has entered into a Non-Competition Agreement in connection with the transaction; and

e. A short summary of the relevant terms of the transaction including, but not limited to: (i) the purchase price and/or valuation of assets; (ii) the closing date of the transaction; and (iii) if Respondent or a RAC Franchisee acquired or sold Consumer Rental Contracts from multiple RTO Retail Centers in the same transaction, the addresses of the other RTO Retail Centers;

Provided, however, for purposes of this Paragraph IV.B.3, RAC shall: (i) provide such requested information as related to the RAC Franchisees if RAC has custody or control or access to such information; or (ii) make good faith efforts to obtain such information from the RAC Franchisees if that information is not otherwise available.

C. Respondent shall verify each compliance report in the manner set forth in 28 U.S.C. § 1746 by the Chief Executive Officer or another officer or employee specifically authorized to perform this function. Respondent shall submit an original and 2 copies of each compliance report as required by Commission Rule 2.41(a), 16 C.F.R. § 2.41(a), including a paper original submitted to the Secretary of the Commission and electronic copies to the Secretary at ElectronicFilings@ftc.gov and to the Compliance Division at bccompliance@ftc.gov. In addition, Respondent shall provide a copy of each compliance report to the Monitor if the Commission has appointed one in this matter.

V.

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

A. The proposed dissolution of Rent-A-Center, Inc.;

B. The proposed acquisition, merger, or consolidation of Rent-A-Center, Inc.; 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.

VI.

IT IS FURTHER ORDERED that, for purposes of determining or securing compliance with this Order, and subject to any legally recognized privilege, upon written request and five (5) days' notice to the relevant Respondent, made to its principal place of business as identified in this Order, registered office of its United States subsidiary, or its headquarters office, the notified

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 business and other records and all documentary material and electronically stored information as defined in Commission Rules 2.7(a)(1) and (2), 16 C.F.R. § 2.7(a)(1) and (2), 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 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 in connection with any legal proceeding brought by the Commission against Aaron's or Buddy's alleging that Respondent or a RAC Franchisee entered illegal Reciprocal Purchase Agreements, Respondent shall:

C. Agree to service of process of all Commission subpoenas issued under Rule 3.34 of the Commission Rules of Practice, 16 C.F.R. ¶ 3.34; and

D. Negotiate in good faith with the Commission to provide a declaration, affidavit, and/or sponsoring witness, if necessary, to establish the authenticity and admissibility of any documents and/or data that Respondent produces or has produced to the Commission.

VIII.

IT IS FINALLY ORDERED that this Order shall terminate on May 11, 2040.

By the Commission, Commissioners Chopra and Slaughter dissenting.

Concurring Statement

STATEMENT OF CHAIRMAN JOSEPH J. SIMONS AND COMMISSIONER NOAH JOSHUA PHILLIPS

Today, the Commission votes to place a proposed settlement out for public comment to settle charges that three rent-to-own companies—Buddy's, Aaron's, and Rent-A-Center—entered into anticompetitive reciprocal purchase agreements, which in short hand have been referred to as store "swap" agreements. After a nearly ten-month investigation, agency staff identified a series of swap agreements that allegedly had the effect of allocating geographic markets among rent-to-own store competitors. Staff also found that these swap agreements contained non-compete provisions that prohibited the party transferring the contracts from reentering the market for three years. The proposed settlement would, if finalized, (i) prohibit these companies from swapping any more stores, (ii) abrogate related non-compete agreements among the companies, freeing them to compete more aggressively, and (iii) ban any individual associated with either Buddy's or Aaron's from serving on the board of directors of the other company. We believe this relief, which is tailored to both the nature of the challenged conduct and the governing law, would remedy the legal violation and prevent its recurrence.

Commissioner Chopra argues that proposed settlements in this matter are inadequate. We disagree. The settlements fully resolve the competitive concerns identified by staff and impose a significant margin of "fencing-in" relief.[1] A few points merit comment:

- Although staff only found a few swaps that they alleged were anticompetitive, the Commission's settlements bar the parties from entering into *all* such swap agreements among the three largest rent-to-own companies in the United States.[2] This outcome saves the agency resources that would be required to examine each individual future swap agreement to determine its competitive intent and effect.

- Because we only have evidence that a few swap agreements were anticompetitive, notifying all customers and employees affected by any swap agreement would be over- inclusive because a majority of those notified likely would not have been affected by any anticompetitive conduct.

- Unlike situations involving ongoing safety concerns, ongoing health concerns, hidden lack of performance, exposure to recurring charges, and preventing further dissemination of deceptive claims, where notice works to protect consumers, notice here would not protect consumers from any further harm. The settlement, which bans the parties from entering into future swap agreements, ensures that customers and employees suffer no further harm from this conduct. As a result, we believe

1 Fencing-in relief bars a defendant from conduct beyond that which is alleged or found to be unlawful. The purpose of such relief is prophylactic, to reduce the risk that the defendant will violate the law going forward.

2 Notably, the swap agreements were not of a type that so obviously raised concerns that they were hidden. Aaron's listed store swaps in multiple SEC filings and a press release. *See* http://investor.aarons.com/node/17201/html; https://www.prnewswire.com/news-releases/aarons-inc-reports-second-quarter-2015-results-300118252.html; https://sec.report/Document/0000706688-15-000156/.

publicizing the settlement and putting it out for public comment is sufficient notice to the public.

- Although Brian Kahn, the Managing Partner of Vintage Capital Management, the private equity firm that owns Buddy's, sat on Aaron's Board of Directors, that board interlock ended four years ago when Mr. Kahn stepped down from the Aaron's board. As a result, we do not believe adding a count under Section 8 of the Clayton Act, which would typically require the offending parties to end the interlock, adds anything to the settlement. Nor do we believe a Section 5 count alleging the same fact pattern is warranted.

As Commissioner Chopra notes, many customers of rent-to-own stores are among those least able to defend themselves against anticompetitive and illegal commercial practices. That is why the Commission has a long history of addressing harmful practices in this industry.[3] The Commission continues to be aggressive in rooting out anticompetitive conduct, and it will impose remedies where necessary to prevent future anticompetitive conduct and redress harms. We think the Commission's proposed orders strike the right balance by barring potentially anticompetitive conduct and conserving the Commission's resources to investigate other conduct.

3 *See e.g., In re Aaron's Inc.,* Docket No. C-4442 (March 11, 2014) (prohibiting use of surreptitious tracking software on computers rented by RTO retail chain); James M. Lacko, Signe-Mary McKernan & Manoj Hastak, *Survey of Rent-to-Own Customers: Fed. Trade Comm'n Bureau of Econ. Staff Report* (April 2000), *available at* http://www.ftc.gov/reports/renttoown/renttoownr.pdf; *Rent-to-Own Transactions*, *Before the Subcomm. on Fin. Inst. and Consumer Credit, Comm. on Fin. Serv.* (July 26, 2011) (prepared statement of the Fed. Trade Comm'n), *available at* https://www.ftc.gov/public-statements/2011/07/prepared-statement-federal-trade-commission-rent-own-transactions; Fed. Trade Comm'n, *Rent-to-Own: Costly Convenience* (March 2015), https://www.consumer.ftc.gov/articles/0524-rent-own-costly-convenience.

DISSENTING STATEMENT OF COMMISSIONER ROHIT CHOPRA

Summary

- The FTC uncovered evidence that three major rent-to-own players engaged in a market allocation scheme to close down stores that suppressed competition, but the agency is *not* asserting that this conduct was per se unlawful.

- The proposed settlement deprives affected families of direct notification by the companies of their wrongdoing. This goes against a core element of competitive markets: the dissemination of truthful information.

- There is clear evidence that a senior executive served on the board of a competitor. The Commission's complaint should have charged this was unlawful.

I dissent from the Commission's vote regarding three no-money, no-fault proposed orders with the big three major players in the rent-to-own business: Rent-a-Center, Inc. (NASDAQ: RCII), Aaron's, Inc. (NYSE: AAN), and Buddy's Newco, LLC. While I am pleased that we have uncovered difficult-to-detect misconduct, I am concerned our remedy is insufficient, that the analytical basis of the proposed settlements is flawed, and that the Commission is doing little to deter similar misconduct by others.

Background

Rent-a-Center, Aaron's, and Buddy's typically target low-income families seeking items for their homes, such as furniture or electronics. Unlike traditional installment sales contracts, rent-to-own companies "rent" an item to a consumer, who can then take ownership if all the required payments are made after a certain period of time. If the consumer is unable to make payments, they must return the good. Due to this unusual structure, rent-to-own companies have actually threatened customers who fail to make their payments with criminal theft.[1] The companies can even profit when a customer fails to complete the term, because the total price paid by the consumer over time may be far higher than the retail price for the goods.[2]

This business model has resulted in consumers paying significantly high prices. Making matters worse, the industry has tended to prey on vulnerable populations, especially military families.[3] The industry has been on the FTC's radar for at least two decades, though the agency

1 Brian Highsmith & Margot Saunders, NATIONAL CONSUMER LAW CENTER, THE RENT-TO-OWN-RACKET: USING CRIMINAL COURTS TO COERCE PAYMENTS FROM VULNERABLE FAMILIES (Feb. 2019), https://www.nclc.org/images/pdf/criminal-justice/report-rent-to-own-racket.pdf.

2 This is because the total cost of ownership is often far greater than the cash price of the merchandise. While the monthly payments may be low, a consumer only acquires ownership at the end of all scheduled payments, which typically last 12 to 24 months. When a consumer makes many payments but fails to complete the term, the rent-to-own company keeps the goods.

3 *See* Written Testimony of Assistant Director Hollister K. Petraeus on behalf of the Consumer Financial Protection Bureau, Before the U.S. Senate Committee on Banking, Housing, and Urban Affairs (Nov. 3, 2011),

has struggled to address the risks posed by this business model.[4] Given the pre-existing concerns about abuse in the rent-to-own industry, it is even more worrisome that dwindling competition might further diminish the limited leverage that families have when signing a contract.

The Scheme Alleged in the Complaint

The FTC's investigation uncovered evidence of a market allocation scheme between rent-to-own chains with competing stores in multiple geographic markets: one competitor would agree to close a store and sell customer contracts in one geographic market in exchange for a competitor closing one of its stores and selling its customer contracts in another geographic market. The companies did not hold an open auction to sell off stores or inventory.

As noted in the Commission's Analysis to Aid Public Comment, the agency has evidence to suggest that there were stores that would not have otherwise been closed, including stores that were profitable. The companies also added non-compete provisions to the agreements to prevent a competitor from re-emerging in a local market for three years.

While not a primary focus of the agency's investigation, there was another troubling element with respect to Buddy's and Aaron's in this matter. Vintage Capital Management, a private equity outfit with a controlling interest in Buddy's, also was, at one time, a very large shareholder of Aaron's.[5] Mr. Brian Kahn, the managing partner and founder of Vintage Capital Management, served as a member of the board of directors of Aaron's at the same time his fund controlled Buddy's.[6] Some of the alleged market allocation schemes took place during the time of Mr. Kahn's service on Aaron's board.[7]

Analysis of Complaint and Remedy

When competitors agree to close stores in ways that lead to a division of local markets, this will typically be profitable for the companies and harmful to the consumers and employees whose

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https://www.consumerfinance.gov/about-us/newsroom/testimony-of-hollister-k-petraeus-before-the-senate-committee- on-banking-housing-and-urban-affairs/.

4 *See* James M. Lacko et al., FED. TRADE COMM'N, BUREAU OF ECON. STAFF REP'T: SURVEY OF RENT-TO-OWN CUSTOMERS (Apr. 2000), https://www.ftc.gov/reports/survey-rent-own-customers. The FTC even caught Aaron's illegally spying on consumers via rental computers. *See* Press Release, Fed. Trade Comm'n, Aaron's Rent-To-Own Chain Settles FTC Charges That it Enabled Computer Spying by Franchisees (Oct. 22, 2013), https://www.ftc.gov/news-events/press-releases/2013/10/aarons-rent-own-chain-settles-ftc-charges-it-enabled-computer.

5 Press Release, Aaron's Inc., Aaron's, Inc. Reaches Agreement With Vintage Capital Management; Brian R. Kahn and Matthew E. Avril to Join Aaron's Board of Directors (May 13, 2014), http://investor.aarons.com/news-releases/news-release-details/aarons-inc-reaches-agreement-vintage-capital-management.

6 *Id. See also* MORRISON & FOERSTER LLP, *Aaron's Inc. and Vintage Capital Management, Inc.: Chronology of Events Surrounding Unsolicited Offer* at 4 (2014), http://media.mofo.com/files/uploads/Images/UV-Aarons-Vintage-Capital.pdf.

7 Aaron's Compl. ¶15.

lives are disrupted by store closures. I acknowledge that agencies like the FTC do not have unlimited resources. We cannot always investigate every detail of potential misconduct.

However, in this matter, the Commission did not analyze customer contract performance after the store closures, or analyze employee terminations and other critical information that would help to determine the harm inflicted on the public and the companies' ill-gotten gains. The investigation did not focus on whether the companies made any misrepresentations to employees about the rationale for the store closures or other details about closures and layoffs. We also do not know whether customers were deceived when told why they could no longer make payments at the original location where they signed their contract. It is reasonable to assume that some customers faced financial hardships from the market allocation scheme, but we cannot know precisely given the scope of our investigation.

With all of these unknowns, the Commission should not jump to a conclusion that the alleged unlawful conduct was victimless. Instead, we must approach a resolution that takes into account this uncertainty. There are several aspects here worth briefly discussing.

Notice to Victims. The Commission is not seeking any notifications to the employees or customers affected by potentially illegal store closures. Requiring a notice to employees and customers, even if it includes those that may not have been harmed, has important benefits, especially if any employee or customer was deceived or harmed in ways that we were unable to uncover.

A core benefit of notice is the dissemination of truthful information, which helps instill proper incentives in the marketplace. This is especially important in no-money, no-fault settlements like the ones here, because it allows market forces to impose some degree of accountability on wrongdoing firms: harmed consumers may prefer to do business with law-abiding companies instead of ones that flout the law.

Promoting the dissemination of truthful information is foundational to functioning markets and has been a bedrock of FTC policy for decades. Fulfilling that policy goal in a case like this one requires virtually no effort on the Commission's part – it is standard practice for lawbreakers to be ordered to conduct the notifications themselves,[8] with virtually no public resources. The statement by Chairman Simons and Commissioner Phillips appears to go against this principle, by advocating that the Commission deprive customers and employees from being notified directly by the companies about their misconduct, out of fear of being "overinclusive."

Overlapping Control. When a senior executive can sit on the board of a competitor and learn about its business strategy, this can lead to significant anticompetitive effects. For example, if a senior executive learns about the locations of planned store openings of a competitor through an affiliation on that competitor's board, she may advise the other company she is affiliated with

8 *See e.g.*, *Fed. Trade Comm'n v. Cure Encapsulations, Inc.* FTC File No. 1723113 (Feb. 19, 2019); *Fed. Trade Comm'n v. Applied Food Sciences Inc.*, FTC File No. 1423054 (Sept. 10, 2014); *In re Henry Schein Practice Solutions, Inc*, Docket No. C-4575 (May 23, 2016).

to open locations in different markets to avoid competition. This is precisely the rationale behind the ban on interlocking directorates in Section 8 of the Clayton Act.

While the proposed orders against Buddy's and Aaron's ban overlaps on their boards, neither Mr. Kahn nor Vintage Capital Management are subject to these requirements. It is not clear whether the relief is adequate. While I appreciate that there is a ban in overlapping boards,[9] the Commission should have pursued a count charging Buddy's and Aaron's with engaging in an unfair method of competition in violation of the Section 5 of the Federal Trade Commission Act, pursuant to the Commission's 2015 Statement of Enforcement Principles.[10]

There is uncertainty in the market about compliance with the ban on overlapping boards.[11] Some may argue that limited liability companies (LLCs) are not bound by the Clayton Act's ban that applies to corporations. By not pleading a count condemning this overlap, the FTC has missed an opportunity to demonstrate that these overlaps are unlawful.

Per Se Liability. The Commission is not asserting that the store closure scheme was per se unlawful. Instead, the agency analyzed the scheme in a way that allowed the companies to attempt to justify why the conduct was not anticompetitive. While there is fairly limited case law guiding the appropriate legal analysis of the specific fact pattern here, the conduct has the same competitive effect as a straightforward market allocation scheme, which courts treat as per se unlawful. As the FTC and Department of Justice's Antitrust Guidelines for Collaborations Among Competitors describes, agreements to "share or divide markets by allocating customers, suppliers, territories or lines of commerce. . ." have been held per se illegal.[12]

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9 I view the proposed order's ban on future interlocks as the bare minimum the Commission could possibly include in a remedy. Although the ban is broader than what Section 8 requires, since it applies regardless of the Section 8 statutory exemptions that would apply, the order would otherwise merely require Aaron's and Buddy's to abide by the law.

10 While our investigation did not make a conclusive determination as to whether Mr. Kahn's actions were a violation of Section 8 of the Clayton Act's ban on interlocking directorates, the conduct meets the standards outlined in the Commission's 2015 Statement of Enforcement Principles on the use of the agency's 'stand alone' authority to prohibit unfair methods of competition under Section 5. *See* https://www.ftc.gov/public-statements/2015/08/statement-enforcement-principles-regarding-unfair-methods-competition.

11 Makan Delrahim, Assistant Att'y Gen., U.S. Dep't of Just., Keynote Address at Fordham University School of Law, Antitrust in the Financial Sector: Hot Issues and Global Perspectives (May 1, 2019) (noting that "[t]he use of the term "corporation" in the statute has raised many questions about whether Section 8 applies to non-incorporated entities such as [LLCs] or other structures. Section 8 pre-dates the use of LLCs, and certainly predates the widespread acceptance of structures like limited liability corporations as an alternative corporate form to a traditional "corporation." To date, courts have not directly addressed this question, although we believe the harm can be the same regardless of the forms of the entities."), https://www.justice.gov/opa/speech/file/1159346/download.

12 FED. TRADE COMM'N, & U.S. DEP'T OF JUST., ANTITRUST GUIDELINES FOR COLLABORATIONS AMONG COMPETITORS at 3 (Apr. 2000) (citing *Palmer v. BRG of Georgia, Inc.*, 498 U.S. 46 (1990) (market allocation)), https://www.ftc.gov/sites/default/files/documents/public_events/joint-venture-hearings-antitrust-guidelines-collaboration-among-competitors/ftcdojguidelines-2.pdf.

The reason per se liability applies to these types of agreements is simple: certain agreements are so likely to harm competition and have no significant benefits that they do not warrant the time and expense necessary for a detailed rule of reason inquiry into their effects.[13] A rule of reason analysis is much costlier than a per se analysis, typically requiring expert testimony and evidence measuring anticompetitive effects. The level of detail in the analysis varies depending on the nature of the agreement and market circumstances.[14]

For defendants, the difference between per se and rule of reason analysis is enormous, since under a per se analysis only the existence of an agreement need be proved by a plaintiff – no justifications are allowed. Applying the wrong analysis to an allegedly illegal agreement can wreak havoc on our legal system and lead to poor outcomes.

For example, if companies sense that certain conduct is no longer likely to be treated as per se unlawful, they are more likely to engage in the conduct. Well-resourced companies can concoct justifications for their alleged conduct after they've been caught, with a net low risk of sanctions, creating an incentive for behavior that is almost always anticompetitive. This gives them an advantage over smaller and newer businesses that may not have the same guile and can also harm consumers and the companies' own employees in the process. Using a bright-line rule relying on per se liability in this case provides clear guidance to firms subject to that rule and also limits the transaction costs of enforcement.[15]

Conclusion

The proposed settlements are clearly inadequate. Because the Commission has voted to place the proposed orders on the public record for comment, I too look forward to any input the public may have on how the agency can improve the proposed orders and prevent repeating similar mistakes.

When wrongdoers wish to end an investigation by settlement, the FTC must be mindful of all of the potential harms inflicted on the public, rather than simply assuming there were none. When uncertainty is always analyzed in favor of the wrongdoer, this is a recipe for weak enforcement that does little to deter market distortions and undermines fair competition.

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13 *See Continental TV, Inc. v. GTE Sylvania Inc*., 433 U.S. 36, 50 n. 16 (1977).

14 *See California Dental Ass'n v. FTC*, 526 U.S. 756, 781 (1999) ("What is required . . . is an enquiry meet for the case, looking to the circumstances, details, and logic of a restraint").

15 *See* Jonathan B. Baker, *Taking the Error Out of "Error Cost" Analysis: What's Wrong with Antitrust's Right*, 80 ANTITRUST L.J. 1, 31 (2015).

ANALYSIS OF CONSENT ORDER TO AID PUBLIC COMMENT

I. Introduction

The Federal Trade Commission ("Commission") has accepted, subject to final approval, an Agreement Containing Consent Order with Aaron's, Inc. ("Aaron's"), an Agreement Containing Consent Order with Buddy's Newco, LLC ("Buddy's"), and an Agreement Containing Consent Order with Rent-A-Center, Inc. ("RAC") ("Consent Agreements"). The proposed Consent Agreements are intended to remedy anticompetitive effects resulting from reciprocal purchase agreements made between Aaron's, Buddy's, and RAC, and certain of their competitors in the brick-and-mortar rent-to-own ("RTO") industry.

Pursuant to the reciprocal purchase agreements, Aaron's, Buddy's, and RAC sold consumer rental contracts to nearby competitors contingent on Aaron's, Buddy's, or RAC acquiring that competitor's consumer rental contracts in another geographic area. These reciprocal purchase agreements, called swap agreements ("Swap Agreements") by the RTO industry, also included non-competition agreements whereby Aaron's, Buddy's, or RAC and the nearby competitors each agreed to close stores associated with the consumer rental contacts being sold and to not open new stores within a specified distance for a limited amount of time. Not all swap agreements violate the antitrust laws. Swap agreements between competitors that that generate significant procompetitive benefits for consumers, such as more efficient distribution or creation of a new product, may not violate the law. The Swap Agreements and ancillary non-competition agreements at issue in the present case, however, likely reduced competition between Aaron's, Buddy's, RAC, and their competitors in the RTO industry in several local markets in the United States, reducing consumer choice and depriving consumers of the benefits of price and quality competition.

Under the Consent Agreements, Aaron's and Buddy's agree that they will no longer enter into Swap Agreements and will not take any steps to enforce any non-competition agreements associated with the Swap Agreements. The proposed Decision and Order ("Order") in each Consent Agreement preserves competition in the RTO industry by prohibiting such Swap Agreements and enforcement of ancillary non-competition agreements.

II. The Parties

A. Aaron's, Inc.

Aaron's is headquartered in Atlanta, Georgia. As of December 2018, Aaron's, the second largest operator of RTO stores, has 1,689 stores, comprised of 1,312 company-operated stores and 377 independently owned franchised stores operating in 47 states. Aaron's estimates its 2018 fiscal year revenues were roughly $3.8 billion with over $196 million in net earnings.

B. Buddy's Newco, LLC

Buddy's, doing business as Buddy's Home Furnishings, is a limited liability company headquartered in Orlando, Florida. Buddy's operates approximately 300 franchised and corporate stores throughout the Continental United States.

C. Rent-A-Center, Inc.

Rent-A-Center, Inc. is a corporation headquartered in Plano, Texas. RAC has approximately 2,800 company-owned stores and 225 RAC franchised stores throughout the United States.

III. The Complaints

A. Background

In the RTO business, consumers do not buy merchandise outright, but rather take possession after entering into rental contracts with an RTO company. The contracts are short- term contracts (typically one week or one month) that renew when the consumer makes the lease payment. The rental contracts are at-will; consumers may terminate the contracts and return the merchandise without penalty. The rental contracts create a recurring revenue stream for the RTO company. If an RTO store closes, the RTO company will either transfer the store's rental contracts to another of its own stores, or sell them to a nearby competitor.

A large percentage of RTO customers travel to the RTO store associated with their rental contract to make their weekly or monthly payments. If an RTO company seeks to close a store and transfer the store's contracts to another, more distant store, the consumer may terminate the rental contract rather than traveling to the more distant store. The greater the distance between the receiving store and the closing store, the greater the likelihood that the consumer will terminate the contract. Therefore, if an RTO company does not have another store near the closing store, it may opt to sell its rental contracts to a competitor that has an RTO store in close proximity to the closing store.

B. The Challenged Conduct

Between 2015 and 2018, Aaron's, Buddy's, and RAC entered into several Swap Agreements with one another and with other RTO operators. These agreements typically covered stores in multiple different markets. Each Swap Agreement consists of two related transactions. In one transaction, a competitor closes one or more RTO stores and sells the closing stores' consumer rental contracts to Aaron's, Buddy's, or RAC, which have RTO stores near the competitor's soon-to-close stores. In the other transaction, the facts are reversed: Aaron's, Buddy's, or RAC closes one or more of its RTO stores and sells the soon-to-close stores' consumer rental contracts to the competitor which has RTO stores nearby. The sales of the rental contracts by Aaron's, Buddy's, or RAC is explicitly contingent on the purchase of the competitor's rental contracts. Parties to the Swap Agreement also sign non-compete agreements, usually for a three-year period, for the areas in the immediate vicinity of the closed stores.

C. Effects of the Challenged Conduct

The Commission's Complaints do not allege that Swap Agreements are *per se* illegal because the circumstances surrounding their formation and execution indicate that these are not naked market allocation agreements. However, the evidence indicates that at least some of the Swap Agreements entered into by Buddy's, Aaron's, and RAC, had the purpose and effect of facilitating each party's ability to induce its competitor to exit a market. Such agreements are a form of restraint that reduces competition and creates a clear threat of consumer harm. Consumers in the affected geographic areas lost any benefits of price and quality competition resulting from the closing of RTO stores and had fewer options for rental merchandise. Moreover, the evidence indicates that Aaron's, Buddy's, and RAC closed stores that might not have been closed but for the Swap Agreements. Aaron's, Buddy's, and RAC failed to produce sufficient evidence to rebut the presumption that the Swap Agreements are unreasonably anticompetitive. As a result, the FTC has issued its Complaints and entered into the Consent Agreements, which remedy the harm to competition.

IV. The Agreement Containing Consent Order

The proposed Orders fully address Aaron's, Buddy's, and RAC's past actions and contain important fencing in and notification provisions. The Orders prohibit Aaron's, Buddy's, and RAC from entering into any future Swap Agreements and from enforcing any non-compete clauses that are still in effect from past Swap Agreements. The Orders also prohibit any Aaron's or Buddy's representatives from serving on the Board of Directors of any of their competitors, or any competitor's representatives from serving on the Aaron's or Buddy's Board. RAC's Order does not contain this prohibition because, unlike Buddy's and Aaron's, there is no evidence that a RAC representative has previously served on a competitors' Board of Directors. The Orders require Aaron's and Buddy's to establish antitrust compliance programs, while RAC must establish a compliance program related to its Order. Finally, all the Orders impose reporting requirements, and the Orders will terminate in 20 years.

The Commission does not intend this analysis to constitute an official interpretation of the proposed Orders or to modify their terms in any way.

Complaint

IN THE MATTER OF

FEDERAL-MOGUL MOTORPARTS, LLC

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

Docket No. C-4717; File No. 172 3102
Complaint, May 12, 2020 – Decision, May 12, 2020

This consent order addresses Federal-Mogul Motorparts LLC's acts and practices alleged to constitute unfair or deceptive concerning its Wagner OEX brake pads. The complaint alleges that Respondents violated Section 5 of the Federal Trade Commission Act by disseminating advertisements, packaging, and promotional materials that represented its Wagner OEX brake pads would stop a pickup truck, SUV (sport utility vehicles), or CUV (crossover utility vehicles) up to 50 feet sooner than competing brake pads. The Respondents also indicated that the Wagner OEX brake pads significantly reduce the risk of collisions compared to competing brake pads when a driver is trying to stop in the shortest distance possible. The consent order prohibits the Respondents from making any representation about the braking benefits, performance, or efficacy of any aftermarket brake pads branded and/or marketed by Respondents for use as replacement brake pads.

Participants

For the *Commission*: *Matthew D. Gold, Sydney Knight,* and *Evan Rose.*

For the *Respondents*: *Matt Reilly, Ross Weisman,* and *Ray Woodring, Kirkland & Ellis LLP.*

COMPLAINT

The Federal Trade Commission, having reason to believe that Federal-Mogul Motorparts 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. Respondent is a Delaware limited liability company with its principal office or place of business at 27300 W. 11 Mile Rd., Southfield, MI 48034.

2. Respondent has manufactured, advertised, labeled, offered for sale, sold, and distributed products to consumers, including Wagner OE^{x} brake pads. The brake pads are after-market products that can be purchased and installed at automobile repair shops.

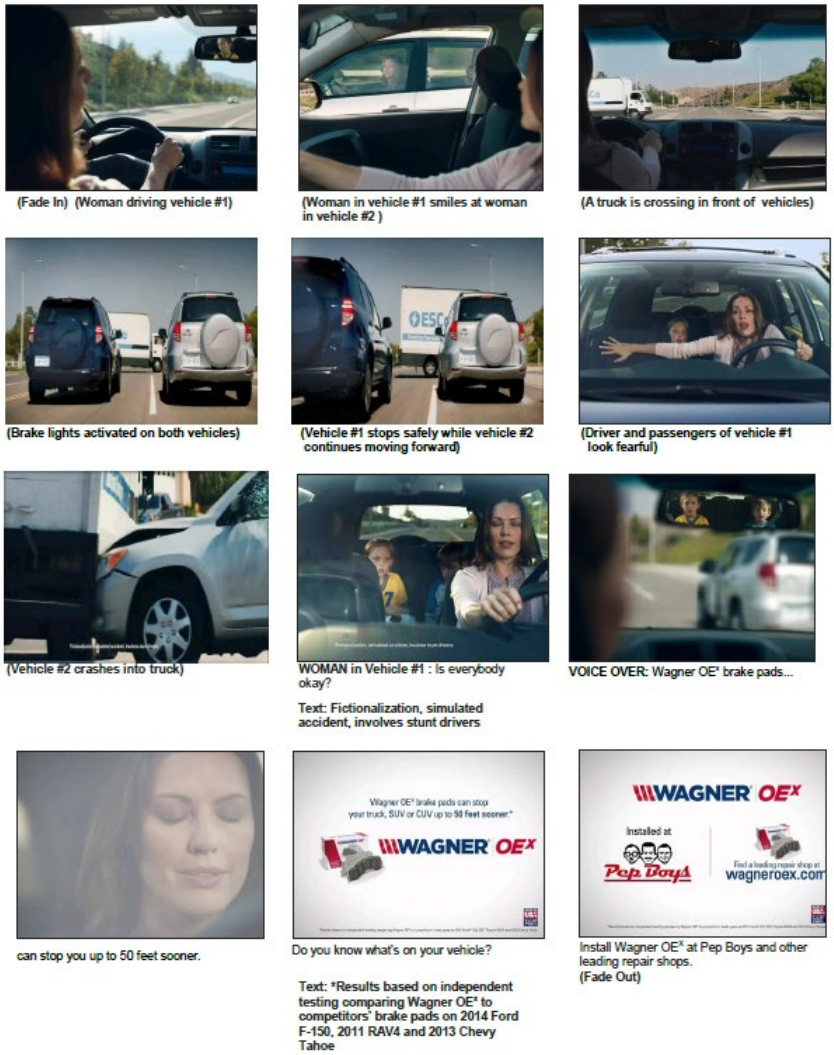
3. The acts and practices of Respondent alleged in this Complaint have been in or affecting commerce, as "commerce" is defined in Section 4 of the Federal Trade Commission Act.

4. Since at least 2015, Respondent has manufactured, advertised, labeled, marketed, promoted, offered for sale, sold, and distributed Wagner OE^{X} aftermarket replacement brake pads to the public for use on categories of vehicles known as CUVs (crossover utility vehicles), SUVs (sport utility vehicles), and pickup trucks. Wagner OE^{X} brake pads represent a "premium" price

tier among aftermarket brake products sold by Respondent compared to "entry-level" and "mid-range" price tiers of brake products sold by Respondent.

5. To induce consumers to purchase Wagner OE^X brake pads, and to induce aftermarket automobile parts retailers and repair shops to install Wagner OE^X premium brake pads rather than other competing brake pads, Respondent has disseminated or has caused to be disseminated advertisements, packaging, and promotional materials, via various advertising media, including the television, internet, and print ads depicted in the attached Exhibits A, B, and C. Consumers who view Respondent's advertisements can select and purchase Wagner OE^X brake pads at various third-party automobile parts retailers and repair shops in order to accomplish the installation themselves or by their preferred installer. The materials contain the following statements and depictions:

a. Storyboard of Television Advertisement (Exhibit A)



Complaint

b. Storyboard of YouTube advertisement (Exhibit B)

(Fade In) (Woman driving vehicle #1)

(Woman in vehicle #1 gazes at woman in vehicle #2)

(A truck is crossing in front of vehicles)

(Brake lights activated on both vehicles)

(Vehicle #1 stops safely while vehicle #2 continues moving forward)

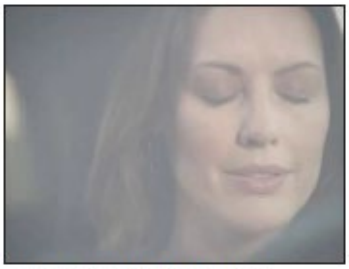
(Driver and passengers of vehicle #1 look fearful)

(Vehicle #2 crashes into truck)

WOMAN in Vehicle #1 : Is everybody okay?

Text: Fictionalization, simulated accident, involves stunt drivers

VOICE OVER: Wagner OE* brakes



can stop you up to 50 feet sooner.

Do you know which brake pads are on your vehicle?

Text: *Results based on independent testing comparing Wagner OE* to competitors' brake pads on 2014 Ford F-150, 2011 RAV4 and 2013 Chevy Tahoe

Your kids' lives depend on it. Parts Matter.
(Fade Out)

c. Print advertisement (Exhibit C)

6. Respondent hired an independent party to conduct head-to-head testing of Wagner OE^{X} brake pads against competing aftermarket brake products. The vehicles used in the tests included a 2014 Ford F-150, a 2013 Chevrolet Tahoe, and a 2011 Toyota RAV4.

a. Pursuant to the test protocol used, certain stopping distance tests were conducted from a speed of 60 mph where the driver was instructed to stop the vehicle by applying a constant and relatively light force of 100 Newtons to the brake pedal. Research has shown that the vast majority of drivers are capable of applying up to four times that much pedal force.

b. The Company's testing protocol also required that the testing be conducted immediately after the braking system was subjected to a sequence of "fade" or "heating" maneuvers designed to heat the brakes until they reached a set temperature above normal driving conditions, also known as "post-fade" or "hot performance" stops. "Post-fade" refers to when the brakes are at their hottest, a condition that will result in a reduction in stopping power. A post-fade condition typically occurs after repeated or sustained application of brakes, such as when a vehicle is driving down a long mountain or hill.

c. The industry standard for measuring vehicle stopping distances is known as the Federal Motor Vehicle Safety Standard for Light Vehicle Brake Systems (FMVSS 135). According to this standard, an evaluation of the stopping distance performance of a vehicle requires that the driver try to stop the vehicle in "the shortest distance achievable," also known as a "best-effort" stop. In a best-effort stop, the driver pushes on the pedal as hard as necessary to achieve the shortest stopping distance.

d. The testing protocol used in Respondent's testing did not evaluate conditions where a driver tries to stop the vehicle in the shortest achievable distance, such as when trying to avoid a collision. Neither did it simulate testing under ordinary driving conditions. Among other things, the test protocol's requirement that the driver apply a constant pedal force of 100 Newtons prevented the driver from applying the amount of pedal force necessary to stop the vehicle in the shortest achievable distance as required by FMVSS 135. Furthermore, by requiring the driver to apply no more than 100 Newtons of force during the "post-fade" or "hot performance" testing, the protocol produces stopping distances that are longer than when the test is conducted at temperatures associated with normal driving conditions. When operating the brakes at the higher temperatures associated with "post-fade" testing, the driver must apply greater pedal force to stop in the shortest achievable distance because heated or faded brakes require more force than cold brakes to produce a comparable level of stopping performance.

Count I

False or Unsubstantiated Performance Claims

7. In connection with the advertising, promotion, offering for sale, sale, or distribution of Wagner OE^{X} brake pads, Respondent has represented, directly or indirectly, expressly or by implication, that:

a. In an emergency, when a driver is trying to stop in the shortest distance possible, Wagner OE^{X} brake pads will stop a pickup truck, SUV, or CUV up to 50 feet sooner than competing brake pads; and

b. In an emergency, when a driver is trying to stop in the shortest distance possible, Wagner OEX brake pads installed on a pickup truck, SUV, or CUV, significantly reduce the risk of collisions compared to competing brake pads.

8. The representations set forth in Paragraph 7 are false or misleading, or were not substantiated at the time the representations were made.

Violations of Section 5

9. 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 twelfth day of May, 2020, has issued this Complaint against Respondent.

By the Commission.

Complaint

Exhibit A

(Fade In) (Woman driving vehicle #1)

(Woman in vehicle #1 smiles at woman in vehicle #2)

(A truck is crossing in front of vehicles)

(Brake lights activated on both vehicles)

(Vehicle #1 stops safely while vehicle #2 continues moving forward)

(Driver and passengers of vehicle #1 look fearful)

(Vehicle #2 crashes into truck)

WOMAN in Vehicle #1 : Is everybody okay?

Text: Fictionalization, simulated accident, involves stunt drivers

VOICE OVER: Wagner OE* brake pads...

can stop you up to 50 feet sooner.

Do you know what's on your vehicle?

Text: *Results based on independent testing comparing Wagner OE* to competitors' brake pads on 2014 Ford F-150, 2011 RAV4 and 2013 Chevy Tahoe

Install Wagner OE* at Pep Boys and other leading repair shops.
(Fade Out)

Storyboard of television advertisement **EXHIBIT A(1)**

(Video Exhibit Submitted Separately)

EXHIBIT A(2)

Complaint

Exhibit B

(Fade In) (Woman driving vehicle #1)

(Woman in vehicle #1 gazes at woman in vehicle #2)

(A truck is crossing in front of vehicles)

(Brake lights activated on both vehicles)

(Vehicle #1 stops safely while vehicle #2 continues moving forward)

(Driver and passengers of vehicle #1 look fearful)

(Vehicle #2 crashes into truck)

WOMAN in Vehicle #1 : Is everybody okay?

Text: Fictionalization, simulated accident, involves stunt drivers

VOICE OVER: Wagner OE* brakes

can stop you up to 50 feet sooner.

Do you know which brake pads are on your vehicle?

Text: *Results based on independent testing comparing Wagner OE* to competitors' brake pads on 2014 Ford F-150, 2011 RAV4 and 2013 Chevy Tahoe

Your kids' lives depend on it. Parts Matter. (Fade Out)

Storyboard of YouTube advertisement **EXHIBIT B(1)**

(Video Exhibit Submitted Separately)

EXHIBIT B(2)

Complaint

Exhibit C

Print advertisement **EXHIBIT C**

DECISION

The Federal Trade Commission ("Commission") initiated an investigation of certain acts and practices of the Respondent named in the caption. The Commission's Bureau of Consumer Protection ("BCP") prepared and furnished to Respondent a draft Complaint. BCP proposed to present the draft Complaint to the Commission for its consideration. If issued by the Commission, the draft Complaint would charge the Respondent with violations of the Federal Trade Commission Act.

Respondent and BCP thereafter executed an Agreement Containing Consent Order ("Consent Agreement"). The Consent Agreement includes: 1) statements by Respondent that it neither admits nor denies any of the allegations in the Complaint, except as specifically stated in this Decision and Order, and that only for purposes of this action, it admits the facts necessary to establish jurisdiction; and 2) waivers and other provisions as required by the Commission's Rules.

The Commission considered the matter and determined that it had reason to believe that Respondent has violated the Federal Trade Commission Act, and that a Complaint should issue stating its charges in that respect. The Commission accepted the executed Consent Agreement and placed it on the public record for a period of 30 days for the receipt and consideration of public comments. Now, in further conformity with the procedure prescribed in Rule 2.34, the Commission issues its Complaint, makes the following Findings, and issues the following Order:

Findings

1. The Respondent is Federal-Mogul Motorparts LLC, a Delaware limited liability company with its principal office or place of business at 27300 W. 11 Mile Rd., Southfield, MI 48034.

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

ORDER

Definitions

For purposes of this Order, the following definitions apply:

A. "Covered Product" means any aftermarket brake pads branded and/or marketed by Respondent for use as replacement brake pads, including Wagner OE^{X} aftermarket brake pads and any aftermarket brake pads branded by third parties for which Respondent supplies marketing materials.

B. "Respondent" means Federal-Mogul Motorparts LLC, a limited liability company, and its successors and assigns.

Provisions

I. Prohibited Misleading and Unsubstantiated Representations about Brake Pads

IT IS ORDERED that Respondent, and Respondent's officers, agents, 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 the labeling, advertising, promotion, offering for sale, or sale of any Covered Product, must not make any representation, in any manner, expressly or by implication, including through the use of a product name, endorsement, depiction, or illustration, about the braking benefits, performance, or efficacy of any Covered Product, including that such product:

A. Will stop a vehicle significantly sooner than competing brake pads; or

B. Reduces the risk of collisions compared to competing brake pads;

unless the representation is non-misleading, including that, at the time such representation is made, Respondent possesses and relies upon competent and reliable scientific evidence substantiating that the representation is true. For purposes of this Provision, competent and reliable scientific evidence shall consist of testing of the product that is sufficient in quality and quantity based on standards generally accepted by experts in the field of automobile brakes, when considered in light of the entire body of relevant scientific evidence, to substantiate that the representation is true. Such testing must be conducted by researchers qualified by training and experience to conduct such testing.

II. Acknowledgments of the Order

IT IS FURTHER ORDERED that Respondent obtain acknowledgments of receipt of this Order:

A. Respondent, within 7 days after the effective date of this Order, must submit to the Commission an acknowledgment of receipt of this Order sworn under penalty of perjury.

B. For 3 years after the issuance date of this Order, Respondent must deliver a copy of this Order to: (1) all of its principals, officers, directors, and LLC managers and members; (2) all of its employees and agents with managerial responsibilities in the labeling, advertising, promotion, offering for sale, or sale of any Covered Product; and (3) any business entity engaged in the labeling, advertising, promotion, offering for sale, or sale of any Covered Product, resulting from any change in structure as set forth in the Provision titled Compliance Report and Notices. Delivery must occur within 7 days after the effective date of this Order for current personnel. For all others, delivery must occur before they assume their responsibilities.

C. From each individual or entity to which Respondent delivered a copy of this Order, Respondent must obtain, within 30 days, a signed and dated acknowledgment of receipt of this Order.

III. Compliance Report and Notices

IT IS FURTHER ORDERED that Respondent make timely submissions to the Commission:

A. One year after the issuance date of this Order, Respondent must submit a compliance report, sworn under penalty of perjury, in which Respondent must: (a) identify the primary physical, postal, and email address and telephone number, as designated points of contact, which representatives of the Commission may use to communicate with Respondent; (b) identify all of Respondent's businesses that sell any Covered Product by all of their names, telephone numbers, and physical, postal, email, and Internet addresses; (c) describe the activities of each such business, including the goods and services offered, the means of advertising, marketing, and sales; (d) describe in detail whether and how Respondent is in compliance with each Provision of this Order, including a discussion of all of the changes the Respondent made to comply with the Order; and (e) provide a copy of each Acknowledgment of the Order obtained pursuant to this Order, unless previously submitted to the Commission.

B. For 5 years after the issuance date of this Order, Respondent must submit a compliance notice, sworn under penalty of perjury, within 14 days of any change in the following: (a) any designated point of contact; or (b) the structure of Respondent or any entity that Respondent has any ownership interest in or controls directly or indirectly that may affect compliance obligations arising under this Order, including: creation, merger, sale, or dissolution of the entity or any subsidiary, parent, or affiliate that engages in any acts or practices subject to this Order.

C. Respondent must submit notice of the filing of any bankruptcy petition, insolvency proceeding, or similar proceeding by or against Respondent within 14 days of its filing.

D. Any submission to the Commission required by this Order to be sworn under penalty of perjury must be true and accurate and comply with 28 U.S.C. § 1746, such as by concluding: "I declare under penalty of perjury under the laws of the United States of America that the foregoing is true and correct. Executed on: _____" and supplying the date, signatory's full name, title (if applicable), and signature.

E. Unless otherwise directed by a Commission representative in writing, all submissions to the Commission pursuant to this Order must 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 re Federal-Mogul Motorparts LLC, FTC File No. 172-3102, Docket No. C-4717.

IV. Recordkeeping

IT IS FURTHER ORDERED that Respondent must create certain records for 10 years after the issuance date of the Order, and retain each such record for 5 years. Specifically, Respondent must create and retain the following records:

A. Accounting records showing the revenues from all Covered Products sold;

B. For Respondent's personnel who provide services related to the subject matter of the Order, whether as an employee or otherwise, a record of each person's: name; addresses; telephone numbers; job title or position; dates of service; and (if applicable) the reason for termination;

C. Records of all consumer complaints and refund requests concerning the subject matter of this Order, whether received directly or indirectly, such as through a third party, and any response;

D. All records necessary to demonstrate full compliance with each provision of this Order, including all submissions to the Commission; and

E. A copy of each unique advertisement or other marketing material for any Covered Product.

V. Compliance Monitoring

IT IS FURTHER ORDERED that, for the purpose of monitoring Respondent's compliance with this Order:

A. Within 10 days of receipt of a written request from a representative of the Commission, Respondent must submit additional compliance reports or other requested information, which must be sworn under penalty of perjury, and produce records for inspection and copying.

B. For matters concerning this Order, representatives of the Commission are authorized to communicate directly with Respondent. Respondent must permit representatives of the Commission to interview anyone affiliated with Respondent who has agreed to such an interview. The interviewee may have counsel present.

C. The Commission may use all other lawful means, including posing through its representatives as consumers, suppliers, or other individuals or entities, to Respondent or any individual or entity affiliated with Respondent, without the

necessity of identification or prior notice. Nothing in this Order limits the Commission's lawful use of compulsory process, pursuant to Sections 9 and 20 of the FTC Act, 15 U.S.C. §§ 49, 57b-1.

VI. Order Effective Dates

IT IS FURTHER ORDERED that this Order is final and effective upon the date of its publication on the Commission's website (ftc.gov) as a final order. This Order will terminate on May 12, 2040, or 20 years from the most recent date that the United States or the Commission files a complaint (with or without an accompanying settlement) in federal court alleging any violation of this Order, whichever comes later; *provided, however,* that the filing of such a complaint will not affect the duration of:

A. Any Provision in this Order that terminates in less than 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 Provision.

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 Provision 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 with Federal-Mogul Motorparts LLC ("respondent").

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

Analysis to Aid Public Comment

This matter involves the respondent's advertising for Wagner OE^{X} brake pads. The proposed complaint alleges that Federal-Mogul violated Section 5(a) of the FTC Act by disseminating a series of false and unsubstantiated advertisements claiming that: (1) In an emergency, when a driver is trying to stop in the shortest distance possible, Wagner OE^{X} brake pads will stop a pickup truck, SUV, or crossover up to 50 feet sooner than competing brake pads; and (2) In an emergency, when a driver is trying to stop in the shortest distance possible, Wagner OE^{X} brake pads installed on a pickup truck, SUV, or crossover significantly reduce the risk of collisions compared to competing brake pads.

The order includes injunctive relief that prohibits these alleged violations and fences in similar and related conduct. The product coverage would apply to any Federal-Mogul- branded or marketed aftermarket brake pads, including Wagner OE^{X} aftermarket brake pads, as well as any third-party-branded aftermarket brake pads for which the respondent provides marketing materials.

Part I prohibits the respondent from making any representation about the braking benefits, performance, or efficacy of any covered product, including that such product: (1) will stop a vehicle significantly sooner than competing brake pads; and (2) reduces the risk of collisions compared to competing brake pads, 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 by experts in the field of automotive braking, when considered in light of the entire body of relevant and reliable scientific evidence, to substantiate that the representation is true.

Part II requires the respondent to submit a signed acknowledgment that respondent received the order.

Part III requires the respondent to file compliance reports with the Commission, and to notify the Commission of bankruptcy filings or changes in corporate structure that might affect compliance obligations. **Part IV** contains recordkeeping requirements for accounting records, personnel records, consumer correspondence, advertising and marketing materials, and claim substantiation, as well as all records necessary to demonstrate compliance or non- compliance with the order. **Part V** contains other requirements related to the Commission's monitoring of the respondent's order compliance. **Part VI** provides the effective dates of the order, including that, with exceptions, the order will terminate in 20 years.

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

Complaint

IN THE MATTER OF

TAPPLOCK, INC.

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

Docket No. C-4718; File No. 192 3011
Complaint, May 18, 2020 – Decision, May 18, 2020

This consent order addresses Tapplock, Inc.'s violation of Section 5 of the Federal Trade Commission Act by not taking reasonable measures to secure its locks, or follow industry best practices for protecting consumers' privacy information. The complaint alleges that Respondent failed to identify reasonably foreseeable risks to the security of its smart locks or the security of customers' personal accounts, such as penetration testing. Respondent also failed to adopt and implement written data security standards, policies, procedures, or practices. The consent order requires Respondent must not misrepresent the extent to which Respondent maintains and protects the security of a Covered Device or the privacy, security, confidentiality, or integrity of Personal Information. Respondent must not transfer, sell, share, collect, maintain, or store Personal Information unless it establishes and maintains a comprehensive Security Program that protects Covered Devices and security of Personal Information.

Participants

For the *Commission*: *Jah-Juin Ho* and *Whitney Moore.*

For the *Respondents*: *Michael Wang, President, pro se.*

COMPLAINT

The Federal Trade Commission ("Commission"), having reason to believe that Tapplock, Inc. ("Respondent" or "Tapplock") 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 Tapplock, Inc. is a Canadian corporation with its principal office or place of business at 121 Richmond Street West, Toronto, Ontario M5H 2K1, Canada.

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 Federal Trade Commission Act and constitute "deceptive acts or practices involving foreign commerce" as set forth in Section 5 of the FTC Act.

RESPONDENT'S BUSINESS PRACTICES

3. Respondent is an Internet of Things ("IoT") company that, among other things, sells Internet-connected, fingerprint-enabled padlocks ("smart locks") to U.S. consumers. Respondent's smart locks interact with a companion mobile application ("app") that U.S. users are able to download onto their mobile devices. This app logs usernames, e-mail addresses, profile photos,

location history, and the precise geolocation of a user's smart lock, and it allows users to lock and unlock their smart locks when they are within Bluetooth range.

4. Respondent designs the smart locks it sells to U.S. consumers, is responsible for remediating security vulnerabilities and other flaws associated with those locks, and directly or through its distributors markets and advertises its locks to U.S. consumers.

5. Respondent advertises to U.S. consumers through its website, www.tapplock.com, and has previously advertised through the online crowd funding website Indiegogo.com. These websites advertised Respondent's smart locks in U.S. dollars.

6. Further, Respondent contracted with a U.S.-based third-party service provider to fulfill orders and ship its products to U.S. consumers.

7. Respondent shipped its devices to its service provider's U.S.-based warehouse in order to fulfill orders to U.S. customers. Respondent also referenced the U.S.-based warehouse in public statements to customers (e.g., "Our warehouse is in New Jersey").

RESPONDENT'S DECEPTIVE SECURITY PRACTICES

8. Respondent advertised its smart locks to consumers as "Bold. Sturdy. Secure."

9. Respondent's advertisements touted that its "secure" smart locks were also:

- "strengthened with double-layered lock design;"
- designed with "anti-shim and anti-pry technologies" (Shimming refers to inserting a foreign object into the latch, and prying refers to using a lever to force open a padlock); and
- designed to be "unbreakable," as follows,

10. Respondent makes additional claims about its information security practices in its privacy policy, accessible online to its U.S. customers, stating in part:

> To protect your personal information, we take reasonable precautions and follow industry best practices to make sure it is not inappropriately lost, misused, accessed, disclosed, altered or destroyed.

11. Respondent also claims that users can share access to their locks with an unlimited number of other people, and that users can subsequently limit or revoke such shared access.

12. Despite these claims, Respondent's smart locks were not secure. In June 2018, three separate security researchers identified critical physical and electronic vulnerabilities with Respondent's smart locks.

13. With respect to physical security, one security researcher demonstrated that he could unlock some of Respondent's smart locks within a matter of seconds, simply by unscrewing the back panel.

14. Researchers also discovered reasonably foreseeable electronic security vulnerabilities that could have been avoided if Respondent had implemented simple, low-cost steps. For example:

a. One vulnerability in Respondent's API allowed researchers to bypass the account authentication process in order to gain full access to the accounts of all Tapplock users and their personal information, including usernames, e-mail addresses, profile photos, location history, and precise geolocation of smart locks. A researcher who logged in with a valid user credential could then access another user's account without being re-directed back to the login page, thereby allowing the researcher to circumvent Respondent's authentication procedures altogether.

b. A second vulnerability allowed researchers to lock and unlock any nearby Tapplock smart lock. Because Respondent failed to encrypt the Bluetooth communication between the lock and the app, researchers were able to easily discover and replicate how Respondent generated the private keys necessary to lock and unlock user's smart locks.

c. A third vulnerability prevented users from effectively revoking access to their smart lock once they had provided other users access to that lock. This vulnerability allowed the researchers to "sniff" data packets for the information necessary to authenticate their access to the lock. With that information, researchers were able to continue accessing the lock even after their access had been revoked.

15. Contrary to the statements described in Paragraphs 8-11, Respondent did not take reasonable measures to secure its locks, or take reasonable precautions or follow industry best practices for protecting consumers' personal information. In fact, Respondent did not have a security program prior to the discovery of the vulnerabilities described in Paragraph 13 and 14. For example, Respondent:

a. failed to identify reasonably foreseeable risks to the security of its smart locks or the security of customers' personal accounts, such as through vulnerability or penetration testing, and assess the sufficiency of any safeguards in place to control those risks;

b. failed to employ sufficient measures to detect and prevent users from bypassing the authentication procedures in Respondent's API to gain access to other users' accounts;

c. failed to adopt and implement written data security standards, policies, procedures, or practices; and

d. failed to implement adequate privacy and security guidance or training for its employees responsible for designing, testing, overseeing, and approving software specifications and requirements.

16. As a result of these failures, consumers' personal information was exposed, as described in Paragraph 14, and consumers' personal property was put at risk.

VIOLATIONS OF THE FTC ACT

Deceptive Representation Regarding Security (Count I)

17. Through the means described in Paragraphs 8-9, Respondent has represented, directly or indirectly, expressly or by implication, that its smart locks were secure.

18. In truth and in fact, as described in Paragraphs 12-16, Respondent's smart locks were not secure. Therefore, the representation set forth in Paragraph 17 is false or misleading.

Deceptive Representation Regarding Protection of Personal Information (Count II)

19. Through the means described in Paragraph 10, Respondent has represented, directly or indirectly, expressly or by implication, that it took reasonable precautions and followed industry best practices to protect the personal information provided by consumers.

20. In truth and in fact, as described in Paragraphs 14-16, Respondent failed to take reasonable precautions and follow industry best practices to protect the personal information

provided by consumers. Therefore, the representation set forth in Paragraph 19 is false or misleading.

Violation of Section 5

21. 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 eighteenth day of May, 2020, has issued this complaint against Respondent.

By the Commission.

DECISION

The Federal Trade Commission ("Commission") initiated an investigation of certain acts and practices of the Respondent named in the caption. The Commission's Bureau of Consumer Protection ("BCP") prepared and furnished to Respondent a draft Complaint. BCP proposed to present the draft Complaint to the Commission for its consideration. If issued by the Commission, the draft Complaint would charge the Respondent with violations of the Federal Trade Commission Act, 15 U.S.C. § 45(a)(1).

Respondent and BCP thereafter executed an Agreement Containing Consent Order ("Consent Agreement"). The Consent Agreement includes: (1) statements by Respondent that it neither admits nor denies any of the allegations in the Complaint, except as specifically stated in this Decision and Order, and that only for purposes of this action, it admits the facts necessary to establish jurisdiction; and (2) waivers and other provisions as required by the Commission's Rules.

The Commission considered the matter and determined that it had reason to believe that Respondent has violated the Federal Trade Commission Act, and that a Complaint should issue stating its charges in that respect. The Commission accepted the executed Consent Agreement and placed it on the public record for a period of 30 days for the receipt and consideration of public comments. Now, in further conformity with the procedure prescribed in Rule 2.34, the Commission issues its Complaint, makes the following Findings, and issues the following Order:

Findings

1. The Respondent is Tapplock, Inc., a company, with its principal office or place of business at 121 Richmond Street West, Toronto, Ontario M5H 2K1, Canada.

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

ORDER

Definitions

For purposes of this Order, the following definitions apply:

A. "Covered Device" means (a) any computing device sold by Respondent that operates using an operating system, including any smart lock, smartphone, tablet, wearable, sensor, or any peripheral of any portable computing device; and (b) the software used to access, operate, manage, or configure a device subject to part (a) of this definition, including, but not limited to, the firmware, web or mobile applications, and any related online services, that are advertised, developed, branded, or sold by Respondent, directly or indirectly.

B. "Covered Incident" means any instance in which (a) any United States federal, state, or local law or regulation requires Respondent to notify any U.S. federal, state, or local government entity that information collected or received, directly or indirectly, by Respondent from or about an individual consumer was, or is reasonably believed to have been, accessed or acquired without authorization; or (b) Respondent discovers that Covered Devices or Personal Information necessary to access such Covered Devices (such as a key code) were, or are reasonably believed to have been, accessed without authorization.

C. "Personal Information" means individually identifiable information from or about an individual consumer, including: (a) a first and last name; (b) a home or other physical address, including street name and name of city or town, or other information about the location of the individual, including but not limited to fine or coarse location or GPS coordinates; (c) an email address; (d) a persistent identifier for computers or mobile devices, such as a customer number held in a "cookie," a static Internet Protocol ("IP") address, or a processor serial number; (e) a date of birth; (f) photograph; and (g) key code used to control access to a Covered Device.

D. "Respondent" means Tapplock, Inc., and its successors and assigns.

Provisions

I. Prohibition against Misrepresentations about Privacy and Security

IT IS ORDERED that Respondent, Respondent's officers, agents, 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 any product or service, must not misrepresent in any manner, expressly or by implication, the extent to which

Respondent maintains and protects: (1) the security of a Covered Device; or (2) the privacy, security, confidentiality, or integrity of Personal Information.

II. Mandated Device Security and Information Security Program

IT IS FURTHER ORDERED that Respondent must not transfer, sell, share, collect, maintain, or store Personal Information or manufacture or sell Covered Devices unless it establishes and implements, and thereafter maintains, a comprehensive Security Program ("Security Program") that protects: (1) the security of Covered Devices; and (2) the security, confidentiality, and integrity of Personal Information. To satisfy this requirement, Respondent must, at a minimum:

A. Document in writing the content, implementation, and maintenance of the Security Program;

B. Provide the written program and any evaluations thereof or updates thereto to Respondent's board of directors or governing body or, if no such board or equivalent governing body exists, to a senior officer of Respondent responsible for Respondent's Security Program at least once every 12 months and promptly (not to exceed 30 days) after a Covered Incident;

C. Designate a qualified employee or employees to coordinate and be responsible for the Security Program;

D. Assess and document, at least once every 12 months and promptly (not to exceed 30 days) following a Covered Incident, internal and external risks to the security of Covered Devices and to the security, confidentiality, or integrity of Personal Information that could result in the unauthorized disclosure, misuse, loss, theft, alteration, destruction, or other compromise of such information;

E. Design, implement, maintain, and document safeguards that control for the internal and external risks Respondent identifies to the security of Covered Devices and to the security, confidentiality, or integrity of Personal Information identified in response to sub-Provision II.D. Each safeguard must be based on (1) the sensitivity of the Covered Device's function, and (2) the volume and sensitivity of the Personal Information that is at risk, and the likelihood that the risk could be realized and result in the unauthorized access, collection, use, alteration, destruction, or disclosure of the Personal Information. Such safeguards must also include:

1. Training of all of Respondent's employees, at least once every 12 months, on how to safeguard Personal Information;

2. Technical measures to monitor all of Respondent's networks, Covered Devices, and all systems and assets within those networks to identify data security events, including unauthorized attempts to exfiltrate Personal Information from those networks; and

3. Data access controls for all databases storing Personal Information, including by, at a minimum, (a) restricting inbound connections to approved IP addresses, (b) requiring authentication to access them, and (c) limiting employee access to what is needed to perform that employee's job function.

F. Assess, at least once every 12 months and promptly (not to exceed 30 days) following a Covered Incident, the sufficiency of any safeguards in place to address the risks to the security of Covered Devices and the security, confidentiality, or integrity of Personal Information, and modify the Security Program based on the results;

G. Test and monitor the effectiveness of the safeguards at least once every 12 months and promptly (not to exceed 30 days) following a Covered Incident, and modify the Security Program based on the results. Such testing and monitoring must include: (1) vulnerability testing of Respondent's network once every four months and promptly (not to exceed 30 days) after a Covered Incident; and (2) penetration testing of Respondent's network at least once every 12 months and promptly (not to exceed 30 days) after a Covered Incident;

H. Select and retain service providers capable of safeguarding Covered Devices and Personal Information they access through or receive from Respondent, and contractually require service providers to implement and maintain safeguards for Covered Devices and Personal Information; and

I. Evaluate and adjust the Security Program in light of any changes to Respondent's operations or business arrangements, a Covered Incident, new or more efficient technological or operational methods to control for the risks identified in Part II.D., or any other circumstances that Respondent knows or has reason to know may have an impact on the effectiveness of the Security Program. At a minimum, Respondent must evaluate the Security Program at least once every 12 months and modify the Security Program based on the results.

III. Device and Information Security Assessments by a Third Party

IT IS FURTHER ORDERED that, in connection with compliance with Provision II of this Order titled Mandated Device Security and Information Security Program, Respondent must obtain initial and biennial assessments ("Assessments"):

A. The Assessments must be obtained from a qualified, objective, independent third-party professional ("Assessor"), who: (1) uses procedures and standards generally accepted in the profession; (2) conducts an independent review of the Security Program; and (3) retains all documents relevant to each Assessment for five years after completion of such Assessment and provides such documents to the Commission within ten days of receipt of a written request from a representative of the Commission. No documents may be withheld on the basis of a claim of

confidentiality, proprietary or trade secrets, work product protection, attorney client privilege, statutory exemption, or any similar claim.

B. For each Assessment, Respondent must provide the Associate Director for Enforcement for the Bureau of Consumer Protection at the Federal Trade Commission with the name and affiliation of the person selected to conduct the Assessment, which the Associate Director shall have the authority to approve in his sole discretion.

C. The reporting period for the Assessments must cover: (1) the first 180 days after the issuance date of the Order for the initial Assessment; and (2) each two year period thereafter for 20 years after issuance of the Order for the biennial Assessments.

D. Each Assessment must, for the entire assessment period,: (1) determine whether Respondent has implemented and maintained the Security Program required by Provision II of this Order, titled Mandated Device Security and Information Security Program; (2) assess the effectiveness of Respondent's implementation and maintenance of sub-Provisions II.A-I; (3) identify any gaps or weaknesses in, or instances of material noncompliance with, the Security Program; and (4) identify specific evidence (including, but not limited to, documents reviewed, sampling and testing performed, and interviews conducted) examined to make such determinations, assessments, and identifications, and explain why the evidence that the Assessor examined is sufficient to justify the Assessor's findings. No finding of any Assessment shall rely solely on assertions or attestations by Respondent's management. The Assessment must be signed by the Assessor and must state that the Assessor conducted an independent review of the Information Security Program, and did not rely solely on assertions or attestations by Respondent's management. To the extent that Responded revises, updates, or adds one or more safeguards required under Part II of this Order in the middle of an Assessment period, the Assessment shall assess the effectiveness of the revised, updated, or added safeguard(s) for the time period in which it was in effect, and provide a separate statement detailing the basis for each revised, updated, or additional safeguard.

E. Each Assessment must be completed within 60 days after the end of the reporting period to which the Assessment applies. Unless otherwise directed by a Commission representative in writing, Respondent must submit the initial Assessment to the Commission within ten days after the Assessment has been completed via email to DEbrief@ftc.gov or 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 re Tapplock, FTC File No. 192 3011, Docket No. C-4718." All subsequent biennial Assessments must be

retained by Respondent until the order is terminated and provided to the Associate Director for Enforcement within ten days of request.

IV. Cooperation with Third Party Information Security Assessor

IT IS FURTHER ORDERED that Respondent, whether acting directly or indirectly, in connection with any Assessment required by Provision III of this Order titled Device and Information Security Assessments by a Third Party, must:

A. Provide or otherwise make available to the Assessor all information and material in its possession, custody, or control that is relevant to the Assessment for which there is no reasonable claim of privilege; and

B. Not withhold any material facts to the Assessor, and not misrepresent in any manner, expressly or by implication, any fact material to the Assessor's: (1) determination of whether Respondent has implemented and maintained the Security Program required by Provision II of this Order, titled Mandated Device Security and Information Security Program; (2) assessment of the effectiveness of the implementation and maintenance of sub-Provisions II.A-I; or (3) identification of any gaps or weaknesses in the Security Program.

V. Annual Certification

IT IS FURTHER ORDERED that Respondent must:

A. One year after the issuance date of this Order, and each year thereafter, provide the Commission with a certification from a senior corporate manager, or, if no such senior corporate manager exists, a senior officer of Respondent responsible for Respondent's Security Program that: (1) Respondent has established, implemented, and maintained the requirements of this Order; (2) Respondent is not aware of any material noncompliance that has not been (a) corrected or (b) disclosed to the Commission; and (3) includes a brief description of a Covered Incident. The certification must be based on the personal knowledge of the senior corporate manager, senior officer, or subject matter experts upon whom the senior corporate manager or senior officer reasonably relies in making the certification.

B. Unless otherwise directed by a Commission representative in writing, submit all annual certifications to the Commission pursuant to this Order via email to DEbrief@ftc.gov or 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, "Tapplock, Inc., FTC File No. 192 3011, Docket No. C-4718."

VI. Acknowledgments of the Order

IT IS FURTHER ORDERED that Respondent obtain acknowledgments of receipt of this Order:

A. Respondent, within ten days after the effective date of this Order, must submit to the Commission an acknowledgment of receipt of this Order sworn under penalty of perjury.

B. For 20 years after the issuance date of this Order, Respondent must deliver a copy of this Order to: (1) all principals, officers, directors, and LLC managers and members; (2) all employees, agents, and representatives with responsibilities related to the subject matter of the Order; and (3) any business entity resulting from any change in structure as set forth in Provision VII of this Order titled Compliance Reports and Notices. Delivery must occur within ten days after the effective date of this Order for current personnel. For all others, delivery must occur before they assume their responsibilities.

C. From each individual or entity to which Respondent delivered a copy of this Order, Respondent must obtain, within 30 days, a signed and dated acknowledgment of receipt of this Order.

VII. Compliance Report and Notices

IT IS FURTHER ORDERED that Respondent make timely submissions to the Commission:

A. One year after the issuance date of this Order, Respondent must submit a compliance report, sworn under penalty of perjury, in which Respondent must: (1) identify the primary physical, postal, and email address and telephone number, as designated points of contact, which representatives of the Commission, may use to communicate with Respondent; (2) identify all of Respondent's businesses by all of their names, telephone numbers, and physical, postal, email, and Internet addresses; (3) describe the activities of each business, including the goods and services offered, the means of advertising, marketing, and sales; (4) describe in detail whether and how Respondent is in compliance with each Provision of this Order, including a discussion of all of the changes Respondent made to comply with the Order; and (5) provide a copy of each Acknowledgment of the Order obtained pursuant to this Order, unless previously submitted to the Commission.

B. Respondent must submit a compliance notice, sworn under penalty of perjury, within 14 days of any change in the following: (1) any designated point of contact; or (2) the structure of Respondent or any entity that Respondent has any ownership interest in or controls directly or indirectly that may affect compliance obligations arising under this Order, including: creation, merger, sale, or dissolution of the

entity or any subsidiary, parent, or affiliate that engages in any acts or practices subject to this Order.

C. Respondent must submit notice of the filing of any bankruptcy petition, insolvency proceeding, or similar proceeding by or against Respondent within 14 days of its filing.

D. Any submission to the Commission required by this Order to be sworn under penalty of perjury must be true and accurate and comply with 28 U.S.C. § 1746, such as by concluding: "I declare under penalty of perjury under the laws of the United States of America that the foregoing is true and correct. Executed on: _____" and supplying the date, signatory's full name, title (if applicable), and signature.

E. Unless otherwise directed by a Commission representative in writing, all submissions to the Commission pursuant to this Order must 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, "Tapplock, Inc., FTC File No. 192 3011, Docket No. C-4718."

VIII. Recordkeeping

IT IS FURTHER ORDERED that Respondent must create certain records for 20 years after the issuance date of the Order, and retain each such record for five years. Specifically, Respondent must create and retain the following records:

A. Accounting records showing the revenues from all goods or services sold, the costs incurred in generating those revenues, and resulting net profit or loss;

B. Personnel records showing, for each person providing services, whether as an employee or otherwise, that person's: name; addresses; telephone numbers; job title or position; dates of service; and (if applicable) the reason for termination;

C. Copies or records of all consumer complaints concerning the subject matter of the Order, whether received directly or indirectly, such as through a third party, and any response;

D. A copy of each unique advertisement or other marketing material making a representation subject to this Order;

E. A copy of each widely disseminated representation by Respondent that describes the extent to which Respondent maintains or protects the privacy, confidentiality, security, or integrity of any Personal Information or the security of any Covered Device, including any representation concerning a change in any website or other

service controlled by Respondent that relates to the privacy, confidentiality, security, or integrity of Personal Information or the security of Covered Devices;

F. For five years after the date of preparation of each Assessment required by this Order, all materials and evidence that the Assessor considered, reviewed, relied upon or examined to prepare the Assessment, whether prepared by or on behalf of Respondent, including all plans, reports, studies, reviews, audits, audit trails, policies, training materials, and assessments, and any other materials concerning Respondent's compliance with related Provisions of this Order, for the compliance period covered by such Assessment;

G. For five years from the date received, copies of all subpoenas and other communications with law enforcement, if such communications relate to Respondent's compliance with this Order;

H. For five years from the date created or received, all records, whether prepared by or on behalf of Respondent, that tend to show any lack of compliance by Respondent with this Order; and

I. All records necessary to demonstrate full compliance with each Provision of this Order, including all submissions to the Commission.

IX. Compliance Monitoring

IT IS FURTHER ORDERED that, for the purpose of monitoring Respondent's compliance with this Order:

A. Within ten days of receipt of a written request from a representative of the Commission, Respondent must: submit additional compliance reports or other requested information, which must be sworn under penalty of perjury, and produce records for inspection and copying.

B. For matters concerning this Order, representatives of the Commission are authorized to communicate directly with Respondent. Respondent must permit representatives of the Commission to interview anyone affiliated with Respondent who has agreed to such an interview. The interviewee may have counsel present.

C. The Commission may use all other lawful means, including posing through its representatives as consumers, suppliers, or other individuals or entities, to Respondent or any individual or entity affiliated with Respondent, without the necessity of identification or prior notice. Nothing in this Order limits the Commission's lawful use of compulsory process, pursuant to Sections 9 and 20 of the FTC Act, 15 U.S.C. §§ 49, 57b-1.

X. Order Effective Dates

IT IS FURTHER ORDERED that this Order is final and effective upon the date of its publication on the Commission's website (ftc.gov) as a final order. This Order will terminate May 18, 2040, or 20 years from the most recent date that the United States or the Commission files a complaint (with or without an accompanying settlement) in federal court alleging any violation of this Order, whichever comes later; *provided, however*, that the filing of such a complaint will not affect the duration of:

A. Any Provision in this Order that terminates in less than 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 Provision.

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 Provision as though the complaint had never been filed, except that the Order will not terminate between the date such complaint is filed and the later of the deadline for appealing such dismissal or ruling and the date such dismissal or ruling is upheld on appeal.

By the Commission.

ANALYSIS OF CONSENT ORDER TO AID PUBLIC COMMENT

The Federal Trade Commission ("Commission") has accepted, subject to final approval, an agreement containing a consent order from Tapplock, Inc. ("Tapplock" or "Respondent").

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

Tapplock is a Canadian Internet of Things ("IoT") company that, among other things, sells Internet-connected, fingerprint-enabled padlocks ("smart locks") to U.S. consumers. The company advertises to U.S. consumers through its website, www.tapplock.com, and has previously advertised through the online crowd-funding website Indiegogo.com. Respondent's smart locks

interact with a companion mobile application ("app") that U.S. users are able to download onto their mobile devices. This app logs usernames, e-mail addresses, profile photos, location history, and the precise geolocation of a user's smart lock, and it allows users to lock and unlock their smart locks when they are within Bluetooth range.

In June 2018, security researchers identified critical physical and electronic vulnerabilities with Respondent's smart locks. With respect to physical security, some of Respondent's smart locks could be opened within a matter of seconds, simply by unscrewing the back panel. With respect to electronic security, one vulnerability in Respondent's API could have been exploited to bypass the account authentication process in order to gain full access to the accounts of all Tapplock users and their personal information, including usernames, e-mail addresses, profile photos, location history, and precise geolocation of smart locks. Because Respondent failed to encrypt the Bluetooth communication between the lock and the app, a second vulnerability could have allowed a bad actor to lock and unlock any nearby Tapplock smart lock. Finally, a third vulnerability prevented users from effectively revoking access to their smart lock once they had provided other users access to that lock.

The Commission's proposed two-count complaint alleges that Respondent violated Section 5(a) of the Federal Trade Commission Act. The first count alleges that Respondent misrepresented to consumers that their smart locks were secure. Contrary to this claim, as described above, Respondent's locks were not secure.

The second count alleges that Respondent deceived consumers about its data security practices by falsely representing that it took reasonable precautions and followed industry best practices to protect the personal information provided by consumers. Contrary to this claim, the proposed complaint alleges that Respondent failed to take reasonable precautions and follow industry best practices. For example, the proposed complaint alleges that Respondent: (1) failed to identify reasonably foreseeable risks to the security of its smart locks or the security of customers' personal accounts, such as through vulnerability or penetration testing, and assess the sufficiency of any safeguards in place to control those risks; (2) failed to employ sufficient measures to detect and prevent users from bypassing the authentication procedures in Respondent's API to gain access to other users' accounts; (3) failed to adopt and implement written data security standards, policies, procedures, or practices; and (4) failed to implement adequate privacy and security guidance or training for its employees responsible for designing, testing, overseeing, and approving software specifications and requirements.

The proposed order contains provisions designed to prevent Respondent from engaging in the same or similar acts or practices in the future. Part I of the proposed order prohibits Respondent from misrepresenting the extent to which it maintains and protects: (1) the security of a Covered Device; or (2) the privacy, security, confidentiality, or integrity of Personal Information.

Part II of the proposed order requires Respondent to establish and implement, and thereafter maintain, a comprehensive security program ("Security Program") that that protects: (1) the security of Covered Devices; and (2) the security, confidentiality, and integrity of Personal Information.

Analysis to Aid Public Comment

Part III of the proposed order requires Respondent to obtain initial and biennial data security assessments for twenty years.

Part IV of the proposed order requires Respondent to disclose all material facts to the assessor and prohibits Respondent from misrepresenting any fact material to the assessments required by Part II.

Part V of the proposed order requires Respondent to submit an annual certification from a senior corporate manager (or senior officer responsible for its information security program) that Respondent has implemented the requirements of the Order and is not aware of any material noncompliance that has not been corrected or disclosed to the Commission.

Parts VI through IX of the proposed order are reporting and compliance provisions, which include recordkeeping requirements and provisions requiring Respondent to provide information or documents necessary for the Commission to monitor compliance. Part X states that the proposed order will remain in effect for 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

SHOP TUTORS, INC.
D/B/A
LENDEDU,
NATHANIEL MATHERSON,
MATTHEW LENHARD,
AND
ALEXANDER COLEMAN

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

Docket No. C-4719; File No. 182 3180
Complaint, May 21, 2020 – Decision, May 21, 2020

This consent order addresses Shop Tutors, Inc.'s ("LendEDU") violation of Section 5 of the Federal Trade Commission Act by ranking companies in financial products based on compensation from the companies while touting consumer reviews written by LendEDU employees or their associates. The complaint alleges that Respondent's rate tables, star ratings, and rankings gave higher numerical rankings and higher positions based on compensation to LendEDU. Respondent publicly represented to consumers that their website content was not based on compensation, but repeatedly acknowledged to financial services companies doing business with them that hey can pay for placements. In numerous instances, the review of Respondent on third-party review sites were written or made up by LendEDU employees or their family, friends, or other associates. The consent order requires Respondent must not make any misrepresentations regarding the objectivity of any content and the influence of compensation on any content. Respondent must clearly and conspicuously represent the influence of any compensation on the Respondents' products or services. Respondent must also pay the Federal Trade Commission $350,000.

Participants

For the *Commission*: *Brittany Frassetto, Marguerite Moeller,* and *Thomas Widor.*

For the *Respondents*: *Allen Denson* and *Michael Goodman, Hudson Cook, LLP; Jeffrey Smith, DeCotiis, Fitzpatrick, Cole & Giblin, LLP.*

COMPLAINT

The Federal Trade Commission, having reason to believe that Shop Tutors, Inc. ("LendEDU" or the "Company"), Nathaniel Matherson, individually and as an officer of LendEDU, Matthew Lenhard, individually and as an officer of LendEDU, and Alexander Coleman, individually and as an officer of LendEDU (collectively, "Respondents"), have violated provisions of the Federal Trade Commission Act, and it appearing to the Commission that this proceeding is in the public interest, alleges:

1. Respondent Shop Tutors, Inc., also doing business as LendEDU, is a Delaware corporation with its principal office or place of business at 80 River Street, Suite #3C-2, Hoboken, NJ.

2. Respondent Nathaniel Matherson ("Matherson") is the co-founder and Chief Executive Officer of LendEDU. Individually or in concert with others, he controlled or had the authority to control, or participated in, the acts and practices of LendEDU, including the acts and practices alleged in this complaint. His principal office or place of business is the same as that of LendEDU.

3. Respondent Matthew Lenhard ("Lenhard") is the co-founder and Chief Technology Officer of LendEDU. Individually or in concert with others, he controlled or had the authority to control, or participated in, the acts and practices of LendEDU, including the acts and practices alleged in this complaint. His principal office or place of business is the same as that of LendEDU.

4. Respondent Alexander Coleman ("Coleman") is the Vice President of Product of LendEDU. Individually or in concert with others, he controlled or had the authority to control, or participated in, the acts and practices of LendEDU, including the acts and practices alleged in this complaint. His principal office or place of business is the same as that of LendEDU.

5. Respondents have marketed consumer financial products to consumers.

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

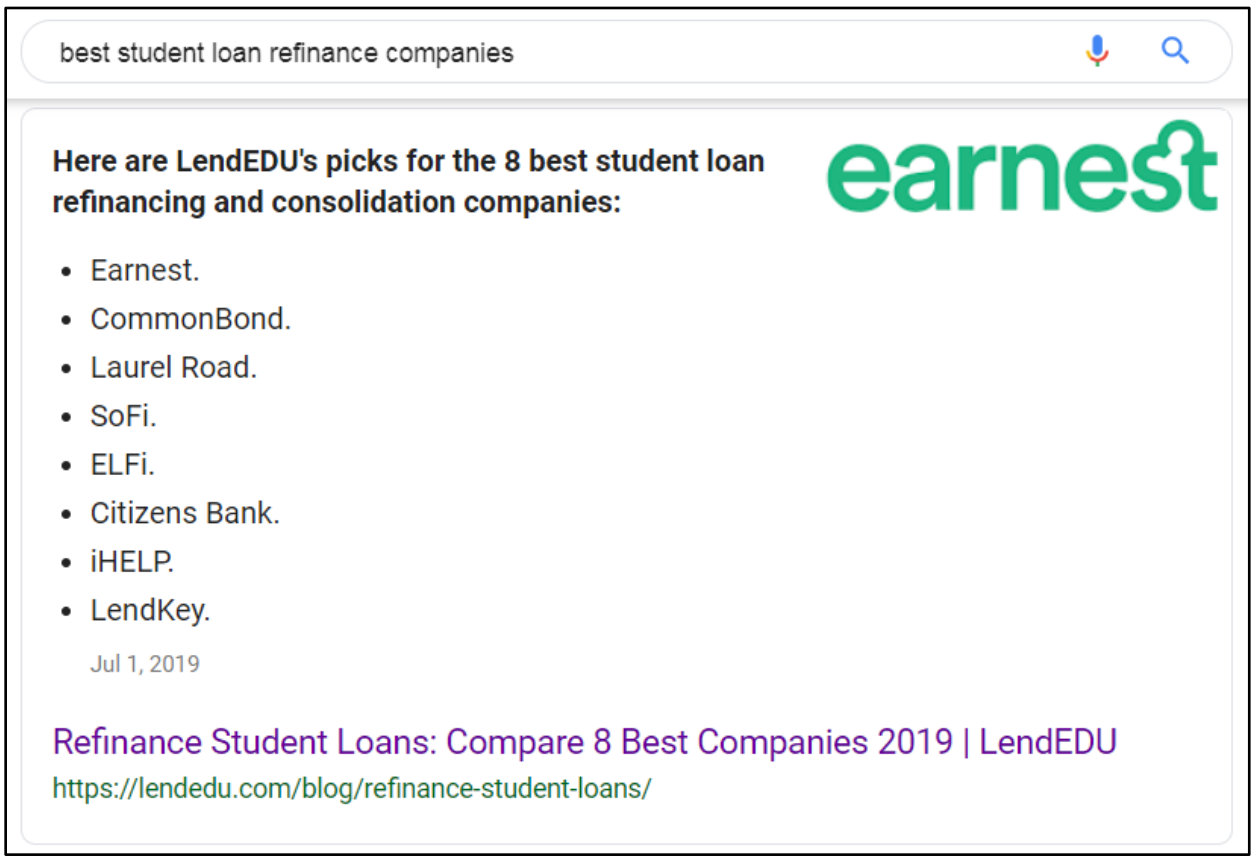
RESPONDENTS' BUSINESS PRACTICES

Overview

7. Since 2014, Respondents have operated the website www.lendedu.com, which they promote as a resource for consumers in search of financial products such as loans and insurance. In numerous instances, Respondents have described the content on the website, including their rate tables, star ratings, and rankings of the companies offering these financial products, as "objective," "honest," "accurate," and "unbiased." In reality, this content is not objective and, instead, is based on compensation from the companies. In addition, Respondents have touted positive consumer reviews about their company and website that, in fact, were written by LendEDU employees or their friends, family members, and associates.

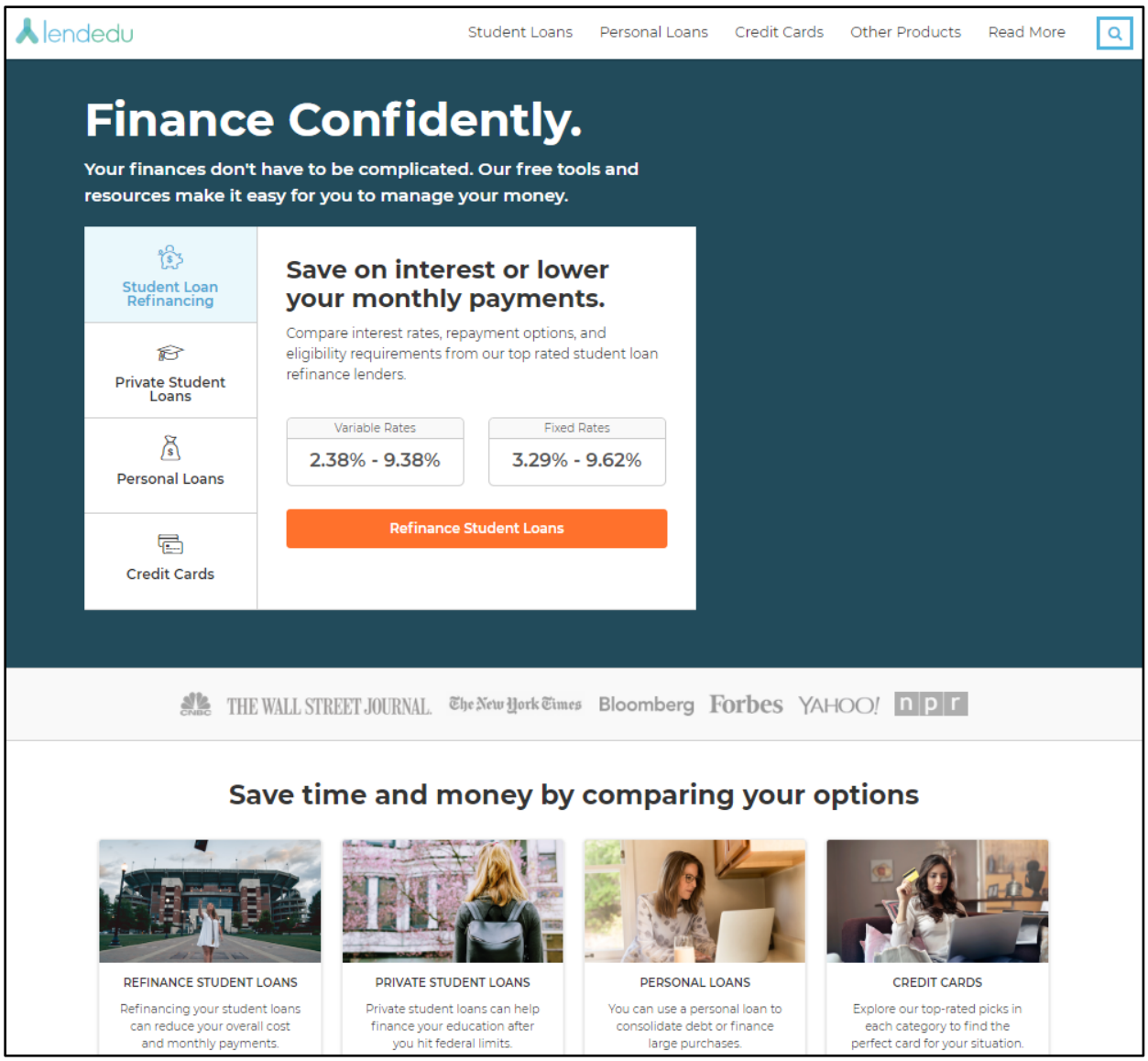
Respondents' LendEDU Website

8. Many consumers have learned of LendEDU while searching or shopping for loans or other financial products. Respondents have promoted LendEDU through social media, content marketing, and search engine advertising, including with Google's AdWords, and search engine optimization strategies. Google search results for "best student loan refinance companies," for example, include an organic, non-paid Google "featured snippet" for "LendEDU's picks for the 8 best student loan refinancing and consolidation companies" with a link to Respondents' website:



LendEDU also appears as the third non-paid search listing below this snippet.

9. When consumers visit LendEDU's home page, they have seen a screen similar to the following:



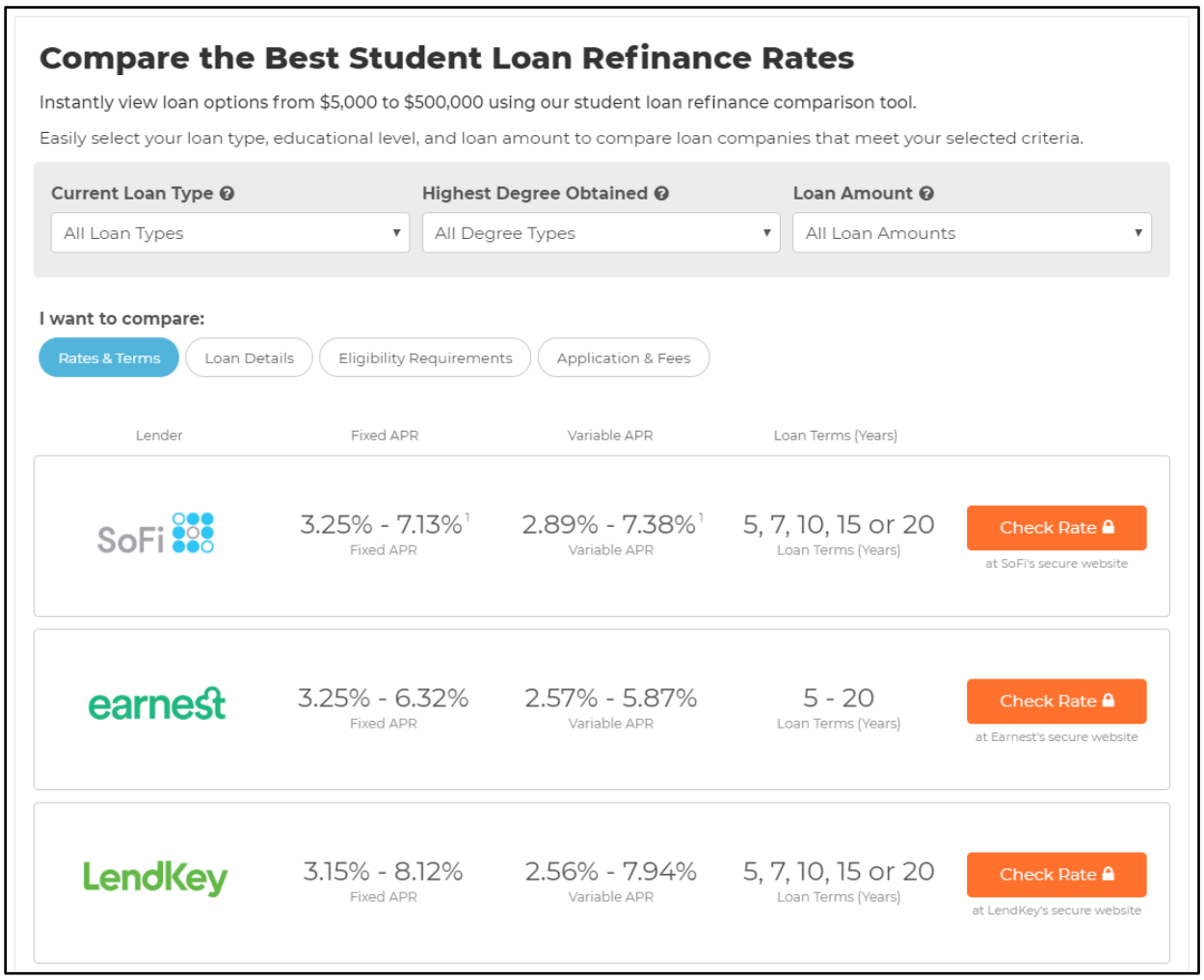
Respondents have encouraged consumers to use their website "confidently" and to "save time and money by comparing your options" in one place. As depicted above, the website allows consumers to choose from various financial products, including student loan refinancing, private student loans, personal loans, and credit cards.

10. As one example, consumers selecting student loan refinancing are taken to Respondents' student loan refinance webpage. On this page, Respondents have provided a rate table, rankings, star ratings, and reviews for what Respondents have represented to be the best or top companies offering the financial product. The top of the page has looked similar to the following:

Complaint

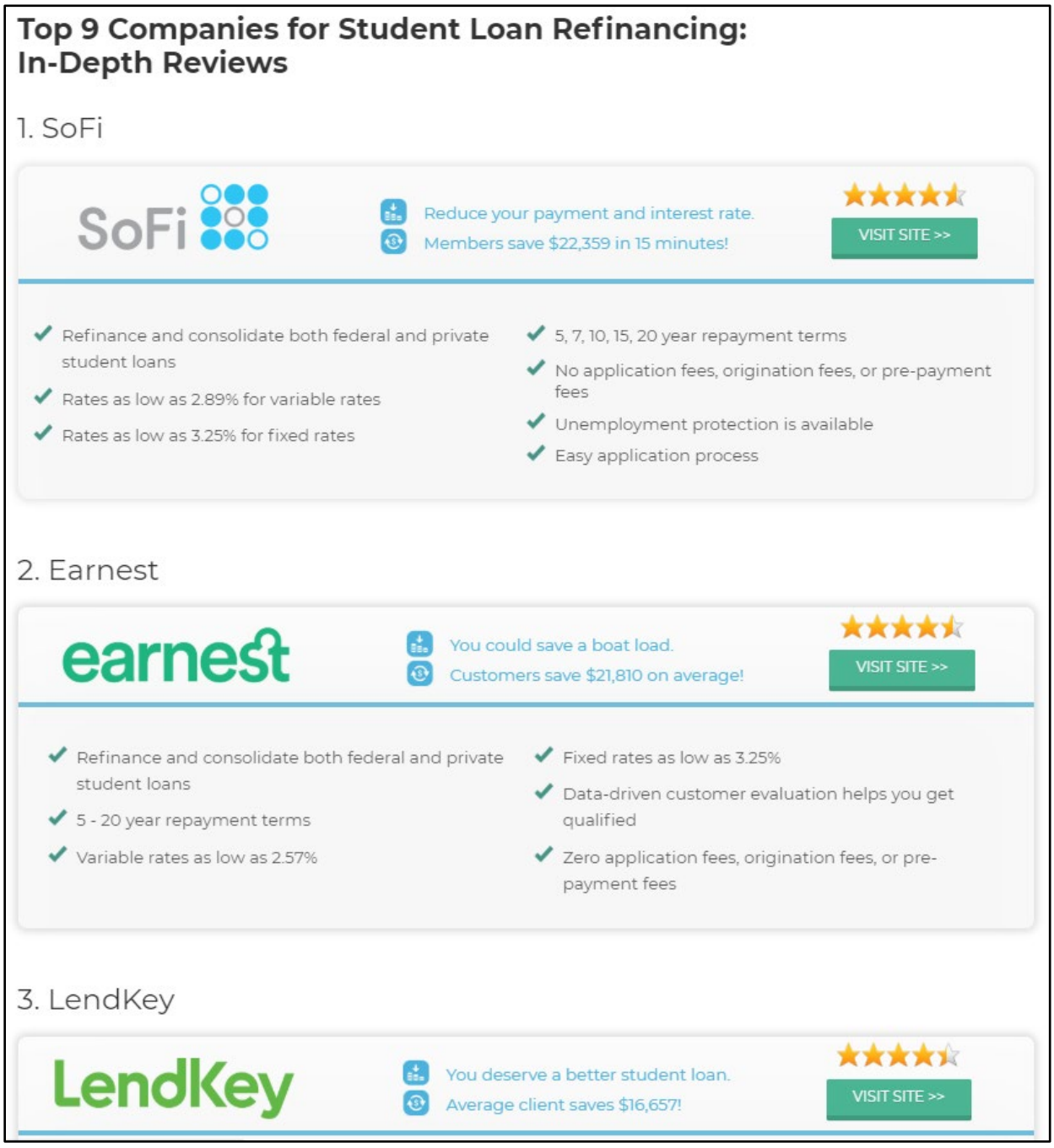

lendedu
Refinance Student Loans
Private Student Loans
Personal Loans
News
Login
Student Loan Consolidation & Refinancing Lenders for 2018
STUDENT LOAN
REFINANCING &
CONSOLIDATION
2018
Lower Interest Rate
Lower Monthly Payment
Save Thousands Today
Updated: 3/28/2018
Looking to refinance student loans? Want to consolidate student loans?
Today, 7 out of 10 graduates are graduating with some form of student loan debt. With an average balance of $28,000, student debt is a big part of the average college graduate's life.
At LendEDU, we help borrowers compare the top student loan companies in one place. We put together this guide to help you get information on all of the top student loan refinance lenders without having to jump around multiple websites. After you are done, you will know how to refinance and consolidate student loans.
Below we've ranked the leading student loan refinancing and consolidation companies. It is free to apply and the process usually takes about 15 minutes. How much could you save? Find out today. You might be able to save $20,000 or more!
Our Top Picks
SoFi
Learn More
earnest
Learn More
LendKey
Learn More
EDUCATION LOAN FINANCE
Learn More
Citizens Bank
Learn More
CommonBond
Learn More
College AVE STUDENT LOANS
Learn More
laurel road
Ambition banks here.
Learn More

11. Scrolling down the page, Respondents show a rate table that compares these best companies, including their interest rates and loan terms:



A consumer clicking the "Check Rate" button is taken directly to the website for that company.

12. Below the rate table, Respondents then have ranked the best or top companies:



A consumer clicking the "Visit Site" button is taken directly to the website for that company.

13. Respondents further have assigned each company a star rating, ranging from a low of one star to a high of five stars. An example of Respondents' star rating appears below.

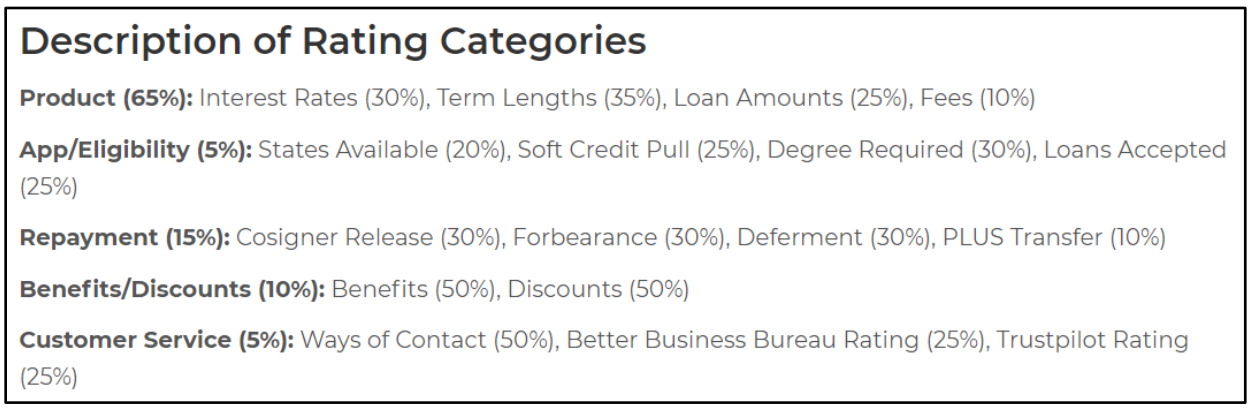
14. The web page layout for other financial products is similar and has included a rate table, rankings, star ratings, and reviews.

Respondents Represent that LendEDU's Content Is Not Influenced by Compensation

15. In numerous instances, Respondents have represented that the resources on their website, including the rate tables, star ratings, and rankings, are "objective," "honest," "accurate," "unbiased," and not based on compensation. Respondents, for example, have represented that their "ratings are completely objective and not influenced by compensation in anyway [sic]." Respondents also have claimed that their "research, news, ratings, and assessments are scrutinized using strict editorial integrity." Respondents have further represented that their "editorial staff and independent contractors do not receive direction from advertisers on our website" and "are not rewarded in anyway [sic] for publishing favorable or unfavorable reviews." A webpage about "editorial integrity" signed by Respondent Matherson represents that the information on Respondents' website is "honest, unbiased, and fact based." Similarly, a webpage about "LendEDU Partners" written by Respondent Coleman represents that "[w]e do not publish favorable (or unfavorable) reviews or assessments at the direction of any company."

16. Respondents have described their resources as "designed to help consumers better understand and make choices about which products fit their needs." Respondents have further represented that they "do not publish favorable or unfavorable reviews or ratings at the direction of any companies," that their "editorial staff and independent contractors are tasked with providing accurate and fact-based analyses," and that their "editorial staff and independent contractors are not rewarded in anyway [sic] for publishing favorable or unfavorable reviews." Respondents also have touted their extensive experience reviewing and researching financial services companies since 2014.

17. The LendEDU website also has a page devoted to explaining its methodology for analyzing the financial products promoted on the website. Respondents have claimed that the Company's staff rigorously uses objective criteria to rank and review lenders, including "breadth of products offered, interest rates by term and product, available term length options, applicable fees, soft-credit check process, borrower benefits and unique incentives, borrower protections, ease of use, quality of customer support staff, and time to funding." More recently in 2019, Respondents have represented that they weigh different criteria based on their importance for that product or service:



18. In addition to explaining the criteria purportedly used by Respondents to analyze each company, Respondents have sought to reinforce the objective and non-paid nature of their ratings and reviews by representing that "[e]ach piece of criteria is cross checked and audited by multiple members of the LendEDU team."

Respondents Rank Financial Services Companies Based on Compensation

19. Contrary to their claims, Respondents have provided financial services companies with higher numerical rankings or star ratings and higher positions on rate tables based on compensation. Respondents also have added or removed companies from their content based on compensation.

20. In numerous instances, Respondents have required financial services companies to increase their payments to LendEDU to maintain or improve upon their current rate table positions and rankings. Respondents Matherson, Lenhard, and Coleman either directly requested additional compensation from financial services companies in exchange for better placements on Respondents' website, or had knowledge of such requests. For example, in an email, Respondent Matherson asked one student loan refinance company to pay $9.50 per click to retake the number one ranking after falling to number three. Respondent Matherson copied Coleman on the email chain requesting more compensation and forwarded it to Respondent Lenhard. The company ultimately agreed to pay $8.50 per click for the number one ranking and rate table placement.

21. Respondents later asked the same student loan refinance company to increase its payments to $16 per click "to maintain the #1 position on our site." In an email to the company, Respondent Coleman wrote: "We want to keep [your company] positioned as the #1 lender on our site, but we need to justify the move from a business perspective." The company agreed to pay $15 per click, and Respondent kept the company ranked number one and positioned first on the rate table.

22. Respondents offered another student loan refinance company the number three position for payment of $16 per click. The company agreed to the paid placement, and Respondents moved the company from the number four ranking to the number three ranking and from the number four position on the rate table to the number three position.

23. The contract between the company and LendEDU expressly provided that LendEDU would rank the company "[n]o lower than position 3" on LendEDU's refinance student loans webpage.

24. Another student loan refinance company paid Respondents for the number three ranking and rate table position prior to the company above and, later, increased the amount of payment per click for the number two ranking and position.

25. Respondents' paid placement policies and practices have resulted in some previously highly ranked companies dropping spots for refusing to pay for their position. For example, Respondents ranked one student loan refinance company number two in the rankings and listed it second in the rate table for several months. When the company refused to pay more to be placed in the second spot, Respondents dropped the company's ranking to number five or lower and listed it fifth or lower in the rate table.

26. Respondents have repeatedly acknowledged to financial services companies doing business—or seeking to do business—with them that they can pay for placements, even though Respondents have publicly represented to consumers that their website content is not based on compensation.

27. Respondents' presentation material to a prospective bank customer included a slide that discussed "Partner Positioning & Ordering," explaining that "compensation may influence the products we review and write about, the order in which partners appear in our articles, whether products appear on our site, and where they're placed."

28. In an email to a private student loan company, Respondent Coleman admitted that Respondents rank companies based on a number of factors, including "compensation terms," and that Respondents also "allow[] partners to pay for premium listings." The company subsequently entered a contract agreeing to pay LendEDU in return for "the highest level of visibility equal to the Number 1 position" on Respondents' private student loans webpage from March 1, 2018 to January 31, 2019. Respondents had not previously ranked the company on their website. Following the paid placement agreement, Respondents immediately ranked the company number one starting March 1, 2018. Respondents also positioned the company at the top of the rate table. During this time, even though other companies had higher star ratings, Respondents placed them lower in the rankings and rate tables.

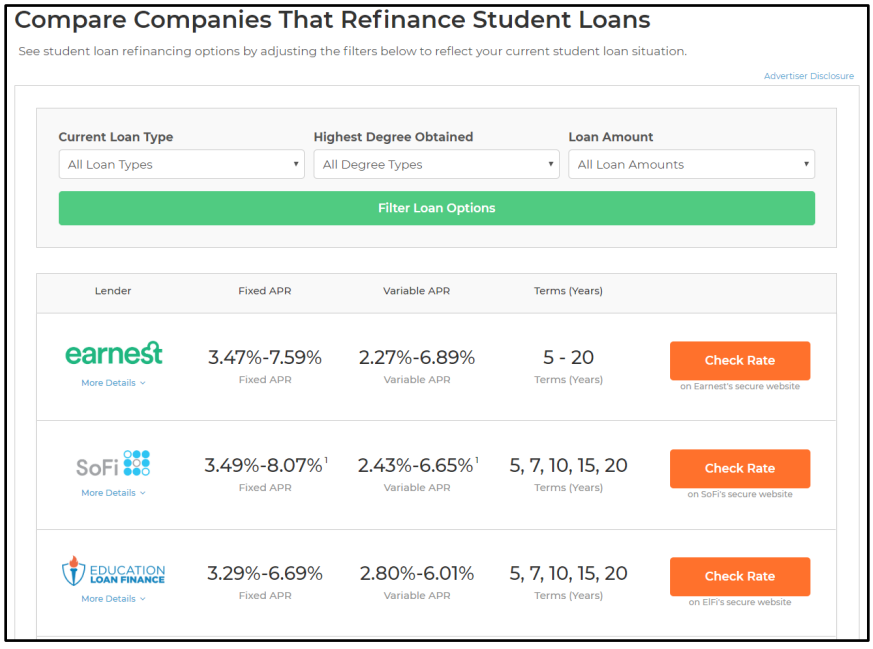
29. LendEDU also has admitted in interrogatory responses to the FTC that, at least into early 2018, "star ratings were typically assigned based on the order in which they appeared on the page" and that the "Financial Services Companies on these pages were ordered mainly based on the compensation we received from them. . . ."

30. In correspondence with financial services companies, Respondents have represented that the rankings and rate table placements influence a consumer's choice in visiting particular companies' websites to apply for a loan product or service. In an email to one company, Respondent Matherson wrote that a company paying for the number one position on the student loan refinance webpage would receive approximately 32 percent of clicks, while the number two company would receive approximately 21 percent of clicks, and the number three company would receive approximately 15 percent of clicks. Respondent Coleman wrote to a different student loan refinance company in the number four position that a paid move to the number three spot would double its click-through volume, while a paid move to the number two spot would triple the volume.

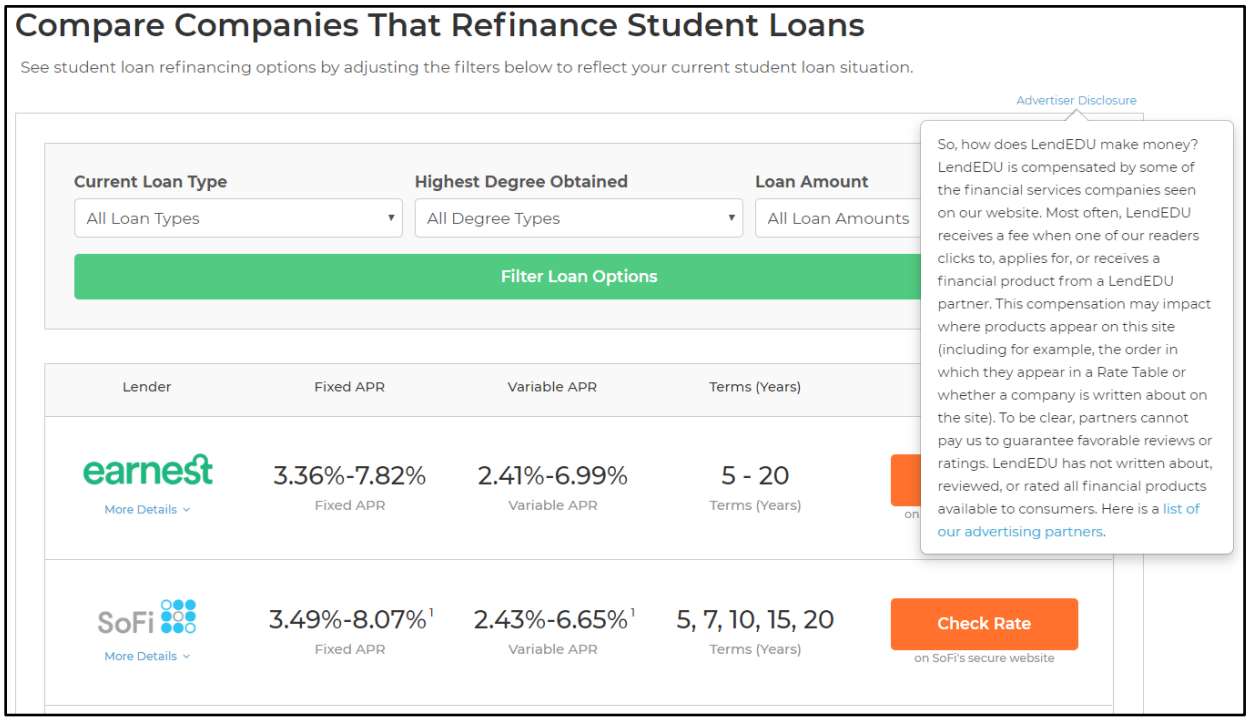
31. Similarly, when offering a "top 4 position" to a personal loan company that held the number nine position, Respondent Coleman wrote that with a top four position, the company "could expect a ~50% increase in traffic," while "[t]he #1 spot would likely result in a ~100% increase in traffic."

32. Respondents have included on their website virtually no information about their relationships with the companies that appear on the site. In mid-2016, Respondents added a fine-print disclaimer that the "site may be compensated through third party advertisers," in the website's footer. After becoming aware of the FTC's investigation into their conduct, around March 2019, Respondents also have listed the companies that "may provide compensation to LendEDU" on a page that consumers are unlikely to visit.

33. Similarly, since approximately June 2019, Respondents have presented their rate tables in the following manner:



34. If a consumer were to notice the small font reading "Advertiser Disclosure" in the upper-right corner and click on the phrase, a popup window would appear containing a small-print disclosure as follows:



The popup window has stated, in part, that "LendEDU is compensated by some of the financial services companies seen on our website" and that "[t]his compensation may impact where products appear on this site (including for example, the order in which they appear in a rate table or whether a company is written about on the site)." The popup window further has stated that "partners cannot pay us to guarantee favorable reviews or ratings."

Respondents Tout Fake Positive Reviews

35. Reviews about LendEDU's website and customer service appear on third-party review platforms, including trustpilot.com ("Trustpilot"). Trustpilot allows users to select a star rating when reviewing a company. The ratings range from five stars ("Excellent") to one star ("Bad"). LendEDU currently has 126 reviews on Trustpilot, consisting of 123 five-star reviews, one four-star review, one two-star review, and one one-star review.

36. Of those 126 reviews, 111, or 90%, were written or made up by LendEDU employees or their family, friends, or other associates. All of those reviews provided five-star ratings for the Company. Examples include:

- Kenny: "LendEDU showed me the light at the end of the tunnel. I was drowning in student loan debt then they showed up with a lifeboat and a warm blanket. The website was easy to navigate and with the help of their

customer service team, I saved a lot of money refinancing. I can't thank them enough and would recommend to anyone!"

- Scott: "Extremely user friendly and easy to use. . . . It was a pleasant surprise to be able to find personal finance education. As a student, high schools don't really provide any basic financial course and credit cards are so easy to obtain. It was refreshing to be able to research and understand more through LendEDU."

- Trace: "I wasn't sure where to go, and stumbled onto an[] article LendEDU published. It was full of good tips that helped. I ended up going to their site and there was quite a bit of helpful stuff there too. They seem to be on top of it!"

The review written by "Kenny" actually comes from a LendEDU employee using a fake name. Similarly, "Scott," the purported high school student researching personal finance, is actually the administrator of LendEDU's 401(k) plan. "Trace" is actually a friend of a LendEDU employee.

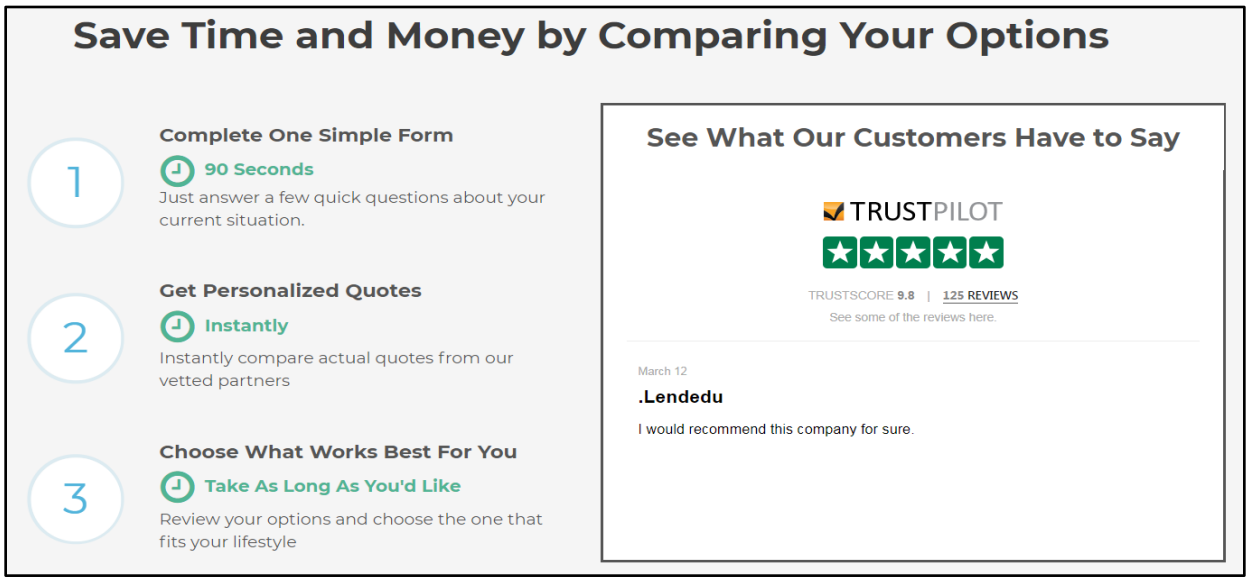
37. In addition, the vast majority of the reviewers do not appear to have used LendEDU. LendEDU offers a loan comparison tool, which requires consumers to enter an email address before they can see a list of potential lenders. Only eleven of the email addresses provided by LendEDU's 126 reviewers on Trustpilot (9 percent) match email addresses that consumers provided to LendEDU. Nevertheless, several of the remaining 115 reviews reference LendEDU's loan comparison tool. Examples include:

- LendEDU's outside counsel: "The application process was very easy and I was given a number of options. While I didn't end up refinancing my student loans, it was worth the look."

- Friend of a LendEDU employee: "Genius! Spent 2 minutes filling out a form and saved thousands of dollars. Wish I had known about LendEDU earlier!"

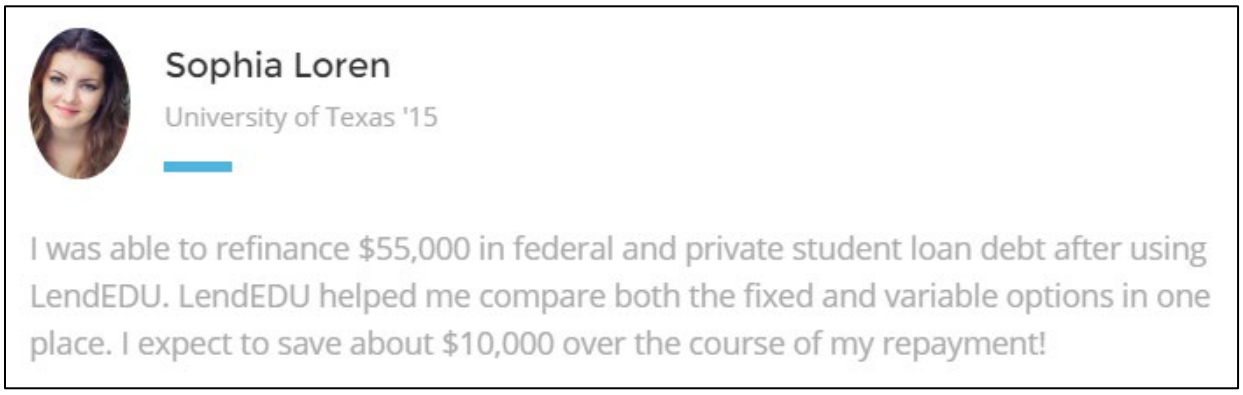
In numerous instances, the reviews were fabricated and did not represent actual consumer experiences with LendEDU.

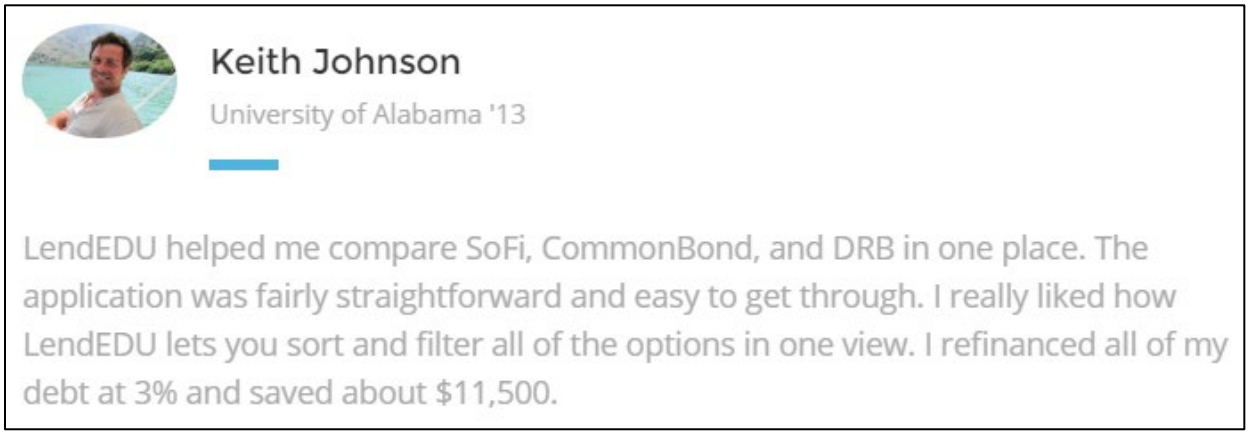
38. Respondents also have reposted and touted the Trustpilot reviews on LendEDU's website, as well as fake reviews written by LendEDU employees who purport to be, but are not, actual users. The LendEDU homepage has, at times, prominently featured reviews from Trustpilot:



39. A LendEDU employee wrote the review in Paragraph 38 under a fake name, stating "I would recommend this company for sure."

40. In other instances, the LendEDU homepage has included "testimonials" from consumers claiming they saved money by using LendEDU's services. These testimonials have included consumer names, colleges, and years of graduation:





None of these consumers exists. Respondents fabricated these "testimonials."

Count I

41. In numerous instances in connection with the advertising, marketing, promotion, offering for sale, or sale of consumer financial products, Respondents represent, directly or indirectly, expressly or by implication, that Respondents' website content promoting financial products, including their rate tables, rankings, and star ratings of companies offering those products, is not influenced by compensation.

42. In truth and in fact, in numerous instances in which Respondents have made the representations set forth in Paragraph 41, Respondents' website content promoting financial products, including their rate tables, rankings, and star ratings of companies offering those products, is influenced by compensation from those companies.

43. Therefore, Respondents' representations as set forth in Paragraph 41 are false and misleading and constitute deceptive acts or practices in violation of Section 5(a) of the FTC Act, 15 U.S.C. § 45(a).

Count II

44. In numerous instances in connection with the advertising, marketing, promotion, offering for sale, or sale of consumer financial products, Respondents represent, directly or indirectly, expressly or by implication, that their website content, including rate tables, rankings, and star ratings, is a source of information about financial products.

45. In numerous instances in which Respondents make the representations set forth in Paragraph 44, Respondents fail to disclose or disclose adequately to consumers that financial services companies paid Respondents for website content, including rate tables, rankings, and star ratings. This additional information would be material to consumers in deciding whether to transact with companies ranked, rated, or reviewed by Respondents.

46. In light of the representations described in Paragraph 44, Respondents' failure to disclose or disclose adequately the material information as set forth in Paragraph 44 constitutes a deceptive act or practice in violation of Section 5(a) of the FTC Act, 15 U.S.C. § 45(a).

Count III

47. In numerous instances in connection with the advertising, marketing, promotion, offering for sale, or sale of consumer financial products, through the means described in Paragraphs 35-40, Respondents have represented, directly or indirectly, expressly or by implication, that certain reviews of LendEDU reflect the actual experiences or opinions of impartial consumers.

48. In truth and in fact, these reviews of LendEDU were not truthful reviews by actual LendEDU users, but instead were fabricated by persons who were friends, employees, or other associates of LendEDU.

49. Therefore, the making of the representations as set forth in Paragraph 47 constitutes a deceptive act or practice in violation of Section 5(a) of the FTC Act, 15 U.S.C. § 45(a).

Violations of Sections 5

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

THEREFORE, the Federal Trade Commission this twenty-first day of May 2020, has issued this complaint against Respondents.

By the Commission, Commissioner Slaughter not participating.

DECISION

The Federal Trade Commission ("Commission") initiated an investigation of certain acts and practices of the Respondents named in the caption. The Commission's Bureau of Consumer Protection ("BCP") prepared and furnished to Respondents a draft Complaint. BCP proposed to present the draft Complaint to the Commission for its consideration. If issued by the Commission, the draft Complaint would charge the Respondents with violations of the Federal Trade Commission Act.

Respondents and BCP thereafter executed an Agreement Containing Consent Order ("Consent Agreement"). The Consent Agreement includes: 1) statements by Respondents that they neither admit nor deny any of the allegations in the Complaint, except as specifically stated in this Decision and Order, and that only for purposes of this action, they admit the facts necessary to establish jurisdiction; and 2) waivers and other provisions as required by the Commission's Rules.

The Commission considered the matter and determined that it had reason to believe that Respondents have violated the Federal Trade Commission Act, and that a Complaint should issue stating its charges in that respect. The Commission accepted the executed Consent Agreement and placed it on the public record for a period of 30 days for the receipt and consideration of public comments. The Commission duly considered any comments received from interested persons pursuant to Section 2.34 of its Rules, 16 C.F.R. § 2.34. Now, in further conformity with the procedure prescribed in Rule 2.34, the Commission issues its Complaint, makes the following Findings, and issues the following Order:

Findings

1. The Respondents are:

    a. Respondent Shop Tutors, Inc., also doing business as LendEDU ("LendEDU"), a Delaware corporation with its principal office or place of business at 80 River Street, Suite #3C-2, Hoboken, NJ.

    b. Respondent Nathaniel Matherson, co-founder and Chief Executive Officer of LendEDU. Individually or in concert with others, he formulates, directs, or controls the policies, acts, or practices of LendEDU. His principal office or place of business is the same as that of LendEDU.

    c. Respondent Matthew Lenhard, co-founder and Chief Technology Officer of LendEDU. Individually or in concert with others, he formulates, directs, or controls the policies, acts, or practices of LendEDU. His principal office or place of business is the same as that of LendEDU.

    d. Respondent Alexander Coleman, Vice President of Product of LendEDU. Individually or in concert with others, he formulates, directs, or controls the

policies, acts, or practices of LendEDU. His principal office or place of business is the same as that of LendEDU.

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

ORDER

Definitions

For purposes of this Order, the following definitions apply:

A. "Clearly and conspicuously" means that a required disclosure is difficult to miss (i.e., easily noticeable) and easily understandable by ordinary consumers, including in all of the following ways:

1. In any communication that is solely visual or solely audible, the disclosure must be made through the same means through which the communication is presented. In any communication made through both visual and audible means, such as a television advertisement, the disclosure must be presented simultaneously in both the visual and audible portions of the communication even if the representation requiring the disclosure ("triggering representation") is made through only one means.

2. A visual disclosure, by its size, contrast, location, the length of time it appears, and other characteristics, must stand out from any accompanying text or other visual elements so that it is easily noticed, read, and understood.

3. An audible disclosure, including by telephone or streaming video, must be delivered in a volume, speed, and cadence sufficient for ordinary consumers to easily hear and understand it.

4. In any communication using an interactive electronic medium, such as the Internet or software, the disclosure must be unavoidable.

5. The disclosure must use diction and syntax understandable to ordinary consumers and must appear in each language in which the triggering representation appears.

6. The disclosure must comply with these requirements in each medium through which it is received, including all electronic devices and face-to-face communications.

7. The disclosure must not be contradicted or mitigated by, or inconsistent with, anything else in the communication.

8. When the representation or sales practice targets a specific audience, such as children, the elderly, or the terminally ill, "ordinary consumers" includes reasonable members of that group.

B. "Close proximity" means that the disclosure is very near the triggering representation. For example, a disclosure made through a hyperlink, pop-up, interstitial, or other similar technique is not in close proximity to the triggering representation.

C. "Material connection" means any relationship that might materially affect the weight or credibility of any representation or endorsement and that would not be reasonably expected by consumers.

D. "Respondents" means all of the Corporate Respondents and the Individual Respondents, individually, collectively, or in any combination.

1. "Corporate Respondent" means Shop Tutors, Inc., a corporation, doing business as LendEDU, and their successors and assigns.

2. "Individual Respondents" means Nathaniel Matherson, Matthew Lenhard, and Alexander Coleman.

Provisions

I. Prohibition Against Misrepresentations

IT IS ORDERED that Respondents, and Respondents' officers, agents, 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 the advertising, promotion, offering for sale, or sale of any product or service, must not make, or assist others in making, any misrepresentation expressly or by implication:

A. Regarding the objectivity or impartiality of any content, including any rate tables, rankings, or star ratings of any entity offering those products;

B. Regarding the influence of compensation on any content, including any rate tables, rankings, or star ratings of any entity offering those products;

C. Regarding any Material connection between any Respondent and any individual or entity offering or affiliated with a product or service;

D. That any endorsement of a product, service, or entity is (i) a truthful endorsement, or (ii) by an actual or impartial user of the product, service, or entity; or

E. Through the use of any endorsement of a product, service, or entity.

II. Required Disclosures

IT IS FURTHER ORDERED that Respondents, and Respondents' officers, agents, 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 the advertising, promotion, offering for sale, or sale of any product or service, must not make, or assist others in making, any representation expressly or by implication:

A. That Respondents' content is a source of information for products or services, (1) without disclosing, Clearly and conspicuously, and in Close proximity to the representation, the influence of any compensation on any such content or any other Material connection between any Respondent and any individual or entity affiliated with any such product or service, and (2) unless the representation is not otherwise misleading; or

B. Regarding any consumer or other endorser or a product, service, or entity, (1) without disclosing, Clearly and conspicuously, and in Close proximity to the representation, any Material connection between such endorser and any Respondent or any other individual or entity offering or affiliated with the product or service, and (2) unless the representation is not otherwise misleading.

III. Monetary Relief

IT IS FURTHER ORDERED that:

A. Respondents must pay to the Commission $350,000, which Respondents stipulate their undersigned counsel hold in escrow for no purpose other than payment to the Commission. All Respondents are jointly and severally liable for the payment amount.

B. Such payment must be made within 8 days of the effective date of this Order by electronic fund transfer in accordance with instructions provided by a representative of the Commission.

IV. Additional Monetary Provisions

IT IS FURTHER ORDERED that:

A. Respondents relinquish dominion and all legal and equitable right, title, and interest in all assets transferred pursuant to this Order and may not seek the return of any assets.

B. The facts alleged in the Complaint will be taken as true, without further proof, in any subsequent civil litigation by or on behalf of the Commission to enforce its rights to any payment pursuant to this Order, such as a nondischargeability complaint in any bankruptcy case.

C. The facts alleged in the Complaint establish all elements necessary to sustain an action by or on behalf of the Commission pursuant to Section 523(a)(2)(A) of the Bankruptcy Code, 11 U.S.C. § 523(a)(2)(A), and this Order will have collateral estoppel effect for such purposes.

D. All money paid to the Commission pursuant to this Order may be deposited into a fund administered by the Commission or its designee to be used for relief, including consumer redress and any attendant expenses for the administration of any redress fund. If a representative of the Commission decides that direct redress to consumers is wholly or partially impracticable or money remains after redress is completed, the Commission may apply any remaining money for such other relief (including consumer information remedies) as it determines to be reasonably related to Respondents' practices alleged in the Complaint. Any money not used is to be deposited to the U.S. Treasury. Respondents have no right to challenge any activities pursuant to this Provision.

V. Customer Information

IT IS FURTHER ORDERED that Respondents must directly or indirectly provide sufficient customer information to enable the Commission to efficiently administer consumer redress. Respondents represent that they have provided this redress information to the Commission. If a representative of the Commission requests in writing any information related to redress, Respondents must provide it, in the form prescribed by the Commission representative, within 14 days.

VI. Acknowledgments of the Order

IT IS FURTHER ORDERED that Respondents obtain acknowledgments of receipt of this Order:

A. Each Respondent, within 10 days after the effective date of this Order, must submit to the Commission an acknowledgment of receipt of this Order sworn under penalty of perjury.

B. For 3 years after the issuance date of this Order, each Individual Respondent, for any business that such Respondent, individually or collectively with any other Respondent, is the majority owner or controls directly or indirectly, and Corporate Respondent, must deliver a copy of this Order to: (1) all principals, officers, directors, and LLC managers and members; (2) all employees having managerial responsibilities for conduct related to the subject matter of the Order and all agents and representatives who participate in conduct related to the subject matter of the Order; and (3) any business entity resulting from any change in structure as set forth in the Provision titled Compliance Report and Notices. Delivery must occur within 10 days after the effective date of this Order for current personnel. For all others, delivery must occur before they assume their responsibilities.

C. From each individual or entity to which a Respondent delivered a copy of this Order, that Respondent must obtain, within 30 days, a signed and dated acknowledgment of receipt of this Order.

VII. Compliance Report and Notices

IT IS FURTHER ORDERED that Respondents make timely submissions to the Commission:

A. One year after the issuance date of this Order, each Respondent must submit a compliance report, sworn under penalty of perjury, in which:

1. Each Respondent must: (a) identify the primary physical, postal, and email address and telephone number, as designated points of contact, which representatives of the Commission may use to communicate with Respondent; (b) identify all of that Respondent's businesses by all of their names, telephone numbers, and physical, postal, email, and Internet addresses; (c) describe the activities of each business, including the products and services offered, the means of advertising, marketing, and sales, and the involvement of any other Respondent (which Individual Respondents must describe if they know or should know due to their own involvement); (d) describe in detail whether and how that Respondent is in compliance with each Provision of this Order; and (e) provide a copy of each Acknowledgment of the Order obtained pursuant to this Order, unless previously submitted to the Commission.

2. Additionally, each Individual Respondent must: (a) identify all telephone numbers and all physical, postal, email, and Internet addresses, including all residences; (b) identify all business activities, including any business for which such Respondent performs services, whether as an employee or otherwise, and any entity in which such Respondent has any ownership interest; and (c) describe in detail such Respondent's involvement in each such business activity, including title, role, responsibilities, participation, authority, control, and any ownership.

B. For 10 years after the issuance date of this Order, each Respondent must submit a compliance notice, sworn under penalty of perjury, within 14 days of any change in the following:

1. Each Respondent must submit notice of any change in: (a) any designated point of contact; or (b) the structure of any Corporate Respondent or any entity that Respondent has any ownership interest in or controls directly or indirectly that may affect compliance obligations arising under this Order, including: creation, merger, sale, or dissolution of the entity or any

subsidiary, parent, or affiliate that engages in any acts or practices subject to this Order.

2. Additionally, each Individual Respondent must submit notice of any change in: (a) name, including alias or fictitious name, or residence address; or (b) title or role in any business activity, including (i) any business for which such Respondent performs services whether as an employee or otherwise and (ii) any entity in which such Respondent has any ownership interest and over which Respondents have direct or indirect control. For each such business activity, also identify its name, physical address, and any Internet address.

C. Each Respondent must submit notice of the filing of any bankruptcy petition, insolvency proceeding, or similar proceeding by or against such Respondent within 14 days of its filing.

D. Any submission to the Commission required by this Order to be sworn under penalty of perjury must be true and accurate and comply with 28 U.S.C. § 1746, such as by concluding: "I declare under penalty of perjury under the laws of the United States of America that the foregoing is true and correct. Executed on: _____" and supplying the date, signatory's full name, title (if applicable), and signature.

E. Unless otherwise directed by a Commission representative in writing, all submissions to the Commission pursuant to this Order must 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 re Shop Tutors, Inc., FTC Docket No. C-4719.

VIII. Recordkeeping

IT IS FURTHER ORDERED that Respondents must create certain records for 10 years after the issuance date of the Order, and retain each such record for 5 years. Specifically, Corporate Respondent and each Individual Respondent for any business that such Respondent, individually or collectively with any other Respondent, is a majority owner or controls directly or indirectly, must create and retain the following records:

A. accounting records showing the revenues from all products or services sold;

B. personnel records showing, for each person providing services, whether as an employee or otherwise, that person's: name; addresses; telephone numbers; job title or position; dates of service; and (if applicable) the reason for termination;

C. copies or records of all consumer complaints and refund requests, whether received directly or indirectly, such as through a third party, and any response;

D. a copy of each unique website, application, form, advertisement or other marketing material making a representation subject to this Order; provided, however, that marketing material is not deemed unique under this subsection if the only change to the marketing material from its prior version is a change to a lender's interest rate or loan term information;

E. copies of any internal compliance policies, procedures, or reports concerning the subject matter of the Order; and

F. all records necessary to demonstrate full compliance with each provision of this Order, including all submissions to the Commission.

IX. Compliance Monitoring

IT IS FURTHER ORDERED that, for the purpose of monitoring Respondents' compliance with this Order:

A. Within 10 days of receipt of a written request from a representative of the Commission, each Respondent must: submit additional compliance reports or other requested information, which must be sworn under penalty of perjury, and produce records for inspection and copying.

B. For matters concerning this Order, representatives of the Commission are authorized to communicate directly with each Respondent. Respondents must permit representatives of the Commission to interview anyone affiliated with any Respondent who has agreed to such an interview. The interviewee may have counsel present.

C. The Commission may use all other lawful means, including posing through its representatives as consumers, suppliers, or other individuals or entities, to Respondents or any individual or entity affiliated with Respondents, without the necessity of identification or prior notice. Nothing in this Order limits the Commission's lawful use of compulsory process, pursuant to Sections 9 and 20 of the FTC Act, 15 U.S.C. §§ 49, 57b-1.

D. Upon written request from a representative of the Commission, any consumer reporting agency must furnish consumer reports concerning Individual Respondents, pursuant to Section 604(a)(2) of the Fair Credit Reporting Act, 15 U.S.C. § 1681b(a)(2).

X. Order Effective Dates

IT IS FURTHER ORDERED that this Order is final and effective upon the date of its publication on the Commission's website (ftc.gov) as a final order. This Order will terminate on May 21, 2040, or 20 years from the most recent date that the United States or the Commission files a complaint (with or without an accompanying settlement) in federal court alleging any violation

of this Order, whichever comes later; *provided, however,* that the filing of such a complaint will not affect the duration of:

A. Any Provision in this Order that terminates in less than 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 Provision.

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 Provision 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 Slaughter not participating.

CONCURRING STATEMENT OF COMMISSIONER REBECCA KELLY SLAUGHTER

In this matter, our dedicated staff in the Division of Financial Practices assembled a powerful complaint that underscores how pay-to-play greed and deception have corrupted the ratings and rankings on which consumers increasingly rely to make informed purchasing choices online. I am pleased to vote to accept for public comment the administrative complaint and consent agreement with Shop Tutors, Inc. d/b/a LendEDU and its principals, Nathaniel Matherson, Matthew Lenhard, and Alexander Coleman.

I write separately to highlight the importance of this case in addressing a cutting edge market practice that I fear is becoming increasingly common online: purportedly neutral rankings and recommendations that actually reflect paid product placement. The complaint's second count alleges that the respondents violated section 5 of the FTC Act by deceptively failing to "disclose adequately to consumers that financial services companies paid Respondents for website content, including rate tables, rankings, and star ratings." Compl. 45. Companies that engage in pay-to-play rankings and ratings should take heed: This conduct robs consumers of vital information, pollutes our online marketplaces, and violates the law, which will result in serious consequences.

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 Shop Tutors Inc., d/b/a LendEDU ("LendEDU" or "the Company"); its co-founder and Chief Executive Officer, Nathaniel Matherson; its co- founder and Chief Technology Officer, Matthew Lenhard; and the Vice President of Product, Alexander Coleman (collectively, "Proposed Respondents").

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

Since 2014, Respondents have operated the website W\".T\v.lendedu.com, which they promote as a resource for consumers in search of financial products such as loans and insurance. In numerous instances, Respondents have described the content on the website, including their rate tables, star ratings, and rankings of the companies offering these financial products, as "objective," "honest," "accurate," and "unbiased." Contrary to their claims, Respondents have provided financial services companies with higher numerical rankings or star ratings and higher positions on rate tables based on compensation. Respondents also have added or removed companies from their content based on compensation.

In addition, Respondents have touted positive consumer reviews about their company and website that, in fact, were written by LendEDU employees or their friends, family members, and associates. Of 126 reviews of LendEDU on the third-party review platform Trustpilot, 90% were written or made up by LendEDU employees or their family, friends, or other associates. Respondents also have reposted and touted the Trustpilot reviews on LendEDU's website, as well as fake reviews written by LendEDU employees who reported to be, but are not, actual users.

The proposed order will prevent Proposed Respondents from engaging in similar acts or practices. Part I would prohibit Proposed Respondents from making the challenged and related misrepresentations. Part II would require Proposed Respondents to disclose the influence of compensation on representations made on its website and to disclose material connections among the Proposed Respondents and the various parties represented on the website. Part III would require Proposed Respondents, jointly and severally, to pay to the Commission $350,000 within 8 days of the effective date of the Order.

Part IV sets out additional requirements related to the monetary relief Part V requires Proposed Respondents to provide sufficient customer information to enable the Commission to efficiently administer consumer redress. Part VI is an order distribution provision that requires Proposed Respondents to provide the order to current and future principals, officers, directors , and LLC managers and members, as well as current and future managers, 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 VII requires Proposed Respondents to submit a compliance report one year after the order is entered. It also

requires Proposed Respondents to notify the Commission of corporate changes that may affect compliance obligations within 14 days of such a change.

Part VIII requires Proposed Respondents to maintain and upon request make available certain compliance-related records, including accounting records and unique websites. Part IX requires Proposed Respondents to submit additional compliance reports within 10 business days of a written request by the Commission. Part X 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

ÖSSUR HF.,
ÖSSUR AMERICAS HOLDINGS,
AND
COLLEGE PARK INDUSTRIES, 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-4712; File No. 191 0177
Complaint, April 6, 2020 – Decision, May 27, 2020

This consent order addresses the acquisition by Össur Hf. and Össur Americas Holdings, Inc. of College Park Industries, Inc. that violates Section 7 of the Clayton Act and Section 5 of the Federal Trade Commission Act. The complaint alleges that the effects of the Acquisition may be to substantially lessen competition and to harm consumers by eliminating substantial future competition between Respondent College Park and Respondent Össur in the development, manufacturing, marketing, distribution, and sale of myoelectric elbows. The consent order requires that Respondents shall divest the Myoelectric Elbow Assets to Steeper pursuant to the Divestiture Agreements.

Participants

For the *Commission*: *Stephen Mohr* and *Jonathan Ripa.*

For the *Respondents*: *Colin Kass, Proskauer Rose LLP; Sheldon Klein, Butzel Long.*

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 Össur Hf., the owner of Össur Americas Holdings, Inc., a corporation subject to the jurisdiction of the Commission, has made an offer to acquire all of the voting securities of College Park Industries, Inc., a company subject to the jurisdiction of the Commission, in violation of Section 5 of the FTC Act, as amended, 15 U.S.C. § 45; 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 Össur Hf. is a corporation organized, existing, and doing business under, and by virtue of, the laws of Iceland, with its executive offices and principal place of business located at Grjothals 1-5, 110 Reykjavik, Iceland, and its United States address for service of process, as follows: 27051 Towne Center Drive, Foothill Ranch, California, 92610. Össur Hf is engaged in the development, manufacture, sale, and distribution of upper and lower- limb prosthetic devices.

2. Respondent Össur Americas Holdings, Inc. is a corporation organized, existing, and doing business under, and by virtue of, the laws of Delaware, with its executive offices and principal place of business located at 27051 Towne Center Drive, Foothill Ranch, California, 92610.

3. Respondents Össur Hf. and Össur Americas Holdings, Inc. (collectively, "Össur") 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, 5 U.S.C. § 12, and is a company whose business is in or affects commerce, as "commerce" is defined in Section 4 of the FTC Act, as amended, 15 U.S.C. § 44.

II. THE ACQUIRED COMPANY

4. Respondent College Park Industries, Inc. ("College Park") is a corporation organized, existing, and doing business under, and by virtue of, the laws of Michigan, with its executive offices and principal place of business located at 27955 College Park Drive, Warren, Michigan, 48088. College Park is engaged in the development, manufacture, sale, and distribution of upper and lower-limb prosthetics.

5. Respondent College Park 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.

III. THE PROPOSED ACQUISITION

6. Pursuant to a Stock Purchase Agreement dated July 19, 2019, Össur agreed to acquire College Park (the "Acquisition"). The Acquisition is subject to Section 7 of the Clayton Act, as amended, 15 U.S.C. § 18.

IV. THE RELEVANT MARKET

7. For the purpose of this Complaint, the relevant line of commerce in which to analyze the effects of the Acquisition is no broader than the development, manufacturing, marketing, distribution, and sale of myoelectric elbows.

8. Myoelectric, or powered, elbows use electromyographic signals and battery-powered motors to control movement of the prosthetic. Myoelectric elbows fit directly on the residual limb and use electrical signals generated by muscles to move the motorized elbow componentry. Myoelectric elbows provide substantial functional advantages over mechanical elbows, such as being easier and more natural to control than mechanical elbows.

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

V. THE STRUCTURE OF THE MARKET

10. The U.S. market for myoelectric elbows is highly concentrated. Respondent College Park is a leading supplier of myoelectric elbows and Respondent Össur is currently developing its own myoelectric elbow. The only other participants in the U.S. myoelectric market are Otto Bock Healthcare North America and Fillauer LLC.

VI. ENTRY CONDITIONS

11. Entry or expansion into the relevant market 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 time required for product development and market adoption is lengthy. No other entry is likely to occur to deter or counteract the competitive harm likely to result from the Acquisition.

VII. EFFECTS OF THE ACQUISITION

12. The effects of the Acquisition, if consummated, may be to substantially lessen competition in the relevant market in violation of Section 7 of the Clayton Act, as amended, 15 U.S.C. § 18, and Section 5 of the FTC Act, as amended, 15 U.S.C. § 45, and to harm consumers by, among other things, eliminating substantial future competition between Respondent College Park and Respondent Össur in the development, manufacturing, marketing, distribution, and sale of myoelectric elbows.

VIII. VIOLATIONS CHARGED

13. 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 sixth day of April 2020, issues its Complaint against said Respondent.

By the Commission.

ORDER TO MAINTAIN ASSETS

The Federal Trade Commission ("Commission") initiated an investigation of the proposed acquisition by Respondent Össur Americas Holdings Inc., controlled by Respondent Össur Hf of the voting securities of Respondent College Park Industries, Inc., collectively "Respondents." The Commission's Bureau of Competition prepared and furnished to Respondents the Draft Complaint,

which it proposed to present to the Commission for its consideration. If issued by the Commission, the Draft Complaint 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.

Respondents and the Bureau of Competition executed an Agreement Containing Consent Orders ("Consent Agreement") containing (1) an admission by Respondents of all the jurisdictional facts set forth in the Draft Complaint, (2) a statement that the signing of said agreement is for settlement purposes only and does not constitute an admission by Respondents that the law has been violated as alleged in the Draft Complaint, or that the facts as alleged in the Draft Complaint, other than jurisdictional facts, are true, (3) waivers and other provisions as required by the Commission's Rules, and (4) a proposed Decision and Order and Order to Maintain Assets.

The Commission considered the matter and determined to accept the executed Consent Agreement and to place such Consent Agreement on the public record for a period of 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 issues its Complaint, makes the following jurisdictional findings and issues this Order to Maintain Assets:

1. Respondent Össur Hf is a corporation organized, existing, and doing business under, and by virtue of, the laws of Iceland, with its executive offices and principal place of business located at Grjothals 1-5, 110 Reykjavik, Iceland, and its United States address for service of process, as follows: 27051 Towne Center Drive, Foothill Ranch, California, 92610, United States of America.

2. Respondent Össur Americas Holdings, Inc. is a corporation organized, existing, and doing business under, and by virtue of, the laws of Delaware, with its executive offices and principal place of business located at 27051 Towne Center Drive, Foothill Ranch, California, 92610, United States of America.

3. Respondent College Park Industries, Inc. is a corporation organized, existing, and doing business under, and by virtue of, the laws of Michigan, with its executive offices and principal place of business located at 27955 College Park Drive, Warren, Michigan, 48088, United States of America.

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

ORDER

I. Definitions

IT IS HEREBY ORDERED that, as used in this Order to Maintain Assets, the following definitions, and all other definitions used in the Consent Agreement and the Decision and Order, shall apply:

A. "Asset Maintenance Period" means the period commencing on the date the Commission issues this Order to Maintain Assets and ending on the date the Order to Maintain Assets terminates pursuant to Paragraph X.

B. "Assets To Be Maintained" means the Myoelectric Elbow Assets and the Myoelectric Elbow Business.

C. "Decision and Order" means:

1. The proposed Decision and Order contained in the Consent Agreement in this matter, until issuance of a final Decision and Order by the Commission; and

2. The final Decision and Order, once it is issued by the Commission in this matter.

II. Asset Maintenance

IT IS FURTHER ORDERED that during the Asset Maintenance Period, Respondents shall operate the Assets To Be Maintained in the ordinary course of business consistent with past practices, and shall:

A. Take such actions as are necessary to maintain the full economic viability, marketability, and competitiveness of the Assets To Be Maintained, to minimize any risk of loss of competitive potential of the Assets To Be Maintained, to operate the Assets To Be Maintained in a manner consistent with applicable laws and regulations, and to prevent the destruction, removal, wasting, deterioration, or impairment of the Assets To Be Maintained (including regular repair and maintenance efforts), except for ordinary wear and tear. Respondents shall not sell, transfer, encumber, terminate the operations of, or otherwise impair the Assets To Be Maintained (other than in the manner prescribed in the Decision and Order and this Order to Maintain Assets), nor take any action that lessens the full economic viability, marketability, or competitiveness of the Assets To Be Maintained; and

B. Conduct or cause to be conducted the Assets To Be Maintained in the regular and ordinary course of business and in accordance with past practice and as may be necessary to preserve the full economic viability, marketability, and competitiveness of the Assets To Be Maintained, and shall use best efforts to preserve the existing relationships with suppliers, customers, employees, governmental authorities, vendors, landlords, creditors, agents, and others having business relationships with the Assets To Be Maintained. Included in the above obligations, Respondents shall:

1. Make any payment required to be paid under any contract or lease when due, and otherwise satisfy all liabilities and obligations associated with the Assets To Be Maintained;

2. Provide the Assets To Be Maintained with sufficient financial and other resources to operate at least at current rates of operation, to meet all capital calls, to perform routine or necessary maintenance, to repair or replace facilities and equipment, and to carry on at least at their scheduled pace all capital projects, business plans, development projects, and commercial activities;

3. Provide such other resources as may be necessary to respond to competition against the Assets To Be Maintained, prevent diminution in sales of the Assets To Be Maintained, and maintain the competitive strength of the Assets To Be Maintained;

4. Provide support services at levels customarily provided by Respondents;

5. Maintain all licenses, permits, approvals, authorizations, or certifications related to or necessary for the operation of the Assets To Be Maintained, and otherwise operate the Assets To Be Maintained in accordance and compliance with all regulatory obligations and requirements;

6. Maintain the Business Information of the Assets To Be Maintained;

7. Maintain the working conditions, staffing levels, and a work force of equivalent size, training, and expertise associated with the Assets To Be Maintained, including:

    a. Continuing to provide each of the Myoelectric Elbow Employees with all employee benefits offered by Respondents, including regularly scheduled or merit raises and bonuses, and regularly scheduled vesting of all benefits;

    b. Providing reasonable financial incentives to encourage Myoelectric Elbow Employees to continue in their positions until the Divestiture Date, and as may be necessary to facilitate the employment of such Myoelectric Elbow Employees by the proposed Acquirer following the Divestiture Date;

    c. When vacancies occur, replacing the employees in the regular and ordinary course of business, in accordance with past practice; and

    d. Not transferring any of the Myoelectric Elbow Employees to any of Respondents' assets or businesses that Respondents will not be divesting; and

8. Not reduce, change, or modify in any material respect, the levels of production, quality, pricing, service, or customer support typically associated with the Assets To Be Maintained, other than changes in the ordinary course of business.

Provided, however, that Respondents shall not be in violation of this Paragraph II if Respondents take actions (i) that are explicitly permitted or required by any Divestiture Agreement, or (ii) that have been requested or agreed-to by an Acquirer, in writing, and approved in advance by the Monitor (in consultation with Commission staff), in all cases to facilitate the Acquirer's acquisition of the Assets To Be Maintained and consistent with the purposes of the Decision and Order**.**

III. Additional Obligations

IT IS FURTHER ORDERED that:

A. Respondents, in consultation with the proposed Acquirer, for the purposes of ensuring an orderly transition, shall:

1. Develop and implement a detailed transition plan to ensure that the commencement of the operation of the Myoelectric Elbow Business by the Acquirer is not delayed or impaired by the Respondents;

2. Designate employees of Respondents knowledgeable about the operation of the Myoelectric Elbow Assets and Myoelectric Elbow Business, who will be responsible for communicating directly with the Acquirer, and the Monitor (if one has been appointed), for the purposes of assisting in the transfer to the Acquirer of the Myoelectric Elbow Assets and Myoelectric Elbow Business;

3. Allow the Acquirer reasonable access to all Business Information related to the Myoelectric Elbow Assets and Myoelectric Elbow Business and to employees who possess or are able to locate such information; and

4. Establish projected timelines for accomplishing all tasks necessary to effectuate the transition to the Acquirer in an efficient and timely manner.

B. Respondents shall:

1. Not provide, disclose, or otherwise make available any Confidential Business Information to any person, except as required or permitted by this Order to Maintain Assets, the Decision and Order, or a Divestiture Agreement;

2. Not use any Confidential Business Information for any reason or purpose, other than as required or permitted by this Order to Maintain Assets, the Decision and Order, or a Divestiture Agreement;

3. To the extent practicable, maintain Confidential Business Information separate and apart from other data or information of the Respondents; and

4. Following the Acquisition Date, ensure that Confidential Business Information is not shared with Respondents' employees engaged in myoelectric elbow production or sales activities anywhere in the world, other than employees who had access to the information prior to the Acquisition Date in the normal course of business and subject to the provisions of III.B.1 and III.B.2 above;

Provided, however, that nothing in this Paragraph III shall prevent Respondents from retaining and using any tangible or intangible property that Respondents retain the right to use pursuant to the Decision and Order, *provided further* that to the extent that the use of such property involves disclosure of Confidential Business Information to another person, Respondents shall require such person to maintain the confidentiality of such Confidential Business Information under terms no less restrictive than Respondents' obligations under this Order to Maintain Assets and the Decision and Order.

C. Respondents shall devise and implement measures to protect against the storage, distribution, and use of Confidential Business Information that is not permitted by this Order to Maintain Assets, the Decision and Order, or a Divestiture Agreement. These measures shall include, but not be limited to, restrictions placed on access by persons to information available or stored on any of Respondents' computers or computer networks.

D. No later than 10 days after the Divestiture Date, Respondents shall provide written notification of the restrictions on the use and disclosure of the Confidential Business Information by Respondents' personnel to all of its officers, directors, employees, or agents who may have possession or access to such Confidential Business Information. Respondents shall require such personnel to acknowledge in writing or electronically their receipt and understanding of these written instructions, and shall maintain custody of these written instructions and acknowledgments for inspection upon request by the Commission.

E. Notwithstanding this Paragraph III of this Order to Maintain Assets, and subject to the Decision and Order, Respondent may use Confidential Business Information:

1. For the purpose of performing Respondents' obligations under this Order to Maintain Assets, the Decision and Order, or a Divestiture Agreement; and

2. For purposes of complying with financial reporting requirements, obtaining legal advice, ensuring compliance with legal and regulatory requirements, prosecuting or defending legal claims, conducting investigations, or as otherwise required by law.

F. No later than the Divestiture Date, Respondents shall, at their sole expense, obtain each Consent required to transfer the Myoelectric Elbow Assets, including Contracts and Approvals. Respondents may satisfy this requirement for a required Consent by certifying that the Acquirer has equivalent arrangements or has otherwise directly obtained the necessary Consent.

Provided, however, it is not a violation of this provision for Respondents not to transfer a Contract or Governmental Authorization that Respondents have no legal right to assign, transfer or sublicense (even by obtaining relevant Consents) so long as (i) prior to signing the Consent Order, Respondents inform Commission staff and the Acquirer that they cannot transfer the relevant Contract or Governmental Authorization, and (ii) Respondents assist the Acquirer in obtaining an equivalent Contract or Approval.

G. Respondents shall cooperate and assist the Acquirer (or any other person with whom Respondents engage in negotiations to acquire the Myoelectric Elbow Assets) with a due diligence investigation of the Myoelectric Elbow Assets and the Myoelectric Elbow Business, including by providing sufficient and timely access to all information and employees customarily provided as part of a due diligence process.

IV. Employees

IT IS FURTHER ORDERED that:

A. Respondents shall cooperate with and assist any proposed Acquirer of the Myoelectric Elbow Assets to evaluate independently and offer employment to the Myoelectric Elbow Employees, with such cooperation to include at least the following:

1. Not later than 5 business days after a request from a proposed Acquirer, Respondents shall, to the extent permitted by applicable law:

   a. Provide to the proposed Acquirer a list of all Myoelectric Elbow Employees and provide Employee Information for each; and

   b. Allow the proposed Acquirer a reasonable opportunity to interview any Myoelectric Elbow Employees;

2. Not later than 10 days after a request from a proposed Acquirer, Respondents shall provide an opportunity for the proposed Acquirer to:

a. Meet personally, and outside the presence or hearing of any employee or agent of Respondents, with any of the Myoelectric Elbow Employees; and

b. Make offers of employment to any of the Myoelectric Elbow Employees;

3. Respondents shall not directly or indirectly interfere with a proposed Acquirer's offer of employment to any one or more of the Myoelectric Elbow Employees, not offer any incentive to Myoelectric Elbow Employees to decline employment with a proposed Acquirer, and not otherwise interfere with the recruitment of any Myoelectric Elbow Employees by a proposed Acquirer;

B. Respondents shall remove any impediments within the control of Respondents that may deter any Myoelectric Elbow Employees from accepting employment with a proposed 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 a proposed Acquirer, and shall not make any counteroffer to any Myoelectric Elbow Employees who receive an offer of employment from the Acquirer; *provided, however*, that nothing in this Order to Maintain Assets shall be construed to require Respondents to terminate the employment of any employee or prevent Respondents from continuing the employment of any employee.

V. Monitor

IT IS FURTHER ORDERED that:

A. Mark W. Ford of Catdaddy Enterprises LLC shall serve as the Monitor pursuant to the agreement executed by the Monitor and Respondents, and attached as Appendix E ("Monitor Agreement") and Non-Public Appendix F ("Monitor Compensation") to the Decision and Order. The Monitor is appointed to monitor Respondents' compliance with the terms of this Order to Maintain Assets, the Decision and Order, and the Divestiture Agreement.

B. No later than 1 day after the date this Order to Maintain Assets is issued, Respondents shall, pursuant to the Monitor Agreement, confer on the Monitor all rights, powers, and authorities necessary to permit the Monitor to monitor Respondents' compliance with the terms of this Order to Maintain Assets, the Decision and Order, and the Divestiture Agreement, in a manner consistent with the purposes of the orders.

C. 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 divestiture and related requirements of this Order to Maintain Assets, the Decision and Order, and the Divestiture 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 the orders.

2. The Monitor shall act in consultation with the Commission or its staff, and shall serve as an independent third party and not as an employee or agent of the Respondents or of the Commission.

3. The Monitor shall serve until 30 days after Respondents have satisfied all obligations under Paragraph II and IV of the Decision and Order, or until such other time as may be determined by the Commission or its staff.

D. 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 its obligations under this Order to Maintain Assets, the Decision and Order, and the Divestiture Agreement.

E. 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 to Maintain Assets, the Decision and Order, and the Divestiture Agreement.

F. 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 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 Monitor's duties and responsibilities.

G. Respondents shall indemnify the Monitor and hold the Monitor harmless against any losses, claims, damages, liabilities, or expenses arising out of, or in connection with, the performance of the Monitor's duties, including all reasonable fees of counsel and other reasonable expenses incurred in connection with the preparations for, or defense of, any claim, whether or not resulting in any liability, except to the extent that such losses, claims, damages, liabilities, or expenses result from gross negligence, willful or wanton acts, or bad faith by the Monitor. For purposes of this Paragraph V.G, the term "Monitor" shall include all persons retained by the Monitor pursuant to Paragraph V.F of this Order to Maintain Assets.

H. Respondents shall report to the Monitor in accordance with the requirements of this Order to Maintain Assets and the Decision and Order, and as otherwise provided in the Monitor Agreement approved by the Commission. The Monitor shall evaluate the reports submitted by the Respondents with respect to the performance of Respondents' obligations under this Order to Maintain Assets and the Decision and Order. Within 1 month from the date the Monitor is appointed pursuant to this Paragraph V, and every 60 days thereafter (and otherwise as the Commission or its staff may request), the Monitor shall report in writing to the Commission concerning performance by Respondents of their obligations under the Orders.

I. Respondents 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 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.

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 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 10 days after the 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.

2. Not later than 10 days after the appointment of the substitute Monitor, Respondents 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 Respondents' compliance with the relevant terms of this Order to Maintain Assets, the Decision and Order, and the Divestiture Agreement in a manner consistent with the purposes of the orders and in consultation with the Commission.

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 this Order to Maintain Assets, the Decision and Order, and the Divestiture Agreement.

M. The 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.

VI. Compliance Reports

IT IS FURTHER ORDERED that Respondents shall file verified written reports ("compliance reports") in accordance with the following:

A. Within 30 days after this Order to Maintain Assets is issued, and every 30 days thereafter until this Order to Maintain Assets terminates, Respondents shall submit to the Commission compliance reports setting forth in detail the manner and form in which Respondents intend to comply, are complying, and have complied with all provisions of this Order to Maintain Assets and the Decision and Order. Each compliance report shall contain sufficient information and documentation to enable the Commission to determine independently whether Respondents are in compliance with this Order to Maintain Assets and the Decision and Order. Conclusory statements that Respondents have complied with their obligations under this Order to Maintain Assets and the Decision and Order are insufficient. Respondents shall include in their reports, among other information or documentation that may be necessary to demonstrate compliance, a full description of the measures Respondents have implemented or plan to implement to ensure that they have complied or will comply with each paragraph of this Order to Maintain Assets and the Decision and Order, and such supporting materials shall be retained and produced later if needed.

B. Each compliance report shall be verified in the manner set forth in 28 U.S.C. § 1746 by the Chief Executive Officer or another officer or employee specifically authorized to perform this function. Respondents shall submit an original and 2 copies of each compliance report as required by Commission Rule 2.41(a), 16 C.F.R. § 2.41(a), including a paper original submitted to the Secretary of the Commission and electronic copies to the Secretary at ElectronicFilings@ftc.gov and to the Compliance Division at bccompliance@ftc.gov. In addition, Respondents shall provide a copy of each compliance report to the Monitor if the Commission has appointed one in this matter.

Provided, however, that, after the Decision and Order in this matter is issued as final, the reports due under this Order to Maintain Assets may be consolidated with, and submitted to the Commission on the same timing as, the compliance reports required to be submitted by Respondents pursuant to the Decision and Order.

VII. Change in Respondent

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

A. The proposed dissolution of either Össur Hf, Össur Americas Holding, Inc., or College Park Industries, Inc.;

B. The proposed acquisition, merger or consolidation of either Össur Hf, Össur Americas Holding, Inc., or College Park Industries, Inc.; or

C. Any other change in Respondents, including assignment and the creation, sale, or dissolution of subsidiaries, if such change may affect compliance obligations arising out of this Order.

VIII. Access

IT IS FURTHER ORDERED that, for purposes of determining or securing compliance with this Order to Maintain Assets, and subject to any legally recognized privilege, upon written request and 5 days' notice to the relevant Respondent, made to its principal place of business as identified in this Order to Maintain Assets, registered office of its United States subsidiary, or its headquarters office, the notified 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 business and other records and all documentary material and electronically stored information as defined in Commission Rules 2.7(a)(1) and (2), 16 C.F.R. § 2.7(a)(1) and (2), in the possession or under the control of the Respondent related to compliance with this Order to Maintain Assets, which copying services shall be provided by the Respondent at the request of the authorized representative of the Commission and at the expense of the Respondent; and

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

IX. Purpose

IT IS FURTHER ORDERED that the purpose of this Order to Maintain Assets is to: (1) maintain and preserve the Assets To Be Maintained as viable, marketable, competitive, and ongoing businesses until the divestitures required by the Decision and Order are achieved; (2) prevent interim harm to competition pending the divestitures and other relief required by the Decision and Order; and (3) remedy the harm to competition the Commission alleged in its Complaint and ensure an Acquirer can operate the Myoelectric Elbow Business in a manner equivalent in all material respects to the manner in which Respondents operated the Myoelectric Elbow Business prior to the Acquisition.

X. Term

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

A. 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 Respondents' (or a Divestiture Trustee's) completion of the divestitures required by Paragraph II of the Decision and Order;

Provided, however, that if at the time such divestitures have been completed, the Decision and Order in this matter is not yet final, then this Order to Maintain Assets shall terminate three business days after the Decision and Order becomes final;

Provided, further, however, that if the Commission, pursuant to Paragraph II.B of the Decision and Order, requires the Respondents to rescind the divestitures to Steeper, then, upon rescission, the requirements of this Order to Maintain Assets shall again be in effect until the day after Respondents' (or a Divestiture Trustee's) completion of the divestiture of the assets required by the Decision and Order.

By the Commission.

DECISION

The Federal Trade Commission initiated an investigation of the proposed acquisition by Respondent Össur Americas Holdings Inc., controlled by Respondent Össur Hf, of the voting securities of Respondent College Park Industries, Inc., collectively "Respondents." The Commission's Bureau of Competition prepared and furnished to Respondents the Draft Complaint, which it proposed to present to the Commission for its consideration. If issued by the Commission, the Draft Complaint 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.

Respondents and the Bureau of Competition executed an Agreement Containing Consent Orders ("Consent Agreement") containing (1) an admission by Respondents of all the jurisdictional facts set forth in the Draft Complaint, (2) a statement that the signing of said agreement is for settlement purposes only and does not constitute an admission by Respondents that the law has been violated as alleged in the Draft Complaint, or that the facts as alleged in the Draft Complaint, other than jurisdictional facts, are true, (3) waivers and other provisions as required by the Commission's Rules, and (4) a proposed Decision and Order and Order to Maintain Assets.

The Commission considered the matter and 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. The Commission accepted the Consent Agreement and placed it on the public record for a period of 30 days for the receipt and consideration of public comments. The Commission 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 Rule 2.34, the Commission issues its Complaint, makes the following jurisdictional findings, and issues the following Decision and Order ("Order"):

1. Respondent Össur Hf is a corporation organized, existing, and doing business under, and by virtue of, the laws of Iceland, with its executive offices and principal place of business located at Grjothals 1-5, 110 Reykjavik, Iceland, and its United States address for service of process is: 27051 Towne Center Drive, Foothill Ranch, California, 92610, United States of America.

2. Respondent Össur Americas Holdings, Inc. is a corporation organized, existing, and doing business under, and by virtue of, the laws of Delaware, with its executive offices and principal place of business located at 27051 Towne Center Drive, Foothill Ranch, California, 92610, United States of America.

3. Respondent College Park Industries, Inc. is a corporation organized, existing, and doing business under, and by virtue of, the laws of Michigan, with its executive offices and principal place of business located at 27955 College Park Drive, Warren, Michigan, 48088, United States of America.

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

ORDER

I. Definitions

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

A. "College Park" means College Park Industries, Inc., its directors, officers, employees, agents, representatives, successors, and assigns; and the joint ventures, subsidiaries, partnerships, divisions, groups, and affiliates controlled by College Park Industries, Inc., and the respective directors, officers, employees, agents, representatives, successors, and assigns of each.

B. "Össur Americas Holdings, Inc." means Össur Americas Holdings, Inc., its directors, officers, employees, agents, representatives, successors, and assigns; and the joint ventures, subsidiaries, partnerships, divisions, groups, and affiliates controlled by Össur Americas Holdings, Inc., and the respective directors, officers, employees, agents, representatives, successors, and assigns of each.

C. "Össur Hf" means Össur Hf, its directors, officers, employees, agents, representatives, successors, and assigns; and the joint ventures, subsidiaries,

partnerships, divisions, groups, and affiliates controlled by Össur Hf, including Össur Americas Holdings, Inc., and the respective directors, officers, employees, agents, representatives, successors, and assigns of each.

D. "Acquirer" means: (i) Steeper or (ii) any other Person that the Commission approves to acquire the Myoelectric Elbow Assets pursuant to this Decision and Order.

E. "Acquisition" means the proposed acquisition by Respondent Össur Hf of all the voting securities of College Park as described in the *Stock Purchase Agreement by and among College Park Industries, Inc., The Sellers Set Forth on Exhibit A, Össur Americas Holdings, Inc. and John Bonner, In His Capacity as Sellers Representative*, dated as of July 19, 2019.

F. "Acquisition Date" means the date on which Respondents consummate the Acquisition.

G. "Agency(ies)" means any government regulatory authority or authorities in the world responsible for granting Approval(s), clearance(s), qualification(s), license(s), or permit(s) for any aspect of the Myoelectric Elbow Business. The term "Agency" includes the United States Food and Drug Administration.

H. "Approval(s)" means any approvals, registrations, permits, licenses, consents, authorizations, and other approvals, and pending applications and requests therefor, required by applicable Agencies related to the research, Development, manufacture, distribution, finishing, packaging, marketing, sale, storage, or transport of the Myoelectric Elbow Products worldwide.

I. "Business" means the research, Development, manufacture, commercialization, distribution, marketing, importation, exportation, advertisement, or sale of a product.

J. "Business Information" means all books, records, data, and information, wherever located and however stored, relating to the Myoelectric Elbow Assets or used in the Myoelectric Elbow Business, including documents, written information, graphic materials, and data and information in electronic format, along with the unwritten knowledge of employees, contractors and representatives. Business Information includes records and information relating to research and development, manufacturing, process technology, engineering, product formulations, production, sales, marketing, logistics, advertising, personnel, accounting, business strategy, information technology systems, customers, customer purchasing histories, customer preferences, delivery histories, delivery routing information, suppliers and all other aspects of the Myoelectric Elbow Business or Myoelectric Elbow Assets. For clarity, Business Information includes Respondents' right and control over information and material provided to any other person.

K. "College Park Manufacturing Equipment" means all fixtures, equipment, and machinery that are being used or have been used at any time by College Park to manufacture, assemble, package, or sell a Myoelectric Elbow Product, and as listed in Non-Public Appendix C.

L. "Commission" means the Federal Trade Commission.

M. "Confidential Business Information" means any non-public Business Information relating to the Myoelectric Elbow Assets and Myoelectric Elbow Business:

1. Obtained by Respondents prior to the Divestiture Date; or

2. Obtained by Respondents after the Divestiture Date, in the course of performing Respondents' obligations under this Order or any Divestiture Agreement;

Provided, however, that Confidential Business Information shall not include:

1. Information that is in the public domain when received by Respondents;

2. Information that is not in the public domain when received by Respondents and thereafter becomes public through no act or failure to act by Respondents;

3. Information that Respondents develop or obtain independently, without violating any applicable law or this Order, and without breaching any confidentiality obligation with respect to the information; and

4. Information that becomes known to Respondents from a Third Party not in breach of applicable law or a confidentiality obligation with respect to the information.

N. "Contracts" means all contracts, agreements, mutual understandings, arrangements, or commitments, including (i) those that make specific reference to a Myoelectric Elbow Product and pursuant to which any Third Party is obligated to purchase, or has the option to purchase without further negotiation of terms, that specific Myoelectric Elbow Product from Respondent College Park; and (ii) those regarding purchasing necessary components from any Third Party for use in connection with the manufacture or assembly of the Myoelectric Elbow Product.

O. "Development" or "Develop" means all research and development activities, including: design; process development; manufacturing scale-up; development-stage manufacturing; quality assurance/quality control development; statistical analysis and report writing; mechanical properties testing; performance testing; safety testing; studies done for the purpose of obtaining or achieving any and all approvals, licenses, registrations, permits, or authorizations from any Agency

necessary for the manufacture, use, storage, import, export, transport, promotion, marketing, and sale of a Myoelectric Elbow Product (including any government price or reimbursement approvals).

P. "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.

Q. "Divestiture Agreement(s)" means:

1. Asset Purchase Agreement by and among Össur Americas Holdings, Inc. and Hugh Steeper Ltd., dated as of March 5, 2020, and all amendments, exhibits, attachments, agreements, and schedules thereto, attached to the Order as Non-Public Appendix A; and

2. Any other agreement between Respondents (or a Divestiture Trustee appointed pursuant to Paragraph X of this Order), and an Acquirer to purchase the Myoelectric Elbow Assets, and all amendments, exhibits, attachments, agreements, and schedules thereto.

R. "Divestiture Date" means the date on which the Respondents (or a Divestiture Trustee appointed pursuant to Paragraph X of this Order) consummate the divestiture of the Myoelectric Elbow Assets as required by Paragraph II of this Order.

S. "Divestiture Trustee" means the Person appointed by the Commission pursuant to Paragraph X of this Order.

T. "Employee Information" means, for each Myoelectric Elbow Employee, a profile prepared by Respondents summarizing the employment history of each employee and including, as requested by the Acquirer and to the extent permitted by applicable 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 Acquirer's option, copies of all employee benefit plans and summary plan descriptions (if any) applicable to the employee.

U. "Excluded Assets" means:

1. Real property interests owned, leased or otherwise held, including easements and appurtenances, together with buildings, facilities and other structures, and improvements thereto;

2. Respondents' corporate or business logos, trademarks, service marks, domain names, trade or other names or any deviation thereof not exclusively related to the Myoelectric Elbow Business;

3. Cash, cash equivalents and accounts receivable;

4. Software that can be readily purchased or licensed from sources other than Respondents and that has not been materially modified;

5. Enterprise software that Respondents also use in their businesses other than the Myoelectric Elbow Business;

6. The portion of Business Information that contains information about any business other than the business divested to an Acquirer;

7. Any original document that Respondents have a legal, contractual, or fiduciary obligation to retain the original; *provided, however,* that Respondents shall provide copies of the record and shall provide the Acquirer access to the original materials if copies are insufficient for regulatory or evidentiary purposes; and

8. Assets specifically identified as excluded in Non-Public Appendix B.

V. "Intellectual Property" means intellectual property of any kind, including patents, patent applications, mask works, trademarks, service marks, copyrights, trade dress, commercial names, internet websites, internet domain names, inventions, discoveries, process technology, engineering technology, product technology, product rights, trade secrets, know-how, and proprietary information.

W. "Key Employees" means the employees listed in Non-Public Appendix D to this Order.

X. "Marketing Materials" means all marketing materials used specifically in the marketing or sale of the Myoelectric Elbow Product as of the Divestiture Date,

including all quality system documentation used for customer presentations, advertising materials, training materials, product data, mailing lists, sales materials (*e.g.*, sales reports, sales funnel or process information, and 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 to be provided to distributors and/or end-use customer (*e.g.* specification sheets, application/use instructions and technical specifications), website content and advertising and display materials, artwork for the production of packaging components, television masters, and other similar materials related to the Myoelectric Elbow Product.

Y. "Monitor" means any monitor appointed pursuant to Paragraph IX of this Decision and Order or Paragraph V of the Order to Maintain Assets.

Z. "Myoelectric Elbow Assets" means all legal or equitable rights, title, and interests in and to all tangible and intangible assets, wherever located, relating to the Myoelectric Elbow Business (including assets removed and not replaced after the announcement of the Acquisition, other than in the ordinary course of business), including:

1. Business Information and Confidential Business Information;

2. Intellectual Property;

3. Approvals;

4. The College Park Manufacturing Equipment, at the Acquirer's option;

5. Marketing Materials;

6. The content related exclusively to the Myoelectric Elbow Product that is displayed on any website that is not dedicated exclusively to the Myoelectric Elbow Product;

7. At the option of the Acquirer, all Contracts;

8. For each Myoelectric Elbow Product:

    a. a list of all customers for each Myoelectric Elbow Product and a listing of the net sales (in either units or dollars) of that Myoelectric Elbow Product to such customers during the one (1) year period immediately prior to the Divestiture Date, stated on either an annual, quarterly, or monthly basis, including the name of each customer's

employee(s) who is or has been responsible for the purchase of the product on behalf of the customer and that employee's business contact information;

b. a list for each Myoelectric Elbow Product containing: (i) the net price (*i.e.*, the final price per unit charged by Respondent College Park net of all customer-level discounts, rebates, or promotions) as of the Divestiture Date; and (ii) the net price charged by Respondent College Park at the end of each quarter during the one (1) year period immediately prior to the Divestiture Date.

9. At the option of the Acquirer, all Myoelectric Elbow Products inventory; and

10. The quantity and delivery terms in all unfilled customer purchase orders for each Myoelectric Elbow Product as of the Divestiture Date, to be provided to the Acquirer not later than 5 days after the Divestiture Date.

Provided, however, that "Myoelectric Elbow Assets" does not include the Excluded Assets.

AA. "Myoelectric Elbow Business" means the Business related to the Myoelectric Elbow Products and including without limitation all improvements and activities relating thereto as of the Divestiture Date.

BB. "Myoelectric Elbow Employees" means: (1) any and all full-time, part-time, or contract employees of Respondent College Park who work or worked on the Myoelectric Elbow Business, at any time 1 year prior to the Divestiture Date; and (2) the Key Employees.

CC. "Myoelectric Elbow Product(s)" means the myoelectric prosthetic elbow products Developed, manufactured, assembled, marketed, sold, owned, or controlled by Respondent College Park, including the entire Espire Elbow family of products (e.g., Espire Pro, Hybrid, Classic Plus, Classic, and Basic).

DD. "Order to Maintain Assets" means the Order to Maintain Assets incorporated into and made a part of the Agreement Containing Consent Orders.

EE. "Orders" means this Decision and Order and the related Order to Maintain Assets.

FF. "Person" means any individual, partnership, joint venture, firm, corporation, limited liability company, limited liability partnership, joint stock company, trust, unincorporated association or organization, or other business entity, and any subsidiaries, divisions, groups, or affiliates thereof.

GG. "Steeper" means Steeper Group, a corporation organized, existing, and doing business under and by virtue of the laws of the United Kingdom with its executive offices and principal place of business located at Unit 3, Stourton Link, Intermezzo Drive, Leeds, LS10 1DF, United Kingdom, and any Person controlled by or under common control of Steeper Group.

HH. "Technical Support" means all capabilities to provide customer-specific technical expertise, modification of products, customizing of products, testing of products, product performance advice, equipment assessment, on-site product assistance, monitoring of inventory levels and product orders/deliveries, and general product issue-solving and trouble-shooting.

II. "Third Party(ies)" means any non-governmental Person other than Respondents or the Acquirer of particular assets or rights pursuant to this Order.

JJ. "Transitional Product Supply" means Respondents' provision of supply of the Myoelectric Elbow Products (including manufacture and assembly), and/or any component or input thereof, to the Acquirer.

KK. "Transition Assistance" means Technical Support, services, assistance, cooperation, training and access to personnel regarding the transfer and operation of the Myoelectric Elbow Business, including, but not limited to, accounting and finance, human resources (employee benefits, payroll, etc.), information technology and systems, logistics (purchasing, distribution, warehousing, supply chain management, etc.), manufacturing (technology, technology transfer, operating permits and licenses, regulatory compliance, quality control, manufacturing processes and troubleshooting, etc.), research and Development, and sales and marketing (including customer service, supply chain management, and customer transfer logistics, etc.).

II. Divestiture

IT IS FURTHER ORDERED that:

A. No later than 10 days after the Acquisition Date, Respondents shall divest, absolutely and in good faith, the Myoelectric Elbow Assets to Steeper pursuant to, and in accordance with, the Divestiture Agreements.

Provided, however, the Respondents may need to divest Excluded Assets if the Commission, in its sole discretion and within 12 months of the date of this Order is issued, determines in consultation with the Acquirer and the Monitor, that any such assets are necessary for the Acquirer to operate the Myoelectric Elbow Assets or the Myoelectric Elbow Business in a manner that achieves the purpose of this Order.

B. If Respondents divest the Myoelectric Elbow Assets to Steeper before the Commission issues this Order, and the Commission subsequently notifies Respondents that:

1. Steeper is not an acceptable acquirer of the Myoelectric Elbow Assets, then Respondents shall immediately rescind the Divestiture Agreements, and shall divest the Myoelectric Elbow Assets no later than 180 days from the date this Order is issued, absolutely and in good faith, at no minimum price, to an Acquirer that receives the prior approval of the Commission and in a manner that receives the prior approval of the Commission; or

2. The manner in which the divestiture of the Myoelectric Elbow Assets to the Acquirer 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 Myoelectric Elbow Assets as the Commission may determine are necessary to satisfy the requirements of this Order.

C. Respondents shall deliver the Business Information and Intellectual Property related to the Myoelectric Elbow Products to the Acquirer as soon as practicable after the Divestiture Date in a manner that ensures their completeness, accuracy, and usefulness, and meets the reasonable requirements of the Acquirer.

D. Prior to the Divestiture Date, Respondents shall provide the Acquirer with the opportunity to review all Contracts included in the Myoelectric Elbow Assets for the purposes of the Acquirer's determination whether to assume such Contracts; *provided, however*, that in cases in which any Contract also relates to an Excluded Asset, Respondents shall, at the Acquirer's option, assign or otherwise make available to the Acquirer all such rights under the Contract as are related to the Myoelectric Elbow Product, but concurrently may retain similar rights for the purposes of the Excluded Asset.

E. Prior to the Divestiture Date, Respondents shall secure all consents, assignments, and waivers from all Persons that are necessary for the divestiture of the Myoelectric Elbow Assets; *provided, however,* that Respondents may satisfy this requirement by certifying that the Acquirer has executed appropriate agreements directly with each of the relevant Persons or has otherwise directly obtained the necessary consents.

Provided, however, that for the purposes of this Paragraph II.E., consents, assignments, and waivers do not include Approvals.

III. Divestiture Agreements

IT IS FURTHER ORDERED that:

A. The Divestiture Agreements shall be incorporated by reference into this Order and made a part hereof, and any failure by Respondents to comply with the terms of the Divestiture Agreements shall constitute a violation of this Order; *provided, however*, that the Divestiture Agreements shall not limit, or be construed to limit, the terms of this Order. To the extent any provision in the Divestiture Agreements varies from or conflicts with any provision in this Order such that Respondents cannot fully comply with both, Respondents shall comply with this Order.

B. Respondents shall not modify or amend the terms of the Divestiture Agreements after the Commission issues this Order without the prior approval of the Commission, except as otherwise provided in Commission Rule 2.41(f)(5), 16 C.F.R. § 2.41(f)(5).

IV. Transition Assistance and Supply

IT IS FURTHER ORDERED that:

A. Until Respondents have transferred all Business Information included in the Myoelectric Elbow Assets, Respondents shall provide the Acquirer with access to records and information (wherever located and however stored) included in the Business Information that Respondents have not yet transferred to the Acquirer, and to employees who possess the records and information.

B. Respondents shall provide the Acquirer with Transition Assistance and Transitional Product Supply sufficient to (i) efficiently transfer the Myoelectric Elbow Assets to the Acquirer and (ii) assist the Acquirer in operating the Myoelectric Elbow Assets and the Myoelectric Elbow Business in a manner equivalent in all material respects to the manner in which Respondent College Park did so prior to the Acquisition.

C. Respondents shall provide Transition Assistance and Transitional Product Supply:

1. As set forth in a Divestiture Agreement, or as otherwise reasonably requested by the Acquirer (whether before or after the Divestiture Date);

2. At the price set forth in the Divestiture Agreement, or if no price is set forth, at Direct Cost; and

3. For a period sufficient to meet the requirements of this paragraph, which shall be, at the option of the Acquirer, 12 months after the Divestiture Date, with a right to extend an additional 3 months at the request of the Acquirer and with approval by Commission staff. *Provided however*, that upon the

Acquirer's request and with approval by Commission staff, Respondents must file with the Commission a written request to further extend the time period.

D. During the term of any agreement with the Acquirer to provide Transition Assistance or Transitional Product Supply, and pursuant to such agreements and this Order, Respondents shall:

1. Make representations and warranties to the Acquirer that the Myoelectric Elbow Products supplied by Respondents meet or have obtained the relevant Approvals;

2. For Myoelectric Elbow Products to be marketed or sold worldwide, 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 Myoelectric Elbow Products supplied to the Acquirer by Respondents to meet the relevant Approvals. This obligation may be made contingent upon the Acquirer giving Respondents prompt written notice of such claim and cooperating fully in the defense of such claim;

Provided, however, that Respondents may reserve the right to control the defense of any such claim, including the right to settle the claim, so long as such settlement is consistent with Respondents' responsibilities to supply the Myoelectric Elbow 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 Respondents to the Acquirer in an agreement to supply Myoelectric Elbow Products;

3. For each Myoelectric Elbow Product for which Respondents purchases the components(s) or material(s) from a Third Party, provide the Acquirer with the actual price paid by Respondents for components and materials used to manufacture that Myoelectric Elbow Product;

4. Upon written request and with reasonable notice by the Acquirer, allow employees of the Acquirer access to:

   a. Facilities and machines that manufacture and assemble the Myoelectric Elbow Products; and

   b. Areas where finished Myoelectric Elbow Products are stored and distributed.

Provided, however, Respondents may restrict access to the machines manufacturing or assembling the Myoelectric Elbow Products during such time, if any, as those machines are being used solely for other products.

5. Take all actions as are reasonably necessary to ensure that the provision of Transition Assistance and Transitional Product Supply to the Acquirer are uninterrupted; and

6. Not cease providing Transition Assistance or Transitional Product Supply due to breach by the Acquirer of a Divestiture Agreement, and shall not limit the damages (including indirect, special, and consequential damages) that an Acquirer is entitled to receive in the event of Respondents' breach of an agreement to provide Transition Assistance or Transitional Product Supply.

V. Employees

IT IS FURTHER ORDERED that:

A. From the date Respondents sign the Consent Agreement up to 1 year after the Divestiture Date, Respondents shall cooperate with and assist any proposed Acquirer of the Myoelectric Elbow Assets to evaluate independently and offer employment to the Myoelectric Elbow Employees, with such cooperation to include at least the following:

1. Not later than 5 business days after a request from a proposed Acquirer, Respondents shall, to the extent permitted by applicable law:

   a. Provide to the proposed Acquirer a list of all Myoelectric Elbow Employees and provide Employee Information for each; and

   b. Allow the proposed Acquirer a reasonable opportunity to interview any Myoelectric Elbow Employees.

2. Not later than 10 days after a request from a proposed Acquirer, Respondents shall provide an opportunity for that Acquirer to:

   a. Meet personally, and outside the presence or hearing of any employee or agent of Respondents, with any of the Myoelectric Elbow Employees; and

   b. Make offers of employment to any Myoelectric Elbow Employees.

3. Respondents shall not directly or indirectly interfere with a proposed Acquirer's offer of employment to any one or more of the Myoelectric Elbow Employees, not offer any incentive to Myoelectric Elbow Employees

to decline employment with a proposed Acquirer, and not otherwise interfere with the recruitment of any Myoelectric Elbow Employees by a proposed Acquirer;

4. Respondents shall remove any impediments within the control of Respondents that may deter any Myoelectric Elbow Employees from accepting employment with a proposed 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 a proposed Acquirer, and shall not make any counteroffer to any Myoelectric Elbow Employees who receive an offer of employment from the 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; and

5. Respondents shall provide Myoelectric Elbow Employees with reasonable financial incentives to continue in their positions, and as may be necessary to facilitate the employment of such Myoelectric Elbow Employees by the proposed Acquirer. Such incentives shall include a continuation of all employee compensation and benefits offered by Respondents, including regularly scheduled or merit raises and bonuses, regularly scheduled vesting of pension benefits, and additional reasonable incentives as may be necessary.

B. If at any point within 1 year of the Divestiture Date, the Commission, in consultation with the Acquirer and the Monitor, determines in its sole discretion that the Acquirer should have the ability to interview, make offers of employment to, or hire any of Respondents' employees that are not otherwise included as Myoelectric Elbow Employees, then the Commission may notify Respondents that such employees are to be designated as Myoelectric Elbow Employees, and the provisions of this Paragraph V shall apply to such employees as of that notification date.

C. Respondents shall:

1. For a period of 1 year from the Divestiture Date, not directly or indirectly solicit or induce, or attempt to solicit or induce, any Myoelectric Elbow Employee who has accepted an offer of employment with, or who is employed by, an Acquirer to terminate his or her employment relationship with the Acquirer; and

2. For a period of 2 years from the Divestiture Date, not directly or indirectly solicit or induce, or attempt to solicit or induce, any Key Employee who has accepted an offer of employment with, or who is employed by, an Acquirer to terminate his or her employment relationship with the Acquirer.

Provided, however, a violation of this Paragraph V.C will not occur if:

1. The employee's employment has been terminated by the Acquirer;

2. Respondents advertise for employees in newspapers, trade publications, or other media not targeted specifically at any one or more of the employees of the Acquirer; or

3. Respondents hire an employee who has applied for employment with Respondents, provided that such application was not solicited or induced in violation of this Order.

VI. Asset Maintenance

IT IS FURTHER ORDERED that:

A. From the date Respondents sign the Consent Agreement until such time as Respondents divest the Myoelectric Elbow Assets to the Acquirer, Respondents shall:

1. Take such actions as are necessary to maintain the full economic viability, marketability, and competitiveness of the Myoelectric Elbow Assets, to minimize any risk of loss of competitive potential of the Myoelectric Elbow Assets, to operate the Myoelectric Elbow Assets in a manner consistent with applicable laws and regulations, and to prevent the destruction, removal, wasting, deterioration, or impairment of the Myoelectric Elbow Assets (including regular repair and maintenance efforts), except for ordinary wear and tear. Respondents shall not sell, transfer, encumber, terminate the operations of, or otherwise impair the Myoelectric Elbow Assets (other than in the manner prescribed in this Order), nor take any action that lessens the full economic viability, marketability, or competitiveness of the Myoelectric Elbow Assets;

2. Conduct or cause to be conducted the Myoelectric Elbow Business in the regular and ordinary course of business and in accordance with past practice and as may be necessary to preserve the full economic viability, marketability, and competitiveness of the Myoelectric Elbow Business, and shall use best efforts to preserve the relationships and goodwill with suppliers, customers, employees, governmental authorities, vendors, landlords, creditors, agents, and others having business relationships with the Myoelectric Elbow Business; and

B. From the date the Respondents sign the Consent Agreement until such time as Acquirer purchases and installs the College Park Manufacturing Equipment or equipment that replicates the College Park Manufacturing Equipment such that it manufactures or assembles the Myoelectric Elbow Products in a manner that fulfills the Acquirer's worldwide demand, and until Acquirer obtains all relevant Approvals worldwide, Respondents shall:

1. Shall take actions as are necessary to prevent the destruction, removal, wasting, deterioration, or impairment of the College Park Manufacturing Equipment;

2. Shall take actions as are necessary to operate the College Park Manufacturing Equipment in the regular and ordinary course of business and in accordance with past practices and in a manner consistent with applicable laws and regulation; and

3. Shall not take any actions to reduce the availability of the services of the current officers, employees, and agents of Respondent College Park required to operate and maintain the College Park Manufacturing Equipment, except for terminations for cause.

C. The purposes of this Paragraph VI is to: (1) preserve the Myoelectric Elbow Assets as a viable, competitive, and ongoing business until the assets are transferred to Acquirer and the College Park Manufacturing Equipment is either transferred or replicated by the Acquirer; (2) prevent interim harm to competition pending the relevant divestitures and other relief; and (3) help remedy any anticompetitive effects of the Acquisition as alleged in the Commission's Complaint.

VII. Confidential Business Information

IT IS FURTHER ORDERED that:

A. Respondents shall:

1. Not provide, disclose, or otherwise make available any Confidential Business Information to any person, except as required or permitted by this Order, the Order to Maintain Assets, or a Divestiture Agreement;

2. Not use any Confidential Business Information for any reason or purpose, other than as required or permitted by this Order, the Order to Maintain Assets, or a Divestiture Agreement;

3. To the extent practicable, maintain Confidential Business Information separate and apart from other data or information of the Respondents; and

4. Following the Acquisition Date, ensure that Confidential Business Information is not shared with Respondents' employees engaged in prosthetic elbow production or sales activities, other than employees who had access to the information prior to the Acquisition Date in the normal course of business and subject to the provisions of VII.A.1 and VII.A.2 above.

Provided, however, that nothing in this Paragraph VII shall prevent Respondents from retaining and using any tangible or intangible property that Respondents retain the right to use pursuant to this Order, provided further that to the extent that the use of such property involves disclosure of Confidential Business Information to another person, Respondents shall require such person to maintain the confidentiality of such Confidential Business Information under terms no less restrictive than Respondents' obligations under this Order.

B. Respondents shall devise and implement measures to protect against the storage distribution, and use of Confidential Business Information that is not permitted by this Order, the Order to Maintain Assets, or any Divestiture Agreement. These measures shall include, but not be limited to, restrictions placed on access by persons to information available or stored on any of Respondents' computers or computer networks.

C. No later than 10 days after the Divestiture Date, and no less than annually for 3 years after the Divestiture Date, Respondents shall provide written notification of the restrictions on the use and disclosure of the Confidential Business Information by Respondents' personnel to all of its officers, directors, employees, or agents who may have possession or access to such Confidential Business Information. Respondents shall require such personnel to acknowledge in writing or electronically their receipt and understanding of these written instructions, and shall maintain custody of these written instructions and acknowledgments for inspection upon request by the Commission;

D. Notwithstanding this Paragraph VII of this Order, and subject to the Order to Maintain Assets, Respondents may use Confidential Business Information:

1. For the purpose of performing Respondents' obligations under this Order, the Order to Maintain Assets, or the Divestiture Agreements; and

2. For purposes of complying with financial reporting requirements, obtaining legal advice, ensuring compliance with legal and regulatory requirements, prosecuting or defending legal claims, conducting investigations, or as otherwise required by law.

VIII. Additional Obligations

IT IS FURTHER ORDERED that:

A. Respondents, in consultation with the Acquirer, for the purposes of ensuring an orderly transition, shall:

1. Develop and implement a detailed transition plan to ensure that the commencement of the operation of the Myoelectric Elbow Business by the Acquirer is not delayed or impaired by the Respondents;

2. Designate employees of Respondents knowledgeable about the operation of the Myoelectric Elbow Assets and Myoelectric Elbow Business, who will be responsible for communicating directly with the Acquirer, and the Monitor (if one has been appointed), for the purposes of assisting in the transfer to the Acquirer of the Myoelectric Elbow Assets and Myoelectric Elbow Business;

3. Allow the Acquirer reasonable access to all Business Information related to the Myoelectric Elbow Assets and Myoelectric Elbow Business and to employees who possess or are able to locate such information; and

4. Establish projected timelines for accomplishing all tasks necessary to effectuate the transition to the Acquirer in an efficient and timely manner.

B. Respondents shall not join, file, prosecute, or maintain any suit, in law or equity, against the Acquirer, its licensees, or its customers under any patent that was pending or issued on or before the Acquisition Date if such suit would directly limit or impair the Acquirer's freedom to manufacture, distribute, market, sell, or offer for sale any Myoelectric Elbow Product anywhere in the world.

C. Upon reasonable written notice and request from the Acquirer to Respondents, Respondents shall provide, in a timely manner, at no greater than Direct Cost, assistance of knowledgeable employees of Respondents to assist the Acquirer to defend against, respond to, or otherwise participate in any litigation brought by a Person related to the Intellectual Property related to any of the Myoelectric Elbow Product(s), if such litigation would have the potential to interfere with the Acquirer's freedom to practice: (i) the research, Development, or manufacture anywhere in the world of the Myoelectric Elbow Product(s) for the purposes of marketing, sale, or offer for sale of such Myoelectric Elbow Product(s); or (ii) the import, export, use, supply, distribution, sale, or offer for sale of the Myoelectric Elbow Product(s).

D. For any patent infringement suit filed prior to the Divestiture Date in which Respondents are alleged to have infringed a Patent of a Third Party or any potential patent infringement suit from a Third Party that Respondents have prepared or is

preparing to defend against as of the Divestiture Date, and where such a suit would have the potential directly to limit or interfere with the Acquirer's freedom to practice: (i) the research, Development, or manufacture anywhere in the world of the Myoelectric Elbow Product(s) acquired for the purposes of marketing, sale, or offer for sale of such Myoelectric Elbow Product(s); or (ii) the import, export, use, supply, distribution, sale, or offer for sale of the Myoelectric Elbow Product(s), Respondents shall:

1. Cooperate with the Acquirer and provide any and all necessary technical and legal assistance, documentation, and witnesses from Respondents in connection with obtaining resolution of any pending patent litigation related to that Myoelectric Elbow Product;

2. Waive conflicts of interest, if any, to allow Respondents' outside legal counsel to represent the Acquirer in any ongoing patent litigation related to that Myoelectric Elbow Product; and

3. Permit the transfer to the Acquirer of all of the litigation files and any related attorney work product in the possession of Respondents' outside counsel related to that Myoelectric Elbow Product.

IX. Monitor

IT IS FURTHER ORDERED that:

A. Mark W. Ford of Catdaddy Consulting Services LLC shall serve as the Monitor pursuant to the agreement executed by the Monitor and Respondents and attached as Appendix E ("Monitor Agreement") and Non-Public Appendix F ("Monitor Compensation"). The Monitor is appointed to monitor Respondents' compliance with the terms of this Order, the Order to Maintain Assets, and the Divestiture Agreement.

B. No later than 1 day after the Order to Maintain Assets is issued, Respondents shall, pursuant to the Monitor Agreement, confer on the Monitor all rights, powers, and authorities necessary to permit the Monitor to monitor Respondents' compliance with the terms of this Order, the Order to Maintain Assets, and the Divestiture Agreement, in a manner consistent with the purposes of the orders.

C. 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 divestiture and related requirements of this Order, the Order to Maintain Assets, and the Divestiture 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 the orders;

2. The Monitor shall act in consultation with the Commission or its staff, and shall serve as an independent third party and not as an employee or agent of the Respondents or of the Commission; and

3. The Monitor shall serve until 30 days after Respondents have satisfied all obligations under Paragraph II and IV of this Order, or until such other time as may be determined by the Commission or its staff.

D. 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 its obligations under this Order, the Order to Maintain Assets, and the Divestiture Agreement.

E. 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, the Order to Maintain Assets, and the Divestiture Agreement.

F. 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 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 Monitor's duties and responsibilities.

G. Respondents shall indemnify the Monitor and hold the Monitor harmless against any losses, claims, damages, liabilities, or expenses arising out of, or in connection with, the performance of the Monitor's duties, including all reasonable fees of counsel and other reasonable expenses incurred in connection with the preparations for, or defense of, any claim, whether or not resulting in any liability, except to the extent that such losses, claims, damages, liabilities, or expenses result from gross negligence, willful or wanton acts, or bad faith by the Monitor. For purposes of this Paragraph IX.G, the term "Monitor" shall include all persons retained by the Monitor pursuant to Paragraph IX.F of this Order.

H. Respondents shall report to the Monitor in accordance with the requirements of this Order or the Order to Maintain Assets, and as otherwise provided in the Monitor Agreement approved by the Commission. The Monitor shall evaluate the reports submitted by the Respondents with respect to the performance of Respondents' obligations under this Order and the Order to Maintain Assets. Within 1 month from the date the Monitor is appointed pursuant to this Paragraph IX, and every 60 days thereafter (and otherwise as the Commission or its staff may request), the Monitor shall report in writing to the Commission concerning performance by Respondents of their obligations under the Orders.

I. Respondents 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 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.

K. 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.

L. 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.

M. If the Commission determines that the Monitor has ceased to act or failed to act diligently, the Commission may appoint a substitute Monitor:

1. Commission may select the substitute Monitor, subject to the consent of Respondents, which consent shall not be unreasonably withheld. If Respondents have not opposed, in writing, including the reasons for opposing, the selection of a proposed Monitor within 10 days after the 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.

2. Not later than 10 days after the appointment of the substitute Monitor, Respondents 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 Respondents' compliance with the relevant terms of this Order, the Order to Maintain Assets, and the Divestiture Agreement in a manner consistent with the purposes of the orders and in consultation with the Commission.

X. Divestiture Trustee

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 Myoelectric Elbow Assets and perform Respondents' other obligations in a manner that satisfies the requirements of this Order.

B. In the event that the Commission or the Attorney General brings an action pursuant to § 5(*l*) of the Federal Trade Commission Act, 15 U.S.C. § 45(*l*), or any other statute enforced by the Commission, 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 Respondents to comply with this Order.

C. The Commission may 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 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 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 Myoelectric Elbow Assets.

2. The Divestiture Trustee shall have 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 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 period only 2 times.

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

4. The Divestiture Trustee shall use commercially reasonable efforts to negotiate the most favorable price and terms available in each contract that is submitted to the Commission, subject to Respondents' absolute and unconditional obligation to divest expeditiously and at no minimum price. The divestiture shall be made in the manner and to the Acquirer that receives the prior approval of the Commission 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 5 days of receiving notification of the Commission's approval.

5. The Divestiture Trustee shall serve, without bond or other security, at the cost and expense of Respondents, on such reasonable and customary terms and conditions as the Commission or a court may set. The Divestiture Trustee shall have the authority to employ, at the cost and expense of Respondents, such consultants, accountants, attorneys, investment bankers, business brokers, appraisers, and other representatives and assistants as are necessary to carry out the Divestiture Trustee's duties and responsibilities. The Divestiture Trustee shall account for all monies derived from the

divestiture and all expenses incurred. After approval by the Commission and, in the case of a court-appointed Divestiture Trustee, by the court, of the account of the Divestiture Trustee, including fees for the Divestiture Trustee's services, all remaining monies shall be paid at the direction of Respondents, and the Divestiture Trustee's power shall be terminated. The compensation of the Divestiture Trustee shall be based at least in significant part on a Commission arrangement contingent on the divestiture of all of the relevant assets that are required to be divested by this Order.

6. Respondents shall indemnify the Divestiture Trustee and hold the Divestiture Trustee harmless against any losses, claims, damages, liabilities, or expenses arising out of, or in connection with, the performance of the Divestiture Trustee's duties, 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 X.E.6., the term "Divestiture Trustee" shall include all Persons retained by the Divestiture Trustee pursuant to Paragraph X.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 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 X.

H. The Divestiture Trustee appointed pursuant to this Order may be the same Person appointed as the Monitor pursuant to the relevant provisions of this Order.

I. 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 actions required by this Order.

XI. Prior Notice

IT IS FURTHER ORDERED that:

A. For a period of 5 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 XI:

1. Acquire any assets of, or financial interest in, any Person that researches, develops, manufactures, markets, or sells a myoelectric prosthetic elbow;

2. Acquire a license or ownership interest in Intellectual Property related to any myoelectric prosthetic elbow; or

3. Enter into any contract to participate in the management, operation, or control of any company with a myoelectric prosthetic elbow.

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 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 30 days after submitting such additional information or documentary material. Early termination of the waiting periods in this Paragraph XI 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 XI 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.

XII. Compliance Reports

IT IS FURTHER ORDERED that:

A. Respondents shall:

1. Notify Commission staff via email at bccompliance@ftc.gov of the Acquisition Date and of the Divestiture Date no later than 5 days after the occurrence of each; and

2. Submit the complete Divestiture Agreements to the Commission at ElectronicFilings@ftc.gov and bccompliance@ftc.gov no later than 30 days after the Divestiture Date.

B. Respondents shall file verified written reports ("compliance reports") in accordance with the following:

1. Respondents shall submit interim compliance reports 30 days after the Order is issued, and every 60 days thereafter until Respondents have fully complied with Paragraphs II and IV of this Order; annual compliance reports one year after the date this Order is issued, and annually for the next 4 years on the anniversary of that date; and additional compliance reports as the Commission or its staff may request.

2. Each compliance report shall contain sufficient information and documentation to enable the Commission to determine independently whether Respondents are in compliance with the Order. Conclusory statements that Respondents have complied with their obligations under the Order are insufficient. Respondents shall include in their reports, among other information or documentation that may be necessary to demonstrate compliance:

a. A full description of the measures Respondents have implemented or plan to implement to ensure that they have complied or will comply with each paragraph of the Order; and

b. A detailed description of all substantive contacts, negotiations, actions, or recommendations related to:

i. The transfer and delivery of all Myoelectric Elbow Assets to the Acquirer;

ii. The provision of Transition Assistance to the Acquirer; and

iii. The provision of Transitional Product Supply of the Myoelectric Elbow Products to the Acquirer.

3. Respondents shall retain all material written communications with each party identified in the compliance report and all non-privileged internal memoranda, reports, and recommendations concerning fulfilling Respondents' obligations under the Order and provide copies of these documents to Commission staff upon request.

4. Respondents shall verify each compliance report in the manner set forth in 28 U.S.C. § 1746 by the Chief Executive Officer or another officer or employee specifically authorized to perform this function. Respondents shall submit an original and 2 copies of each compliance report as required by Commission Rule 2.41(a), 16 C.F.R. § 2.41(a), including a paper original submitted to the Secretary of the Commission and electronic copies to the Secretary at ElectronicFilings@ftc.gov and to the Compliance Division at bccompliance@ftc.gov. In addition, Respondents shall provide a copy of each compliance report to the Monitor.

XIII. Change in Respondents

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

A. The proposed dissolution of either Össur Hf, Össur Americas Holding, Inc., or College Park Industries, Inc.;

B. The proposed acquisition, merger or consolidation of either Össur Hf, Össur Americas Holding, Inc., or College Park Industries, Inc.; or

C. Any other change in Respondents, including assignment and the creation, sale, or dissolution of subsidiaries, if such change may affect compliance obligations arising out of this Order.

XIV. Access

IT IS FURTHER ORDERED that, for purposes of determining or securing compliance with this Order, and subject to any legally recognized privilege, upon written request and 5 days' notice to a Respondent, made to its principal place of business as identified in this Order, registered office of its United States subsidiary, or its headquarters office, the notified Respondent shall, without restraint or interference, permit any duly authorized representative of the Commission:

A. Access, during business office hours of that Respondent and in the presence of counsel, to all facilities and access to inspect and copy all business and other records and all documentary material and electronically stored information as defined in Commission Rules 2.7(a)(1) and (2), 16 C.F.R. § 2.7(a)(1) and (2), in the possession or under the control of that Respondent related to compliance with this Order, which copying services shall be provided by that Respondent at the request of the authorized representative of the Commission and at the expense of that Respondent; and

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

XV. Purpose

IT IS FURTHER ORDERED that the purpose of this Order is to:

A. Ensure that the Acquirer can operate the Myoelectric Elbow Business in a manner equivalent in all material aspects to the manner in which Respondent College Park operated the Myoelectric Elbow Businesses prior to the Acquisition;

B. Create a viable and effective competitor that is independent of Respondents in the Myoelectric Elbow Business; and

C. Remedy the lessening of competition resulting from the Acquisition as alleged in the Commission's Complaint in a timely and sufficient manner.

XVI. Term

IT IS FURTHER ORDERED that this Order shall terminate on May 27, 2030.

By the Commission, Commissioner Slaughter not participating.

NON-PUBLIC APPENDIX A

DIVESTITURE AGREEMENTS

[Redacted From the Public Version But Incorporated by Reference]

NON-PUBLIC APPENDIX B

EXCLUDED ASSETS

[Redacted From the Public Version But Incorporated by Reference]

NON-PUBLIC APPENDIX C

COLLEGE PARK MANUFACTURING EQUIPMENT

[Redacted From the Public Version But Incorporated by Reference]

NON-PUBLIC APPENDIX D

KEY EMPLOYEES

[Redacted From the Public Version But Incorporated by Reference]

APPENDIX E
MONITOR AGREEMENT

MONITOR RETENTION AGREEMENT

This Monitor Agreement ("Monitor Agreement") entered into on March 5, 2020 between Mark Ford of Catdaddy Enterprises, LLC, an Ohio limited liability company (the "Monitor"), and Respondent Össur Americas Holdings Inc., controlled by Respondent Össur Hf, of the voting securities of Respondent College Park Industries, Inc. (collectively "Respondents") provides as follows:

WHEREAS the United States Federal Trade Commission (the "FTC") has accepted or will shortly accept for public comment an Agreement Containing Consent Orders, containing a proposed Decision and Order and Order to Maintain Assets (collectively, the "Orders"), which, among other things, (i) would require the divestiture of the Myoelectric Elbow Assets, as defined in the Decision and Order, and (ii) contemplates the appointment of a Monitor to monitor Respondents' compliance with their obligations under the Orders;

WHEREAS the FTC may appoint Mark Ford of Catdaddy Enterprises, LLC as Monitor pursuant to the Orders;

WHEREAS the Orders further provide that Respondents shall execute an agreement, subject to the prior approval of the FTC, that confers all the rights and powers necessary to permit the Monitor to monitor Respondents' compliance with the terms of the Orders; and

WHEREAS the parties to this Monitor Agreement intend to be legally bound, subject only to the FTC's approval of this Agreement.

NOW, THEREFORE, the parties agree as follows:

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

A. Monitor's Responsibilities. The Monitor shall be responsible for monitoring Respondents' compliance with their obligations as set forth in the Orders and the Divestiture Agreements ("Monitor's Responsibilities"). In so doing, the Monitor shall act in consultation with the Commission or its staff, and **shall serve as an independent third party and not as an employee or agent of the Respondents or the Commission.** The Monitor shall have all rights, duties, powers and authorities required by the Orders, and nothing in the Monitor Agreement shall change, amend, modify or otherwise limit those rights, duties, powers, and authorities.

B. Access to Relevant Information and Facilities. Subject to any demonstrated legally recognized privilege, the Monitor shall have full and complete access to the personnel, books and records of Respondents kept in the ordinary course of business, facilities, technical information related to Respondents' compliance with its obligations under the Orders and any Remedial Agreements, and such other relevant information as the Monitor may reasonably request.

Respondents shall cooperate with any reasonable request of the Monitor. The Monitor shall give Respondents a written request and at least five (5) days' prior notice of any

request for such access or such information and shall attempt to schedule any access or requests for information in such a manner as will not unreasonably interfere with Respondents' operations. At the request of the Monitor, Respondents shall promptly arrange meetings and discussions, including tours of relevant facilities, as reasonable times and locations between the Monitor and employees of Respondents who have knowledge relevant to the proper discharge of the Monitor's responsibilities under the Orders.

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

D. Additional Personnel. Respondents agree that, to the extent authorized by the Orders, the Monitor shall have the authority to employ, at the expense of the Respondents, such consultants, accountants, attorneys, and other representatives and assistants as are reasonably necessary to carry out the Monitor's Responsibilities.

E. Monitor's Obligations. The Monitor shall:

1. Carry out the Monitor's Responsibilities, including submission of periodic reports to the FTC or its staff concerning performance by Respondents of their obligations under the Orders, and any additional written reports as may be requested by the FTC or its staff;
2. Maintain the confidentiality of all non-public information, including Confidential Business Information, provided to the Monitor by Respondents, the FTC-approved Acquirer(s), any supplier or customer of the Respondents, the FTC, or FTC staff in connection with the Monitor's Responsibilities ("Confidential Information"). Such Confidential Information shall be used only for the purpose of discharging the Monitor's obligations pursuant to this Monitor Agreement and not for any other purposes, including, without limitation, any other business, scientific, technological, or personal purpose. The Monitor may only disclose Confidential Information to:
    a. Persons employed by or working with the Monitor under this Monitor Agreement and who have executed a confidentiality agreement consistent with the provisions of this Agreement;
    b. Persons employed by Respondents that are entitled to have access to such Confidential Information;
    c. FTC staff that are working on this matter; or
    d. Persons employed by the FTC-approved Acquirer that are entitled to have access to such Confidential Information.
3. Maintain a record and inform the FTC or its staff of all persons to whom Confidential Information related to this Monitor Agreement has been disclosed;
4. Require any consultants, accountants, attorneys, and any other representatives and/or assistants retained by the Monitor to assist in carrying out the Monitor's Responsibilities to execute a confidentiality agreement that requires such third parties to treat Confidential Information with the same standards of care and

obligations of confidentiality to which the Monitor must adhere under this Monitor Agreement;

5. Maintain the confidentiality for a period of seven (7) years after the termination of this Monitor Agreement, of all other aspects of the performance of the Monitor's Responsibilities and not disclose Confidential Information relating thereto except as required by law. In the event the Monitor is requested pursuant to subpoena or other legal process to produce any documents or to provide testimony relating to this matter in judicial or administrative proceedings to which the Monitor is not a party, Respondents shall reimburse the Monitor at standard billing rates for all professional time and expenses, including reasonable attorneys' fees, incurred in preparing for and responding to requests for documents and providing testimony;

6. Upon termination of the Monitor's duties under this Monitor Agreement, the Monitor shall consult with FTC staff regarding disposition of any written and electronic materials (including materials that Respondent provided to the Monitor) in the possession or control of the Monitor that relate to the Monitor's duties, and the Monitor shall dispose of such materials, which may include sending such materials to the FTC staff, as directed by the FTC staff. In response to a request by Respondent to return or destroy materials that Respondent provided to the Monitor, the Monitor shall inform FTC staff of such request and, if the FTC staff does not object, shall comply with the Respondents' request. Nothing herein shall abrogate the Monitor's duty of confidentiality, which includes an obligation not to disclose any non-public information obtained while acting as a Monitor.

For the purpose of this Monitor Agreement, information shall not be considered confidential or proprietary to the extent it is or becomes part of the public domain (other than as a result of any action by the Monitor or by any employee, agent, affiliate or consultant of the Monitor), or to the extent that the recipient of such information can demonstrate that such information was already know to the recipient at the time of receipt from a source other than the Monitor, the Respondents, or any director, officer, employee, agent, consultant or affiliate of the Monitor or the Respondents, when such source was not known to the recipient after the due inquiry to be restricted from making such disclosure to such recipient.

F. Monitor Payment. Respondents shall pay Monitor a fee as provided in the confidential fee schedule attached as Appendix A hereto. In addition, Respondents shall pay: (i) all documented out-of-pocket expenses reasonably incurred by Monitor in the performance of its duties under the Orders; and (ii) all documented reasonable fees of, and disbursements reasonably incurred by, any consultants, accountants, attorneys, and other representatives and assistants appointed by Monitor pursuant to Section D above. Monitor shall provide Respondents with monthly invoices for time and expenses that include details by timekeeper, time, activity, and an explanation of all matters for which Monitor submits an invoice to Respondents. Respondents shall pay such invoices within thirty (30) days of receipt. Monitor and Respondents shall submit any disputes about invoices to the Commission staff for assistance in resolving such disputes.

G. Monitor's Indemnification and Limitation of Liability. Respondents shall indemnify 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 Responsibilities,

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 gross negligence, willful misconduct, or bad faith by the Monitor. In addition, the parties shall not be liable to each other for any consequential, incidental, special or punitive damages, nor shall the Monitor be liable for direct compensatory damages in excess of the fees actually received by the Monitor for the performance of services hereunder.

H. Disputes. In the event of a disagreement or dispute between Respondents and the Monitor concerning Respondents obligations under one or both Orders, and, in the event that such disagreement or dispute cannot be resolved by the parties, either party may seek the assistance of the staff of the FTC in charge of compliance.

I. Conflicts of Interest. If the Monitor becomes aware during the term of this Monitor Agreement that the Monitor 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 the Monitor's Responsibilities, the Monitor shall immediately inform the Respondents and FTC staff of any such conflict. The Monitor may accept other retentions during the term of this Monitor Agreement and thereafter, provided that, during the pendency of this Monitor Agreement, the Monitor agrees not to accept any other engagement which would result in the Monitor working in a position directly adverse to the FTC, the Respondents, or the FTC-approved Acquirer(s) in any substantially related matter.

J. Standard of Care. In the performance of the Monitor's Responsibilities, the Monitor shall exercise the standard of care and diligence that would be expected of a reasonable person in the conduct of the person's own business affairs.

K. Term. This Monitor Agreement shall terminate no later than: (i) the date set forth in the relevant provisions of the Orders; (ii) the date on which the FTC appoints a substitute monitor pursuant to the Orders; or (iii) the date Respondents notify the Monitor that the Respondents have received a notification from FTC staff that the Monitor has ceased to act or failed to act in a manner consistent with the Monitor's responsibilities under the Orders.

L. Termination. In the event that FTC staff notifies Respondents that the Monitor has ceased to act or failed to act in a manner consistent with the Monitor's responsibilities under the Orders, Respondents shall be entitled to immediately terminate this Monitor Agreement.

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

N. Disclosure of Information. Nothing in this Monitor Agreement shall require Respondents to disclose any material information that is subject to a legally recognized privilege or that Respondents are prohibited from disclosing by reason of law.

O. Assignment. This Monitor Agreement may not be assigned or otherwise transferred by Respondents or the Monitor without the consent of the Respondents, the Monitor, and the

approval of the FTC. Any such assignment or transfer may only be made in a manner consistent with the terms of the Orders.

P. Modification. No amendment, modification, termination, or waiver of any provision of this Monitor Agreement shall be effective unless made in writing, signed by all parties, and approved by the FTC. Any such amendment, modification, termination, or waiver may only be made in manner consistent with the terms of the Orders.

Q. Approval by the FTC. This Monitor Agreement shall have no force or effect with respect to the Orders until approved by the FTC.

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

[SIGNATURE PAGE FOLLOWS]

IN WITNESS WHEREOF, the parties hereto have executed this Monitor Agreement as of the date first written above.

MONITOR

CATDADDY ENTERPRISES, LLC

By: _____
Name: Mark Ford
Title: President

RESPONDENTS

OSSUR AMERICAS HOLDINGS, INC.

By: _____
Name: Jon Sigurdsson
Title: CEO

OSSUR HF

By: _____
Name:
Title:

COLLEGE PARK INDUSTRIES, INC.

By: _____
Name: William Carver
Title: President

IN WITNESS WHEREOF, the parties hereto have executed this Monitor Agreement as of the date first written above.

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CATDADDY ENTERPRISES, LLC

By: _____
Name: Mark Ford
Title: President

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Name: Jon Sigurdsson
Title: CEO

OSSUR HF

By: _____
Name:
Title:

COLLEGE PARK INDUSTRIES, INC.

By: _____
Name: William Carver
Title: President

Analysis to Aid Public Comment

NON-PUBLIC APPENDIX F

MONITOR COMPENSATION

[Redacted From the Public Version But Incorporated by Reference]

ANALYSIS OF CONSENT ORDER TO AID PUBLIC COMMENT

INTRODUCTION

The Federal Trade Commission ("Commission") has accepted from Össur Hf., Össur Americas Holdings, Inc., (collectively "Össur") and College Park Industries, Inc., ("College Park"), subject to final approval, an Agreement Containing Consent Order ("Consent Agreement") designed to remedy the anticompetitive effects that would likely result from Össur's proposed acquisition of College Park. The proposed Decision and Order ("Order") contained in the Consent Agreement requires College Park to divest its myoelectric elbow business to Hugh Steeper Ltd. ("Steeper").

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

Pursuant to a Stock Purchase Agreement dated July 19, 2019, Össur agreed to acquire College Park (the "Acquisition"). The Commission's Complaint alleges that the proposed Acquisition, if consummated, would violate Section 7 of the Clayton act, as amended, 15 U.S.C. § 18, and Section 5 of the FTC Act, as amended, 15 U.S.C. § 45, by substantially lessening future competition between College Park and Össur in the development, manufacturing, marketing, distribution, and sale of myoelectric elbows. The proposed Consent Agreement would remedy the alleged violations by preserving the competition that otherwise would be lost in this market as a result of the proposed Acquisition.

THE PARTIES

Headquartered in Reykjavik, Iceland, Össur Hf. is engaged in the development, manufacture, sale, and distribution of upper and lower-limb prosthetic devices. Össur Hf markets and sells its prosthetics throughout the United States through its subsidiary, Össur Americas Holdings, Inc., which is headquartered in Foothill Ranch, California. College Park, headquartered in Warren, Michigan, also is engaged in the development, manufacture, sale, and distribution of upper and lower-limb prosthetics.

Analysis to Aid Public Comment

THE RELEVANT PRODUCT MARKET AND MARKET STRUCTURE

The relevant product market in which to assess the competitive effects of the proposed acquisition is no broader than the development, manufacturing, marketing, distribution, and sale of myoelectric elbows. Myoelectric, or powered, elbows use electromyographic signals and battery-powered motors to control movement of the prosthetic. Myoelectric elbows fit directly on the residual limb and use electrical signals generated by muscles to move the motorized elbow componentry. Myoelectric elbows provide substantial functional advantages over mechanical elbows, such as being easier and more natural to control than mechanical elbows.

The relevant geographic area in which to assess the competitive effects of the Acquisition is the United States. The United States has unique regulatory and reimbursement requirements that distinguish it from other countries where myoelectric elbows are sold, and manufacturers require U.S. sales and clinical personnel to support their U.S. clinic customers.

The U.S. market for myoelectric elbows is highly concentrated. Respondent College Park is a leading supplier of myoelectric elbows and Respondent Össur is currently developing its own myoelectric elbow. The only other participants in the U.S. myoelectric elbow market are Otto Bock Healthcare North America and Fillauer LLC.

EFFECTS OF THE ACQUSITION

Absent a divestiture, the Acquisition is likely to harm customers of myoelectric elbows in the United States. College Park is currently a leading manufacturer of myoelectric elbows in the United States. Össur is the largest prosthetic manufacturer in the United States that does not currently offer a myoelectric elbow, but it is developing a myoelectric elbow to enter the market. Absent the Acquisition, the highly concentrated myoelectric elbow market likely would benefit significantly from Össur's entry and Össur would compete directly for College Park's customers.

ENTRY

Entry into the myoelectric elbow market would not be timely, likely, or sufficient in magnitude, character, and scope to deter or counteract the anticompetitive effects of the proposed Acquisition. *De novo* entry is unlikely to occur in a timely manner because the time required for product development and market adoption is lengthy, and the only passive and body-powered elbow manufacturers already sell myoelectric elbows.

THE CONSENT AGREEMENT

The proposed Order would remedy the competitive concerns raised by the proposed transaction by requiring Össur to divest to Steeper the worldwide College Park myoelectric elbow business. The divestiture package consists of the following assets and rights: all assets and rights to research, develop, manufacture, market, and sell the College Park myoelectric elbow products, including all related intellectual property and other confidential business information, manufacturing technology, and existing inventory. Steeper will also be hiring several key College Park employees who are essential to the divested business. Additionally, the Order requires that,

at the request of Steeper, Össur must provide transitional assistance for up to fifteen months following the divestiture date (with an option to extend further with Commission approval). These services include logistical, administrative, and sales and marketing support.

The Order also includes other standard terms designed to ensure the viability of the divested business. The provisions of the proposed Consent Agreement positions Steeper to become an effective competitor in the market for myoelectric elbows in the United States.

Under the Order, College Park is required to divest its myoelectric elbow business no later than ten days from the close of its acquisition by Össur. If the Commission determines that Steeper is not an acceptable acquirer, or that the manner of the divestiture is not acceptable, the Order requires College Park to either unwind the sale of rights and assets to Steeper and then divest the assets to a Commission-approved acquirer within 180 days of the date the Order becomes final, or modify the divestiture to Steeper in the manner the Commission determines is necessary to satisfy the requirements of the Order.

The Order also requires a monitor to oversee Össur's compliance with the obligations set forth in the Order. If Össur does not fully comply with the divestiture and other requirements of the Order, the Commission may appoint a Divestiture Trustee to divest the myoelectric elbow assets and perform Össur's other obligations consistent with the Order. The Order also requires that Össur shall not, without providing advance written notification to the Commission, acquire any myoelectric prosthetic elbow manufacturer or product for a period of five years from the date the Order is issued.

The purpose of this analysis is to facilitate public comment on the Consent Agreement to aid the Commission in determining whether it should make the Consent Agreement final. This analysis is not an official interpretation of the proposed Consent Agreement and does not modify its terms in any way.

Complaint

IN THE MATTER OF

DANAHER CORPORATION
AND
GENERAL ELECTRIC COMPANY

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-4710; File No. 191 0082
Complaint, March 19, 2020 – Decision, March 19, 2020

This consent order addresses the $21.4 billion acquisition by Respondent Danaher Corporation of certain assets of Respondent General Electric Company's Biopharma business that would violate Section 7 of the Clayton Act and Section 5 of the Federal Trade Commission Act. The complaint alleges that the Acquisition may be to substantially lessen competition in microcarrier beads, conventional low-pressure liquid chromatography ("LPLC") columns, conventional LPLC skids, single-use LPLC, chromatography resins, LPLC continuous chromatography systems, and single-use tangential flow filtration ("TFF") systems. The consent order requires Respondents operate the hold separate businesses as independent, ongoing, economically viable businesses and take no action to integrate the operations of the hold separate businesses with other Danaher businesses.

Participants

For the *Commission*: *William Cooke* and *Lisa DeMarchi Sleigh.*

For the *Respondents*: *Leon Greenfield, Lauren Ige, Perry Lange, Gannam Rifkah,* and *Hartmut Schneider, WilmerHale; Deb Garza, Anne Lee,* and *Kavita Pillai, Covington & Burlington LLP; Sharis Pozen, Clifford Chance LLP.*

COMPLAINT

Pursuant to the Clayton Act and the Federal Trade Commission Act ("FTC Act"), and its authority thereunder, the Federal Trade Commission ("Commission"), having reason to believe that Respondent Danaher Corporation ("Danaher"), a company subject to the jurisdiction of the Commission, has made an offer to acquire the Biopharma business of GE Healthcare Life Sciences ("GE Biopharma"), a division of General Electric Company ("GE"), a company subject to the jurisdiction of the Commission, 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 Danaher is a corporation organized, existing, and doing business under and by virtue of the laws of the state of Delaware, with its executive and principal offices located at 2200 Pennsylvania Avenue, NW, Suite 800W, Washington, D.C. 20037. Danaher is engaged

in the development, manufacture, sale, and distribution of equipment used in several industries including life sciences, diagnostics, and environmental and applied solutions.

2. Respondent GE is a corporation organized, existing, and doing business under and by virtue of the laws of the state of New York, with its headquarters located at 41 Farnsworth Street, Boston, Massachusetts 02210. GE Biopharma is engaged in the development, manufacture, sale, and distribution of instruments, consumables, and software that support the research, discovery, process development, and manufacturing workflows of biopharmaceutical drugs.

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 Equity and Asset Purchase Agreement dated February 25, 2019, Respondent Danaher proposed to acquire the GE Biopharma business of Respondent GE in a transaction valued at approximately $21.4 billion (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. The relevant lines of commerce in which to analyze the effects of the Acquisition are (1) the research, development, manufacture, marketing, distribution, and sale of the following products, which are used to support the research, discovery, process development, and manufacturing workflows of biopharmaceutical drugs: (a) microcarrier beads; (b) conventional low-pressure liquid chromatography ("LPLC") columns; (c) conventional LPLC skids; (d) single-use LPLC; (e) chromatography resins; (f) LPLC continuous chromatography systems; and (g) single-use tangential flow filtration ("TFF") systems, and (2) the research, development, manufacture, marketing, distribution, and sale of label-free molecular characterization instruments.

a. Microcarrier beads are used in cell culture bioprocessing. They provide a surface for the anchorage of dependent cells to attach and grow in cell culture vessels and bioreactors;

b. LPLC columns separate wanted from unwanted molecules by using a liquid or gaseous phase to carry the cell mass through an adsorbent serving as a stationary phase. Conventional LPLC columns are containers that hold chromatography resins used as the adsorbent during the stationary phase. Columns are made of glass, stainless steel, acrylic glass, or plastic;

c. Conventional LPLC skids control the flow of liquid in the chromatography process. Conventional LPLC skids contain a system of pumps, valves,

sensors, tubing, electronic components, software, and flow paths composed of multi-use components;

d. Single-use LPLC skids control the flow of liquid in the chromatography process and have the same function as conventional LPLC skids except that the flow path is composed of single-use components;

e. Chromatography resins are chemically treated consumables that constitute the stationary phase of the LPLC process. Each resin type differs in its chemical characteristics and features so each is used for specific purification and production steps and the processing of particular molecules;

i. Affinity resins include resins that utilize specific binding interactions between a ligand that is immobilized to a resin and its binding partner but does not include protein A;

ii. Ion exchange resins include resins that separate molecules based on their total charge; and

iii. Mixed mode resins include resins that utilize matrices that have been functionalized with ligands capable of multiple interactions.

f. LPLC continuous chromatography systems allow for the simultaneous processing of multiple columns in LPLC. LPLC continuous chromatography systems consist of pumps, valves, sensors, tubing, electronic components, software, and flow paths composed of either multi-use or single-use components;

g. Single-use TFF systems control the filtration process, which removes unwanted molecules from the cell growth process through physical separation by running liquids through porous membranes. Single-use TTF systems include sensors, valves, safety and security items, software, and network communication hardware, as well as flow kits, manifolds, and pumps composed of single-use components; and

h. Label-free molecular characterization instruments characterize protein binding interaction and protein concentration based on measurement of the optical, calorimetric, electrical, acoustic, and other physical reactions to various stimuli.

6. The relevant geographic area in which to assess the competitive effects of the Acquisition is no narrower than the United States and may be as broad as the entire world.

IV. THE STRUCTURE OF THE MARKETS

7. Respondents Danaher and GE are two of a limited number of significant participants in the markets for microcarrier beads, conventional LPLC columns, conventional LPLC skids, single-use LPLC skids, chromatography resins, LPLC continuous chromatography systems, single-use TFF systems, and label-free molecular characterization instruments, and each relevant market is highly concentrated.

8. The microcarrier beads market is highly concentrated with only three significant suppliers, including Respondents. By their own estimate, the combined firm would have a market share of greater than 70 percent. The Acquisition substantially increases concentration in the microcarrier bead market and reduces the number of major suppliers from three to two.

9. The LPLC conventional chromatography columns market is highly concentrated with only three significant suppliers, including Respondents. Respondents estimate the combined firm would have a market share of greater than 45 percent. Several fringe firms also supply the market. The Acquisition substantially increases concentration in the market for conventional LPLC chromatography columns by reducing the number of major suppliers from three to two.

10. The market for conventional LPLC skids is highly concentrated, with only three significant suppliers. GE estimates it was the leading supplier of conventional LPLC skids with over 30 percent market share in 2018. Combined, Danaher and GE would have an even larger share of the market for conventional LPLC skids. Post-Acquisition, the combined firm would compete with only significantly smaller firms.

11. With only three significant suppliers, the single-use LPLC skids market is highly concentrated and GE is the dominant supplier with approximately 80 percent market share. The Acquisition increases concentration in this market and reduces the number of significant suppliers from three to two.

12. The markets for affinity, ion exchange, and mixed mode chromatography resins are highly concentrated. GE is the dominant supplier in each resin category, accounting for more than half of all sales in each market. Danaher and GE currently compete for sales in the markets for each resin. Post-Acquisition, the combined firm would compete with only considerably smaller firms. The Acquisition substantially increases the combined firm's market power in the markets for affinity, ion exchange, and mixed mode chromatography resins.

13. Danaher and GE are the leading suppliers in the market for continuous chromatography systems. Currently, Danaher has approximately 28 percent market share and GE has approximately 14 percent share. Only three other suppliers compete in this market, and the combined firm would have a market share of over 40 percent. The Acquisition substantially increases concentration in the market for continuous chromatography systems.

14. Danaher and GE are two of only three major competitors in the market for single-use TFF systems. GE's TFF system has gained significant market share since recently entering the market and currently competes closely with Danaher's system. Respondents estimate the

combined firm would have a market share of greater than 35 percent. The Acquisition will substantially increase concentration in the market for single-use TFF systems.

15. Danaher and GE currently compete in the market for label-free molecular characterization instruments where they are the two major suppliers. By their own estimates Danaher has approximately 23 percent share and GE has about 39 percent leaving the combined firm with share greater than 60 percent. The Acquisition substantially increases concentration in the market for label-free molecular characterization instruments.

V. ENTRY CONDITIONS

16. Entry or expansion into the relevant markets described in Paragraph 5 would not be timely, likely or sufficient in magnitude, character, and scope to deter or counteract the anticompetitive effects of the Acquisition.

17. Entry into each relevant market requires a significant amount of time and resources. In each relevant 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 into each relevant market must develop around or obtain licenses for existing intellectual property or design around existing intellectual property to compete effectively. Moreover, a potential entrant must establish a sufficient sales force that offers high-quality technical support and that can establish effective relationships with customers of the relevant products.

VI. EFFECTS OF THE ACQUISITION

18. The effects of the Acquisition, if consummated, may be to substantially lessen competition 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 Danaher and GE and reducing the number of competitors for the sale of each relevant product;

b. by increasing Respondent Danaher's ability to unilaterally exercise market power for each relevant product;

c. by increasing the likelihood that consumers would be forced to pay higher prices for each relevant product; and

d. by reducing Respondents Danaher's incentive to improve quality, service, and innovation for each relevant product.

VII. VIOLATIONS CHARGED

19. 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 nineteenth day of March, 2020 issues its Complaint against said Respondent.

By the Commission, Commissioners Chopra and Slaughter dissenting.

ORDER TO HOLD SEPARATE AND MAINTAIN ASSETS

The Federal Trade Commission initiated an investigation of the proposed acquisition by Respondent Danaher Corporation of Respondent General Electric Company's Biopharma business (each a "Respondent," and collectively "Respondents"). The Commission's Bureau of Competition prepared and furnished Respondents and Sartorius AG the Draft Complaint, which it proposed to present to the Commission for its consideration. If issued by the Commission, the Draft Complaint 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.

Respondents, Sartorius, and the Bureau of Competition executed an Agreement Containing Consent Order ("Consent Agreement") containing (1) an admission by Respondents and Sartorius of all the jurisdictional facts set forth in the Draft Complaint, (2) a statement that the signing of said agreement is for settlement purposes only and does not constitute an admission by Respondents that the law has been violated as alleged in the Draft Complaint, or that the facts as alleged in the Draft Complaint, other than jurisdictional facts, are true, (3) waivers and other provisions as required by the Commission's Rules, and (4) a proposed Decision and Order and Order to Hold Separate and Maintain Assets.

The Commission considered the matter and 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. The Commission accepted the Consent Agreement and placed it on the public record for a period of 30 days for the receipt and consideration of public comments; at the same time, it issued and served its Complaint and Order to Hold Separate and Maintain Assets. The Commission 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 Rule 2.34, the Commission makes the following jurisdictional findings:

1. Respondent Danaher is a corporation organized, existing, and doing business under, and by virtue of the laws of the State of Delaware with its executive offices and principal place of business located at 2200 Pennsylvania Avenue, NW, Suite 800W Washington, DC 20037.

2. Respondent GE is a corporation organized, existing, and doing business under and by virtue of the laws of the state of New York, with its headquarters located at 41 Farnsworth Street, Boston, Massachusetts 02210.

3. Sartorius is a corporation organized, existing and doing business under, and by virtue of, the laws of Germany with its headquarters at Otto-Brenner-Str. 20, 37079 Goettingen, Germany, and includes Sartorius Stedim North America Inc., a corporation organized, existing and doing business under, and by virtue of, the laws of the State of Delaware with its headquarters located at 565 Johnson Ave., Bohemia, New York 11716.

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

ORDER

I. Definitions

IT IS HEREBY ORDERED that, as used in this Order to Hold Separate and Maintain Assets, the following definitions, and all other definitions used in the Consent Agreement and the Decision and Order, shall apply:

A. "Decision and Order" means:

1. The proposed Decision and Order contained in the Consent Agreement in this matter, until issuance of a final Decision and Order by the Commission; and

2. The final Decision and Order, once it is issued by the Commission in this matter.

B. "Orders" means this Order to Hold Separate and Maintain Assets and the Decision and Order.

II. Hold Separate and Asset Maintenance

IT IS FURTHER ORDERED that:

A. During the Hold Separate Period, Respondent Danaher shall continue to operate the Hold Separate Businesses as independent, ongoing, economically viable businesses and shall: (1) hold them separate and apart from Respondent Danaher's other businesses, (2) take no action to integrate the operations of the Hold Separate Businesses with other Danaher businesses; (3) take no action to coordinate the operations of the Hold Separate Businesses with any other business of Respondent Danaher other than back office services, such as IT services and administration of compensation and benefits, as long as the confidentiality provisions of Paragraph V are complied with; and (4) vest them with all rights, powers, and authority necessary to conduct business in a manner consistent with the Orders.

B. Prior to the Acquisition Date, Respondent Danaher shall appoint Jeffrey Figg, Senior Vice President Finance for Pall, to oversee, subject to Respondent Danaher's Hold Separate Commitments to the European Commission, the operations of each Hold Separate Business and ensure Respondent Danaher's compliance with the Orders during the Hold Separate Period. Mr. Figg shall serve during the Hold Separate Period and shall have no duties related to the GE Biopharma business during the Hold Separate Period.

C. For the Divestiture Businesses during the Hold Separate Period, Respondent Danaher shall maintain, in accordance with sound accounting principles, separate, accurate, and complete financial ledgers, books, and records that report on a periodic basis, such as the last business day of every month, consistent with past practices, the assets, liabilities, expenses, revenues, and income of each.

D. During the Hold Separate Period, Respondent Danaher shall, subject to legal and regulatory requirements, operate the Divestiture Businesses in the ordinary course of business consistent with past practices, including:

1. Maintaining the Divestiture Businesses in substantially the same condition (except for normal wear and tear) existing on December 18, 2019, and maintaining relations and good will with employees, suppliers, customers, landlords, creditors, agents, and others having business relationships with the Divestiture Businesses;

2. Providing the Divestiture Businesses with sufficient financial and other resources to:

a. Operate the Divestiture Businesses Assets and the Divestiture Businesses at least at the current rate of operation and staffing and to carry out, at their scheduled pace, all business plans, sales and

promotional activities in place prior to the date the Acquisition was announced;

b. Perform all maintenance to, and replacements or remodeling of, the assets of the Divestiture Businesses in the ordinary course of business and in accordance with past practice and current plans, and

c. 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;

3. Preserving the Divestiture Businesses Assets and the Divestiture Businesses as ongoing businesses; and

4. Taking or failing to take any actions that would diminish the viability, competitiveness, and marketability of the Divestiture Businesses Assets or the Divestiture Businesses.

E. Until such time as the Acquirer replicates the manufacture, assembly, testing, packaging, and selling of products related to Flow Kit Consumables in a manner that fulfills the Acquirer's worldwide demand, Respondent Danaher:

1. Shall take actions as are necessary to operate the equipment related to Flow Kit Consumables in the regular and ordinary course of business and in accordance with past practices and in a manner consistent with applicable laws and regulation; and

2. Prevent the destruction, removal, wasting, deterioration, or impairment of the Flow Kit Consumables; and

F. Shall not take any actions to reduce the availability of the services of the current officers, employees, and agents of Respondent Danaher required to operate and maintain the equipment related to Flow Kit Consumables. Until 12 months after the Divestiture Date, Respondent Danaher shall require that each sales or marketing employee who was employed by Pall Corporation prior to the Divestiture Date sign a confidentiality agreement that prohibits the employee from disclosing Confidential Business Information regarding the Divestiture Businesses and opportunities for the sale of products marketed by the Divestiture Businesses.

G. Until 3 days after the Divestiture Date, Respondent Danaher shall continue the Special Sales Incentive Program and Clarifications to the Sales Incentive Program listed in non-public Appendix G of the Decision and Order, and shall provide Pall Corporation sales and marketing staff with written notification explaining the Special Sales Incentive Program and Clarifications to the Sales Incentive Program

on or before the Acquisition Date. Written notification shall be reviewed and approved by the Monitor, and shall include a requirement that the recipient acknowledge receipt and confirm his or her understanding of the notification.

III. Employees

IT IS FURTHER ORDERED that:

A. Until a year after the Divestiture Date, Respondent Danaher shall cooperate with and assist the Acquirer of the Divestiture Businesses Assets to evaluate independently and offer employment to the Relevant Employees, with such cooperation to include at least the following:

1. Not later than 5 business days after a request from the Acquirer, Respondent Danaher shall, to the extent permitted by applicable law:

   a. Provide to the Acquirer a list of all Relevant Employees and provide Employee Information for each; and

   b. Allow the Acquirer a reasonable opportunity to interview any Relevant Employees;

2. Not later than 10 days after a request from the Acquirer, Respondent Danaher shall provide an opportunity for the Acquirer to:

   a. Meet personally, and outside the presence or hearing of any employee or agent of Respondent Danaher, with any of the Relevant Employees; and

   b. Make offers of employment to any of the Relevant Employees;

3. Respondent Danaher shall not directly or indirectly interfere with the Acquirer's offer of employment to any one or more of the Relevant Employees, not offer any incentive to Relevant Employees to decline employment with the Acquirer, and not otherwise interfere with the recruitment of any Relevant Employees by the Acquirer;

4. Respondent Danaher shall remove any impediments within its control that may deter any Relevant Employees from accepting employment with the Acquirer, including, but not limited to, removal of any non-compete or confidentiality provisions of employment or other contracts with Respondent Danaher that may affect the ability or incentive of those individuals to be employed by the Acquirer, and shall not make any counteroffer to any Relevant Employees who receive an offer of employment from the Acquirer; *provided, however*, that nothing in the Orders shall be construed to require Respondent Danaher to terminate the

employment of any employee or prevent Respondent Danaher from continuing the employment of any employee;

5. Respondent Danaher shall provide Relevant Employees with reasonable financial incentives to continue in their positions, and as may be necessary to facilitate the employment of such Relevant Employees by the Acquirer. Such incentives shall include a continuation of all employee compensation and benefits offered by Respondent Danaher, including regularly scheduled or merit raises and bonuses, regularly scheduled vesting of pension benefits, and additional reasonable incentives as may be necessary.

6. If the Acquirer has made a written offer of employment to any Key Employee, provide such Key Employee with reasonable financial incentives to accept a position with the Acquirer, including payment of an incentive equal to up to 3 months of such Key Employee's base salary to be paid only upon such Key Employee's completion of 1 year of employment with the Acquirer.

   Provided, however, that for a period of 1 year from the Divestiture Date, Respondent Danaher, the Acquirer, and the Monitor will work together in good faith to determine whether any additional Relevant Employees should be identified as a Key Employee and subject to the provisions of this Paragraph III.A.6.

   Provided further, however, the total number of Relevant Employees, including Key Employees, shall not exceed 43 employees.

B. Respondent Danaher shall:

1. For a period of 1 year from the Divestiture Date, not directly or indirectly solicit or induce, or attempt to solicit or induce, any Relevant Employee who has accepted an offer of employment with, or who is employed by, an Acquirer to terminate his or her employment relationship with the Acquirer.

2. For a period of 2 years from the Divestiture Date, not directly or indirectly solicit or induce, or attempt to solicit or induce, any Key Employee who has accepted an offer of employment with, or who is employed by, an Acquirer to terminate his or her employment relationship with the Acquirer.

Provided, however, a violation of this Paragraph III.B will not occur if:

1. The employee's employment has been terminated by the Acquirer;

2. Respondent Danaher advertises for employees in newspapers, trade publications, or other media not targeted specifically at any one or more of the employees of the Acquirer; or

3. Respondent Danaher hires an employee who has applied for employment with Respondent Danaher, provided that such application was not solicited or induced in violation of the Orders.

IV. Transition Assistance

IT IS FURTHER ORDERED that:

A. Respondent Danaher shall provide Transition Services that are sufficient to (i) efficiently transfer the Divestiture Businesses Assets to the Acquirer and (ii) enable the Acquirer to operate the Divestiture Businesses Assets and Divestiture Businesses in a manner equivalent in all material respects to the manner in which Respondent Danaher operated the Divestiture Businesses Assets and Divestiture Businesses prior to the Acquisition Date and shall provide Transition Services:

1. As set forth in a Divestiture Agreement, or as otherwise reasonably requested by the Acquirer (whether before or after the Divestiture Date);

2. At the price set forth in a Divestiture Agreement or otherwise mutually agreed to, or at Direct Cost; and

3. Until the later of 24 months after the Divestiture Date or a period sufficient to meet the requirements of this paragraph.

B. Respondent Danaher shall permit the Acquirer to stop receiving any type of Transition Services and any Transition Product upon commercially reasonable notice and without cost or penalty.

C. Respondent Danaher, in consultation with the Acquirer, for the purposes of ensuring an orderly transition of the Divestiture Businesses and the Divestiture Businesses Assets, shall:

1. Develop and implement a detailed transition plan to ensure that the commencement of the operation of the Divestiture Businesses by the Acquirer is not delayed or impaired by the Respondent Danaher;

2. Designate employees of Respondent Danaher who are knowledgeable about the operation of each of the Divestiture Businesses to be responsible for communicating directly with the Acquirer and the Monitor to assist in the transferring the Divestiture Businesses and the Divestiture Businesses Assets to the Acquirer;

3. Until Respondent Danaher has transferred to the Acquirer all Business Information included in the Divestiture Businesses Assets, Respondent Danaher shall provide the Acquirer with access to records and information (wherever located and however stored) that Respondent Danaher has not

yet transferred, and to employees who possess or are able to locate the records and information; and

4. Establish projected timelines for accomplishing all tasks necessary to transfer the Divestiture Businesses Assets and enable the Acquirer to operate the Divestiture Businesses in an efficient and timely manner.

D. Respondent Danaher shall supply Acquirer with each Transition Product pursuant to the Divestiture Agreement that has been approved by the Commission for a period sufficient for Acquirer to find alternative sources or independently manufacture the Transition Product in a manner that allows Acquirer to fulfill its worldwide demand.

E. Respondent Danaher shall not cease providing Transition Assistance or supplying Transition Products due to a breach by the Acquirer of the Divestiture Agreement or any other agreement through which Respondent Danaher provides Transition Assistance or supplies a Transition Product.

F. Respondent Danaher shall not enter into any agreement, including the Divestiture Agreement, with the Acquirer that limits the Acquirer's ability to seek any type or amount of damages for breach of Respondent Danaher's obligations relating to Transition Services or supplying Transition Products.

V. Confidentiality Obligations

IT IS FURTHER ORDERED that:

A. Respondent Danaher shall:

1. Maintain the confidentiality, and prevent the disclosure of, Confidential Business Information regarding the Divestiture Businesses Assets and the Divestiture Businesses ("Confidential Divestiture Information") by, *inter alia*:

a. Providing, disclosing or using Confidential Divestiture Information only as necessary to provide Transition Services to the Acquirer, supply Transition Products to the Acquirer, or comply with any legal or regulatory requirement, and

b. Requiring all employees and representatives who possess or are provided with Confidential Divestiture Information to execute non-disclosure agreements that prevent the use or disclosure of Confidential Divestiture Information for purposes not authorized by the Orders;

2. Institute procedures and requirements to ensure that the employees providing Transition Services or supplying Transition Products to the Acquirer do not provide, disclose, or otherwise make available, directly or indirectly, any Confidential Divestiture Information in contravention of the Orders and do not solicit, access, or use any Confidential Divestiture Information that they are prohibited from receiving for any reason or purpose;

3. Upon the request of the Acquirer, destroy any copies of Confidential Divestiture Information (other than electronic copies of Confidential Divestiture Information created as a result of automatic back-up procedures) within 30 days of such request *except* as otherwise agreed to between Respondent Danaher and the Acquirer or to the extent necessary to comply with applicable law; and

4. Take all action necessary and appropriate to prevent access to, and the disclosure or use of, the Confidential Divestiture Information by or to any Person(s) not authorized to access, receive, and/or use such information pursuant to the terms of the Orders, including:

   a. Establishing and maintaining appropriate firewalls, confidentiality protections, internal practices, training, communications, protocols, and system and network controls and restriction, and

   b. Ensuring by other reasonable and appropriate means that the Confidential Divestiture Information is not shared with any employee of Respondent Danaher personnel engaged in any business that competes with one or more of the Divestiture Businesses.

B. Not later than 30 days after the Divestiture Date, Respondent Danaher shall provide written notification of the restrictions on the use and disclosure of the Confidential Divestiture Information to all employees who (i) may be in possession of such Confidential Business Information or (ii) may have access to such Confidential Business Information. Respondent Danaher 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 Divestiture Date. Respondent Danaher shall provide a copy of the notification to the Acquirer. Respondent Danaher shall maintain complete records of all such notifications at Respondent Danaher's registered office within the United States of America. Respondent Danaher shall provide the Acquirer with copies of all certifications, notifications, and reminders sent to Respondent Danaher's personnel.

VI. Monitor

IT IS FURTHER ORDERED that:

A. Mazars LLP is appointed Monitor to ensure that Respondent Danaher expeditiously complies with all of its obligations and perform all of its responsibilities as required by the Orders.

B. No later than one day after the Commission issues this Order, Respondent Danaher shall, pursuant to the Monitor Agreement, attached as Appendix D and Non-Public Appendix E (Compensation) to the Decision and Order, transfer to the Monitor all the rights, powers, and authorities necessary to permit the Monitor to perform his duties and responsibilities in a manner consistent with the purposes of the Orders.

C. The Monitor shall serve, without bond or other security, at the expense of Respondent Danaher, on such reasonable and customary terms and conditions as the Commission may set. The Monitor shall have authority to employ, at the expense of Respondent Danaher, such consultants, accountants, attorneys and other representatives and assistants as are reasonably necessary to carry out the Monitor's duties and responsibilities. The Monitor shall account for all expenses incurred, including fees for services rendered, subject to the approval of the Commission;

D. Respondent Danaher shall provide the Monitor with the power and authority to monitor Respondent Danaher's compliance with the terms of the Orders and Divestiture Agreements, and shall exercise such power and authority and carry out the duties and responsibilities of the Monitor in a manner consistent with the purposes of the Orders, and in consultation with the Commission, including, but not limited to:

1. Ensuring that Respondent Danaher expeditiously complies with all obligations and performs all responsibilities as required by the Orders and the Divestiture Agreement;

2. Monitoring any transition services agreements; and

3. Ensuring that Confidential Business Information is not received or used by Respondent Danaher, except as allowed in the Orders;

4. Subject to any demonstrated legally recognized privilege, full and complete access to Respondent Danaher'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 Danaher's compliance with their obligations under the Orders and the Divestiture Agreement. Respondent Danaher 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 Danaher's compliance with the Orders and the Divestiture Agreements;

5. Provide the Monitor with copies of all reports Respondent Danaher is required to submit to the Commission or Commission staff pursuant to the Orders.

E. The Monitor is an independent third party and not as an employee or agent of the Respondent Danaher or of the Commission;

F. The Monitor's appointment shall last for such time as is necessary to monitor Respondent Danaher's compliance with the provisions of the Orders and the Divestiture Agreements;

G. Respondent Danaher 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. In connection with its appointment by the Commission, the Monitor shall report in writing to the Commission evaluating reports Respondent Danaher has submitted to the Commission and describing Respondent Danaher's performance of its obligations under the Orders. The Monitor shall submit a report to staff of the Commission one month after the Commission issues the Orders, every 60 days thereafter, and at such other times as staff of the Commission may request.

I. Respondent Danaher may require the Monitor and each of the Monitor's consultants, accountants, attorneys, and other representatives and assistants to sign a customary confidentiality agreement so long as such agreement shall not restrict the Monitor's ability to provide information to the Commission or require the Monitor to inform Respondent Danaher of the substance of communications with 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 relating 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. In the event a substitute Monitor is required, the Commission shall select the Monitor, subject to the consent of Respondent Danaher, which consent shall not be unreasonably

withheld. If Respondent Danaher has not opposed, in writing, including the reasons for opposing, the selection of a proposed Monitor within 10 days after notice by the staff of the Commission to Respondent Danaher of the identity of any proposed Monitor, Respondent Danaher shall be deemed to have consented to the selection of the proposed Monitor. Not later than ten 10 days after appointment of a substitute Monitor, Respondent Danaher 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 Danaher's compliance with the terms of the Orders and the Divestiture Agreements 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 Orders and the Divestiture Agreements.

The Monitor appointed pursuant to the Orders may be the same Person appointed as a Divestiture Trustee pursuant to the Orders.

VII. Divestiture Trustee

IT IS FURTHER ORDERED that:

A. If Respondent Danaher has not fully complied with the obligations imposed by the Orders, the Commission may appoint a Divestiture Trustee to divest any of the Divestiture Businesses, and perform Respondent Danaher's other obligations in a manner that satisfies the requirements of the Orders. In the event that the Commission or the Attorney General brings an action pursuant to Section 5(*l*) of the Federal Trade Commission Act, 15 U.S.C. § 45(*l*), or any other statute enforced by the Commission, Respondent Danaher 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 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 Respondent Danaher to comply with the Orders.

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

C. Not later than 10 days after the appointment of a Divestiture Trustee, Respondent Danaher 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, the Orders.

D. If a Divestiture Trustee is appointed by the Commission or a court pursuant to this Paragraph VII, Respondent Danaher 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, the Orders;

2. The Divestiture Trustee shall have one 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 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 up to 2 times 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 divested by the Decision and Order and to any other relevant information, as the Divestiture Trustee may request. Respondent Danaher shall develop such financial or other information as the Divestiture Trustee may request and shall cooperate with the Divestiture Trustee. Respondent Danaher shall take no action to interfere with or impede the Divestiture Trustee's accomplishment of the divestiture. Any delays caused by Respondent Danaher 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 Respondent Danaher's absolute and unconditional obligation to divest expeditiously and at no minimum price and in a manner and to an Acquirer approved by the Commission.

5. 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 Danaher from among those approved by the Commission unless the Respondent Danaher fails to make a selection within 5 days after receiving notification of the Commission's approval;

6. The Divestiture Trustee shall serve, without bond or other security, at the cost and expense of Respondent Danaher, 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 Danaher, 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 Danaher, 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 the Decision and Order;

7. Respondent Danaher 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;

8. The Divestiture Trustee shall have no obligation or authority to operate or maintain the relevant assets required to be divested by the Decision and Order;

9. The Divestiture Trustee shall report in writing to Respondent Danaher and to the Commission every 30 days concerning the Divestiture Trustee's efforts to accomplish the divestiture;

10. Respondent Danaher 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; and

11. 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 the Orders.

VIII Prior Approval and Prior Notice

IT IS FURTHER ORDERED that:

A. For a period lasting until 3 years after the Divestiture Date, Sartorius shall not sell, transfer or otherwise convey, directly or indirectly, any interest in the Pall Businesses to any Person without the prior approval of the Commission.

B. For a period lasting until 3 years after the Divestiture Date, Sartorius shall not acquire any interest in the Prior Approval Business (as defined in non-public Appendix F to the Decision and Order) or any assets used in the Prior Approval Business without the prior approval of the Commission.

C. For a 2 year period commencing 3 years after the Divestiture Date, Sartorius shall not, without providing prior notification to the Commission in the manner described in this Paragraph VIII, acquire any assets of, or any financial, ownership, or interest in the Prior Approval Business.

1. Said prior notification under this Paragraph shall be in the form of a letter submission with attachments, and shall contain the following:

a. A written description of the transaction, including the identification of the assets involved, Sartorius' plans for the Prior Notice Business; and how the acquired assets will be integrated into Sartorius' existing businesses;

b. The proposed acquisition agreement with all attachments or, if no agreement exists, a detailed term sheet for the proposed acquisition;

c. All recommendation or approval materials, including any analyses used to support those recommendations or approvals, relating to the proposed acquisition (including materials prepared by or for any board, management committee, or executive committee);

d. A description of the projected or likely effects of the transaction on revenues, operations, or capital expenditures; and

e. All other documents that would be responsive to Items 4(c) and 4(d) of the Premerger Notification and Report Form under the Hart-Scott-Rodino Premerger Notification Act, Section 7A of the Clayton Act, 14 U.S.C. § 18a, and Rules, 16 C.F.R. § 801-803, relating to the proposed transaction and not otherwise provided.

2. Sartorius shall verify the notification in the manner set forth in 28 U.S.C. § 1746 by the Chief Executive Officer or another officer or employee specifically authorized to perform this function, and shall attest that a contract, agreement in principle, or letter of intent to merge or acquire has been executed, and further attest to the good faith intention of Sartorius to complete the noticed transaction. Sartorius shall file an original and one copy of the notification only with the Secretary of the Commission, and need not make any filing to the United States Department of Justice. Notification is required from Sartorius and not from any other party to the transaction. No filing fee will be required for any such notification.

3. Sartorius shall provide prior notification to the Commission at least 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), Sartorius shall not consummate the transaction until 30 days after submitting such additional information or documentary material. Early termination of the waiting periods in this Paragraph VIII may be requested and, where appropriate, granted by letter from staff of the Bureau of Competition.

Provided, however, that prior notification shall not be required by this Paragraph VIII 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.

IX. Compliance Reports

IT IS FURTHER ORDERED that:

A. Respondent Danaher shall file verified written reports ("compliance reports") in accordance with the following:

1. Respondent Danaher shall submit compliance reports 30 day after the Commission issue this Order to Hold Separate and Maintain Assets and every 30 days thereafter until the Commission issues a Decision and Order in this matter.

2. Each compliance report shall contain sufficient information and documentation to enable the Commission to determine independently whether Respondent Danaher is complying with its obligations under the Orders. Conclusory statements that Respondent Danaher has complied with its obligations are insufficient. Respondent Danaher shall include in its reports, among other information or documentation that may be necessary to demonstrate compliance, a full description of the measure Respondent Danaher has implemented or plans to implement to ensure that it has complied or will comply with each paragraph of the Orders;

3. Respondent Danaher shall retain all material written communications with each party identified in the compliance report and all non-privileged internal memoranda, reports, and recommendations concerning fulfilling Respondent Danaher's obligations under the Orders and provide copies of these documents to Commission staff upon request.

4. Respondent Danaher shall verify each compliance report in the manner set forth in 28 U.S.C. § 1746 by the Chief Executive Officer or another officer or employee specifically authorized to perform this function. Respondent Danaher shall submit an original and 2 copies of each compliance report as required by Commission Rule 2.41(a), 16 C.F.R. § 2.41(a), including a paper original submitted to the Secretary of the Commission and electronic copies to the Secretary at ElectronicFilings@ftc.gov and to the Compliance Division at bccompliance@ftc.gov. In addition, Respondent Danaher shall provide a copy of each compliance report to the Monitor if the Commission has appointed one in this matter.

Provided, however, that, after the Decision and Order in this matter is issued as final, the reports due under this Order to Maintain Assets may be consolidated with, and submitted to the Commission on the same timing as, the compliance reports required to be submitted by Respondent Danaher pursuant to the Decision and Order.

X. Change in Respondent Danaher

IT IS FURTHER ORDERED that Respondent Danaher shall notify the Commission at least 30 days prior to:

A. The dissolution of Danaher Corporation;

B. The acquisition, merger or consolidation of Danaher Corporation; or

C. Any other change in Respondent Danaher, including assignment and the creation, sale, or dissolution of subsidiaries, if such change may affect compliance obligations arising out of the Orders.

XI. Access

IT IS FURTHER ORDERED that, for purposes of determining or securing compliance with the Orders, and subject to any legally recognized privilege, upon written request and 5 days' notice to Respondent Danaher, made to its principal place of business as identified in the Orders, registered office of its United States subsidiary, or its headquarters office, Respondent Danaher shall, without restraint or interference, permit any duly authorized representative of the Commission:

A. Access, during business office hours of Respondent Danaher and in the presence of counsel, to all facilities and access to inspect and copy all business and other records and all documentary material and electronically stored information as defined in Commission Rules 2.7(a)(1) and (2), 16 C.F.R. § 2.7(a)(1) and (2), in the possession or under the control of Respondent Danaher related to compliance with the Orders, which copying services shall be provided by Respondent Danaher at the request of the authorized representative of the Commission and at the expense of the Respondent Danaher; and

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

XII. Purpose

IT IS FURTHER ORDERED that the purpose of the Orders is to ensure the continuation of the Divestiture Businesses as ongoing viable businesses engaged in the same business in which the assets were engaged at the time of the announcement of the Acquisition, and to remedy the lessening of competition resulting from the Acquisition as alleged in the Commission's Complaint in this matter.

XIII. Term

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

A. 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 Respondent Danaher's (or a Divestiture Trustee's) completion of the divestitures required by Paragraph II of the Decision and Order;

Provided, however, that if at the time such divestitures have been completed, the Decision and Order in this matter is not yet final, then this Order to Hold Separate and Maintain Assets shall terminate three business days after the Decision and Order becomes final;

Provided, further, however, that if the Commission, pursuant to Paragraph II.H of the Decision and Order, requires Respondent Danaher to rescind the divestiture to Sartorius, then, upon rescission, the requirements of this Order to Hold Separate and Maintain Assets shall again be in effect until the day after Respondent Danaher's (or a Divestiture Trustee's) completion of the divestiture of the assets required by the Decision and Order.

By the Commission, Commissioners Chopra and Slaughter dissenting.

DECISION

The Federal Trade Commission initiated an investigation of the proposed acquisition by Respondent Danaher Corporation of Respondent General Electric Company's Biopharma business (each a "Respondent," and collectively "Respondents"). The Commission's Bureau of Competition prepared and furnished Respondents and Sartorius AG the Draft Complaint, which it proposed to present to the Commission for its consideration. If issued by the Commission, the Draft Complaint 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.

Respondents, Sartorius, and the Bureau of Competition executed an Agreement Containing Consent Order ("Consent Agreement") containing (1) an admission by Respondents and Sartorius of all the jurisdictional facts set forth in the Draft Complaint, (2) a statement that the signing of said agreement is for settlement purposes only and does not constitute an admission by Respondents that the law has been violated as alleged in the Draft Complaint, or that the facts as alleged in the Draft Complaint, other than jurisdictional facts, are true, (3) waivers and other provisions as required by the Commission's Rules, and (4) a proposed Decision and Order and Order to Hold Separate and Maintain Assets.

The Commission considered the matter and 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. The Commission accepted the Consent Agreement and placed it on the public record for a period of 30 days for the receipt and consideration of public comments; at the same time, it issued and served its Complaint and Order to Hold Separate and Maintain Assets. The Commission 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 Rule 2.34, the Commission makes the following jurisdictional findings:

1. Respondent Danaher is a corporation organized, existing, and doing business under, and by virtue of the laws of the State of Delaware with its executive offices and principal place of business located at 2200 Pennsylvania Avenue, NW, Suite 800W Washington, DC 20037.

2. Respondent GE is a corporation organized, existing, and doing business under and by virtue of the laws of the state of New York, with its headquarters located at 41 Farnsworth Street, Boston, Massachusetts 02210.

3. Sartorius is a corporation organized, existing and doing business under, and by virtue of, the laws of Germany with its headquarters at Otto-Brenner-Str. 20, 37079 Goettingen, Germany, and includes Sartorius Stedim North America Inc., a corporation organized, existing and doing business under, and by virtue of, the laws of the State of Delaware with its headquarters located at 565 Johnson Ave., Bohemia, New York 11716.

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

ORDER

I. Definitions

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

A. "Danaher" means Danaher Corporation, its directors, officers, employees, agents, representatives, successors, and assigns; and the joint ventures, subsidiaries, partnerships, divisions, groups, and affiliates controlled by Danaher Corporation, and the respective directors, officers, employees, agents, representatives, successors, and assigns of each.

B. "GE" mean General Electric Company, its directors, officers, employees, agents representatives, successors, and assigns; and the joint ventures, subsidiaries, partnerships, divisions, groups, and affiliates controlled by General Electric Company, and the respective directors, officers, employees, agents, representatives, successors, and assigns of each.

C. "Sartorius" means Sartorius AG, a German corporation with its principal executive offices located at Otto-Brenner-Str. 20, 37079 Goettingen, Germany.

D. "Commission" means the Federal Trade Commission.

E. "Acquirer" means:

1. Sartorius; or

2. Any other Person that the Commission approves to acquire one or more Divestiture Business(es) pursuant to this Decision and Order.

F. "Acquisition" means the proposed acquisition described in the Equity and Asset Purchase Agreement, dated February 25, 2019, between GE and Danaher.

G. "Acquisition Date" means the date on which Respondents consummate the Acquisition.

H. "Business Information" means all books, records, data, and information, wherever located and however stored, relating to the Divestiture Businesses Assets or used in one or more Divestiture Businesses, including documents, written information, graphic materials, and data and information in electronic format, along with the unwritten knowledge of employees, contractors and representatives. Business Information includes Respondent Danaher's right and control over information and material provided to any other person.

I. "Chromatography Hardware Business" means the research, development, manufacture, commercialization, distribution, marketing, advertisement, sale, and servicing of conventional chromatography columns, conventional (stainless steel) and single-use chromatography skids, and BioSMB continuous chromatography skids (which includes a process development offering known as BioSMB PD and two process scale offerings known as BioSMB Process 80 and 350) by Respondent Danaher. The business comprises the Flow Kit Consumables, and all related parts and equipment used in process development, pilot-scale and commercial production for chromatography columns, and simulated moving bed chromatography hardware and software, as well as customizable and standard platform single-use chromatography and conventional stainless steel chromatography systems for equilibration, product load, buffer wash, product elute and rinse of chromatography columns packed with resin for chromatography skids.

J. "Confidential Business Information" means any non-public Business Information relating to the Divestiture Businesses Assets or the Divestiture Businesses:

1. Obtained by Respondent Danaher prior to the Divestiture Date; or

2. Obtained by Respondent Danaher after the Divestiture Date, in the course of performing Respondent Danaher's obligations under this Order or any Divestiture Agreement (including any Transition Services agreement),

provided, however, Confidential Business Information shall not include Business Information that has entered the public domain through no act or failure to act by Respondent Danaher.

K. "Consent" means any approval, consent, ratification, waiver, or other authorization.

L. "Direct Cost" means a cost not to exceed the cost of labor, material, travel, and other expenditures to the extent the costs are directly incurred to provide the relevant assistance or service. Direct Cost to the Acquirer for its use of any of Respondent Danaher's employees shall not exceed the then-current average hourly wage rate (including benefits) for such employees.

M. "Divestiture Agreement(s)" means:

1. Purchase Agreement by Respondent Danaher and Sartorius dated October 18, 2019, and all amendments, exhibits, attachments, agreements (including the Transition Services Agreement, Supply and Service Agreement, and Intellectual Property License Agreement), and schedules thereto, attached to this Decision and Order as Non-Public Appendix A; or

2. Any agreement between Respondent Danaher (or a Divestiture Trustee appointed pursuant to Paragraph IX of this Order) and an Acquirer to purchase the Divestiture Businesses Assets, and all amendments, exhibits, attachments, agreements, and schedules thereto.

N. "Divestiture Businesses" means the Molecular Characterization Business, Microcarriers and PVS Business, Resins Business, Chromotography Hardware Business, and the SUT TFF Business.

O. "Divestiture Businesses Assets" means all Respondent Danaher's legal or equitable rights, title, and interests in and to all tangible and intangible assets that are not Excluded Assets, wherever located, relating to the Divestiture Businesses, including:

1. Real property interests owned, leased or otherwise held including easements and appurtenances, together with buildings, facilities and other structures, and improvements thereto, including:

a. The Cergy facility (land and building) owned and operated by Respondent Danaher that currently houses the Resins Business located at 48 Avenue des Genottes, 95800, Cergy, France.

b. Leases to the following real property sites:

i. The Freemont facility, leased by Molecular Devices LLC from PLDSPE LLC, located at 47661 Fremont Boulevard, Fremont, 94538, California, USA;

ii. The Shanghai facility, leased by Pall ForteBio Analytics (Shanghai) Co, Ltd. from Haowei Science and Technology Co., located at No. 88 Shang Ke Road, 3rd Floor Zhangjiang Hi-tech Park, Shanghai, 201210, China; and

iii. The Ann Arbor facility, leased by Pall Corporation from AA Commerce Park JV, L.L.C., located at 4370 Varsity Drive Suite B, Ann Arbor, 48108, MI, USA.

iv. The Hopkinton facility, leased by Pall Corporation from O'Brien Investment Management, LLC, located at 116-118 South Street, Hopkinton, Massachusetts.

2. Intangible rights and property, including Intellectual Property, owned, used, or licensed (as licensor or licensee) by Respondent Danaher, going concern value, goodwill, and telephone listings, internet sites and social media accounts;

3. Tangible personal property, whether owned or leased, including machinery, equipment, tools, furniture, office equipment, computer hardware, supplies, materials, vehicles, together with all express or implied warranties by manufacturers, sellers or lessors and all maintenance records and operating manuals;

4. Inventories;

5. Business Information;

6. Governmental authorizations and all pending applications for governmental authorizations;

7. At the option of the Acquirer, any equipment used by Respondent Danaher to manufacture, assemble, test, package, or sell flow kit consumables for the Flow Kit Consumables Business;

8. The content related exclusively to one or more Divestiture Businesses that is displayed on any website that is not dedicated exclusively to Divestiture Businesses; and

9. Contracts and all outstanding offers or solicitations to enter into any Contract, and all rights thereunder and related thereto, *provided, however*, that Replacement Contracts may be substituted for Shared Contracts.

P. "Divestiture Date" means the date on which Respondent Danaher (or a Divestiture Trustee appointed pursuant to Paragraph IX of this Order) consummates the divestiture of the Divestiture Businesses Assets as required by Paragraph II of this Order.

Q. "Divestiture Trustee" means the person appointed pursuant to Paragraph IX of this Order.

R. "Employee Information" means, for each Relevant Employee, the following information summarizing the employment history of each employee that includes, as requested by the proposed Acquirer and to the extent permitted by applicable 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 Respondent Danaher's last fiscal year, and current target or guaranteed bonus, if any;

5. Written performance reviews for the past three years, if any;

6. Employment status (*i.e.,* active or on leave or disability; full-time or part-time);

7. Any other material terms and conditions of employment in regard to such employee that are not otherwise generally available to similarly situated employees; and

8. At the proposed Acquirer's option, copies of all employee benefit plans and summary plan descriptions (if any) applicable to the employee;

S. "Excluded Assets" means the assets listed in non-public Appendix B.

T. "Flow Kit Consumables" means the research, development, assembly, commercialization, distribution, marketing, advertisement, sale, and servicing of flow kit consumables for use and sale with products manufactured by Respondent Danaher's SUT TFF Business and Chromatography Hardware Business.

U. "ForteBio Molecular Characterization Business" means the research, development, manufacture, commercialization, distribution, marketing, advertisement, sale, and servicing of the ForteBio molecular characterization instruments and consumables by Respondent Danaher, which comprise instruments and related consumables that enable label-free qualification and real-time kinetic analysis of biomolecular research and development.

V. "Hold Separate Businesses" means Respondent Danaher's ForteBio Molecular Characterization Business and Respondent Danaher's subsidiary Pall Corporation.

W. "Hold Separate Commitments" means Respondent Danaher's commitment to hold separate each Divestiture Business pursuant to the European Commission's conditional approval of the Acquisition on December 18, 2019.

X. "Hold Separate Period" means the period from the Acquisition Date until one day after all of the Divestiture Businesses Assets have been finally transferred to the Acquirer.

Y. "Intellectual Property" means intellectual property of any kind including, but not limited to, patents, patent applications, mask works, trademarks, service marks, copyrights, trade dress, commercial names, internet web sites, internet domain names, inventions, discoveries, written and unwritten know-how, trade secrets, and proprietary information.

Z. "Key Employees" means the employees listed in non-public Appendix C to this Order.

AA. "Licensed Intellectual Property" means any Intellectual Property licensed by Respondent Danaher, and all associated rights, thereto, relating to the Divestiture Businesses.

BB. "Microcarriers and PVS Business" means the research, development, manufacture, commercialization, distribution, marketing, advertisement, and sale of microcarriers and particle validation standards ("PVS") by Respondent Danaher, which comprise polystyrene microbeads used in bioreactors upstream to promote attachment and growth of certain cells as well as the particle validation standards business, and custom-manufactured defect test kits.

CC. "Monitor" means the person approved by the Commission to serve as Monitor pursuant to this Order or the Order to Hold Separate and Maintain Assets.

DD. "Orders" means this Decision and Order and the related Order to Hold Separate and Maintain Assets.

EE. "Pall Businesses" means the Chromatography Hardware Business, SUT TFF Business, and the Resins Business.

FF. "Person" means any individual, partnership, firm, corporation, association, trust, unincorporated organization, or other entity of governmental body.

GG. "Relevant Employees" means all full-time, part-time and contract employees of Respondent Danaher whose duties, in whole or part, relate to the Divestiture Businesses at any time during the 18 months prior to the Acquisition Date and who are not employees of the Acquirer the day after the Divestiture Date. Key Employees are Relevant Employees.

HH. "Replacement Contracts" means (i) Contracts entered into by the Acquirer with a third party, or a portion of a Shared Contract assigned to the Acquirer by the Respondent, in advance of the Divestiture Date that replace Shared Contracts with a separate Contract for the Divestiture Businesses; or (ii) arrangements between

Respondent and Acquirer that provide the Divestiture Businesses with no less favorable terms, services, and economic benefits as it would have had under the Shared Contracts.

II. "Resins Business" means the research, development, manufacture, commercialization, distribution, marketing, advertisement, and sale of resins by Respondent Danaher, which comprise sorbent solutions, including ion exchange resins, mixed mode resins and affinity resins used in process chromatography, and Ultroser serum and Helix Pomatia Juice.

JJ. "Shared Contracts" means Contracts that relate to both the Divestiture Businesses and other businesses retained by Respondent.

KK. "SUT TFF Business" means the research, development, manufacture, commercialization, distribution, marketing, advertisement, sale, and servicing of single-use tangential flow filtration ("TFF") skids by Respondent Danaher. This business comprises the Flow Kit Consumables, and customized and standard platform process development and process scale single-use TFF skids that includes hardware and software configured for use with single-use TFF technology for biopharma applications.

LL. "Transition Products" are the following products used by Respondent Danaher in one or more Divestiture Businesses:

1. Filters used in resin processing for the Resins Business;

2. Single-use bags used in gamma irradiated microcarrier delivery systems for the Microcarriers and PVS Business;

3. Fully assembled flow kit consumables used in the Chromatography Hardware Business and SUT TFF Business; and

MM. "Transition Services" means interim services, assistance, cooperation, training and access to personnel regarding any aspect of the Divestiture Businesses or transfer of Divestiture Businesses Assets.

II. Divestiture

A. No later than the earlier of: 45 days after the Acquisition Date or 10 days after Respondent Danaher receives all regulatory approvals necessary to consummate the Divestiture Agreement, Respondent Danaher shall divest the Divestiture Businesses Assets, absolutely and in good faith, to Sartorius pursuant to, and in accordance with, the Divestiture Agreement,

provided that Respondent Danaher may retain and use copies of divested Business Information to the extent necessary to comply with applicable law, regulations, and other legal requirements or to provide Transition Services.

B. No later than the Divestiture Date, Respondent Danaher shall obtain, at its sole expense, each Consent required to divest and transfer the Divestiture Businesses Assets, including Intellectual Property. Respondent Danaher may satisfy this requirement for a required Consent by certifying that the Acquirer has made equivalent arrangements or has otherwise directly obtained the necessary Consent.

C. Respondent Danaher shall deliver Business Information and Intellectual Property that are Divestiture Businesses Assets to the Acquirer as soon as practicable after the Divestiture Date in a manner that ensures their completeness, accuracy, and usefulness, and meets the reasonable requirements of the Acquirer.

D. No later than the Divestiture Date, Respondent Danaher shall:

1. Provide Acquirer with a royalty-free, fully paid-up sublicense to, or Replacement Contract for, all Licensed Intellectual Property for use in the Divestiture Businesses; and

2. Cease to use any Licensed Intellectual Property in any business that competes with one or more of the Divestiture Businesses.

E. Respondent Danaher may receive an non-exclusive royalty-free, fully paid-up license back from the Acquirer for IP divested pursuant to Paragraph II.A of this Order, for use in any business operated by Respondent Danaher that does not compete with the Divestiture Businesses.

F. No later than 15 days after the Divestiture Date, Respondent Danaher shall send written notification approved by the Monitor to each signatory to a Shared Contract with a customer for which Respondent Danaher has not provided a Replacement Contract. Notification shall include: (1) notice that Respondent Danaher has divested the relevant Divestiture Business to the Acquirer, (2) Acquirer's contact information; and (3) the Monitor's contact information.

G. Respondent Danaher shall sell Pall sterile connectors and Kleenpak capsule filters to the Acquirer on a nondiscriminatory and commercially reasonable basis for use in the Divestiture Businesses.

H. If Respondent Danaher has divested the Divestiture Businesses Assets before the Commission issues this Order and the Commission notifies the Respondent Danaher that:

1. Sartorius is not an acceptable Acquirer of the Divestiture Businesses Assets, then Respondent Danaher shall:

a. Within 5 days of notification by the Commission, rescind the Divestiture Agreement,

b. Within 120 days of notification by the Commission, divest the Divestiture Businesses Assets, absolutely and in good faith, at no minimum price, to an Acquirer and in a manner that receives the prior approval of the Commission, and

c. Set forth the manner in which they shall divest the Divestiture Businesses Assets, and comply with the other provisions of this Order, in a proposed Divestiture Agreement that is submitted to the Commission for the prior approval required by this Order.

2. If the manner of the divestiture is not acceptable, then the Commission will direct the Respondent Danaher (or appoint a Divestiture Trustee) to modify the divestiture in the manner the Commission determines is necessary to satisfy the requirements of the Order, which may include entering into additional agreements or modifying the Divestiture Agreement.

III. Divestiture Agreement

IT IS FURTHER ORDERED that:

A. The Divestiture Agreement shall be incorporated by reference into this Order and made a part hereof, and any failure by Respondent Danaher to comply with the terms of the Divestiture Agreement shall constitute a violation of this Order; *provided, however,* that the Divestiture Agreement shall not limit, or be construed to limit, the terms of this Order. To the extent that any provision in the Divestiture Agreement varies from or conflicts with any provision in the Order such that Respondent Danaher cannot fully comply with both, Respondent Danaher shall comply with the Order.

B. Respondent Danaher shall not modify or amend the terms of the Divestiture Agreement after the Commission issues the Order without the prior approval of the Commission, except as otherwise provided in Commission Rule 2.41(f)(5), 16 C.F.R. § 2.41(f)(5).

IV. Transition Assistance

IT IS FURTHER ORDERED that:

A. Respondent Danaher shall provide Transition Services that are sufficient to (i) efficiently transfer the Divestiture Businesses Assets to the Acquirer and (ii) enable the Acquirer to operate the Divestiture Businesses Assets and Divestiture Businesses in a manner equivalent in all material respects to the manner in which

Respondent Danaher operated the Divestiture Businesses Assets and Divestiture Businesses prior to the Acquisition Date and shall provide Transition Services:

1. As set forth in a Divestiture Agreement, or as otherwise reasonably requested by the Acquirer (whether before or after the Divestiture Date);

2. At the price set forth in a Divestiture Agreement or otherwise mutually agreed to, or at Direct Cost; and

3. Until the later of 24 months after the Divestiture Date or a period sufficient to meet the requirements of this paragraph.

B. Respondent Danaher shall permit the Acquirer to stop receiving any type of Transition Services and any Transition Product upon commercially reasonable notice and without cost or penalty.

C. Respondent Danaher, in consultation with the Acquirer, for the purposes of ensuring an orderly transition of the Divestiture Businesses and the Divestiture Businesses Assets, shall:

1. Develop and implement a detailed transition plan to ensure that the commencement of the operation of the Divestiture Businesses by the Acquirer is not delayed or impaired by the Respondent Danaher;

2. Designate employees of Respondent Danaher who are knowledgeable about the operation of each of the Divestiture Businesses to be responsible for communicating directly with the Acquirer and the Monitor to assist in the transferring the Divestiture Businesses and the Divestiture Businesses Assets to the Acquirer;

3. Until Respondent Danaher has transferred to the Acquirer all Business Information included in the Divestiture Businesses Assets, Respondent Danaher shall provide the Acquirer with access to records and information (wherever located and however stored) that Respondent Danaher has not yet transferred, and to employees who possess or are able to locate the records and information; and

4. Establish projected timelines for accomplishing all tasks necessary to transfer the Divestiture Businesses Assets and enable the Acquirer to operate the Divestiture Businesses in an efficient and timely manner.

D. Respondent Danaher shall supply Acquirer with each Transition Product pursuant to the Divestiture Agreement that has been approved by the Commission for a period sufficient for Acquirer to find alternative sources or independently manufacture the Transition Product in a manner that allows Acquirer to fulfill its worldwide demand.

E. Respondent Danaher shall not cease providing Transition Assistance or supplying Transition Products due to a breach by the Acquirer of the Divestiture Agreement or any other agreement through which Respondent Danaher provides Transition Assistance or supplies a Transition Product.

F. Respondent Danaher shall not enter into any agreement, including the Divestiture Agreement, with the Acquirer that limits the Acquirer's ability to seek any type or amount of damages for breach of Respondent Danaher's obligations relating to Transition Services or supplying Transition Products.

V. Employees

IT IS FURTHER ORDERED that:

A. Until a year after the Divestiture Date, Respondent Danaher shall cooperate with and assist the Acquirer of the Divestiture Businesses Assets to evaluate independently and offer employment to the Relevant Employees, with such cooperation to include at least the following:

1. Not later than 5 business days after a request from the Acquirer, Respondent Danaher shall, to the extent permitted by applicable law:

   a. Provide to the Acquirer a list of all Relevant Employees and provide Employee Information for each; and

   b. Allow the Acquirer a reasonable opportunity to interview any Relevant Employees;

2. Not later than 10 days after a request from the Acquirer, Respondent Danaher shall provide an opportunity for the Acquirer to:

   a. Meet personally, and outside the presence or hearing of any employee or agent of Respondent Danaher, with any of the Relevant Employees; and

   b. Make offers of employment to any of the Relevant Employees;

3. Respondent Danaher shall not directly or indirectly interfere with the Acquirer's offer of employment to any one or more of the Relevant Employees, not offer any incentive to Relevant Employees to decline employment with the Acquirer, and not otherwise interfere with the recruitment of any Relevant Employees by the Acquirer;

4. Respondent Danaher shall remove any impediments within its control that may deter any Relevant Employees from accepting employment with the Acquirer, including, but not limited to, removal of any non-compete or

confidentiality provisions of employment or other contracts with Respondent Danaher that may affect the ability or incentive of those individuals to be employed by the Acquirer, and shall not make any counteroffer to any Relevant Employees who receive an offer of employment from the Acquirer; *provided, however*, that nothing in this Order shall be construed to require Respondent Danaher to terminate the employment of any employee or prevent Respondent Danaher from continuing the employment of any employee;

5. Respondent Danaher shall provide Relevant Employees with reasonable financial incentives to continue in their positions, and as may be necessary to facilitate the employment of such Relevant Employees by the Acquirer. Such incentives shall include a continuation of all employee compensation and benefits offered by Respondent Danaher, including regularly scheduled or merit raises and bonuses, regularly scheduled vesting of pension benefits, and additional reasonable incentives as may be necessary.

6. If the Acquirer has made a written offer of employment to any Key Employee, provide such Key Employee with reasonable financial incentives to accept a position with the Acquirer, including payment of an incentive equal to up to 3 months of such Key Employee's base salary to be paid only upon such Key Employee's completion of 1 year of employment with the Acquirer.

   Provided, however, that for a period of 1 year from the Divestiture Date, Respondent Danaher, the Acquirer, and the Monitor will work together in good faith to determine whether any additional Relevant Employees should be identified as a Key Employee and subject to the provisions of this Paragraph V.A.6.

   Provided further, however, the total number of Relevant Employees, including Key Employees, shall not exceed 43 employees.

B. Respondent Danaher shall:

1. For a period of 1 year from the Divestiture Date, not directly or indirectly solicit or induce, or attempt to solicit or induce, any Relevant Employee who has accepted an offer of employment with, or who is employed by, an Acquirer to terminate his or her employment relationship with the Acquirer.

2. For a period of 2 years from the Divestiture Date, not directly or indirectly solicit or induce, or attempt to solicit or induce, any Key Employee who has accepted an offer of employment with, or who is employed by, an Acquirer to terminate his or her employment relationship with the Acquirer.

Provided, however, a violation of this Paragraph V.B will not occur if:

1. The employee's employment has been terminated by the Acquirer;

2. Respondent Danaher advertises for employees in newspapers, trade publications, or other media not targeted specifically at any one or more of the employees of the Acquirer; or

3. Respondent Danaher hires an employee who has applied for employment with Respondent Danaher, provided that such application was not solicited or induced in violation of this Order.

VI. Hold Separate and Asset Maintenance

IT IS FURTHER ORDERED that:

A. During the Hold Separate Period, Respondent Danaher shall continue to operate the Hold Separate Businesses as independent, ongoing, economically viable businesses and shall: (1) hold them separate and apart from Respondent Danaher's other businesses, (2) take no action to integrate the operations of the Hold Separate Businesses with other Danaher businesses; (3) take no action to coordinate the operations of the Hold Separate Businesses with any other business of Respondent Danaher other than back office services, such as IT services and administration of compensation and benefits, as long as the confidentiality provisions of Paragraph VII are complied with; and (4) vest them with all rights, powers, and authority necessary to conduct business in a manner consistent with the Order.

B. Prior to the Acquisition Date, Respondent Danaher shall appoint Jeffrey Figg, Senior Vice President Finance for Pall, to oversee, subject to Respondent Danaher's Hold Separate Commitments to the European Commission, the operations of each Hold Separate Business and ensure Respondent Danaher's compliance with the Order during the Hold Separate Period. Mr. Figg shall serve during the Hold Separate Period and shall have no duties related to the GE Biopharma business during the Hold Separate Period.

C. For the Divestiture Businesses during the Hold Separate Period, Respondent Danaher shall maintain, in accordance with sound accounting principles, separate, accurate, and complete financial ledgers, books, and records that report on a periodic basis, such as the last business day of every month, consistent with past practices, the assets, liabilities, expenses, revenues, and income of each.

D. During the Hold Separate Period, Respondent Danaher shall, subject to legal and regulatory requirements, operate the Divestiture Businesses in the ordinary course of business consistent with past practices, including:

1. Maintaining the Divestiture Businesses in substantially the same condition (except for normal wear and tear) existing on December 18, 2019, and maintaining relations and good will with employees, suppliers, customers, landlords, creditors, agents, and others having business relationships with the Divestiture Businesses;

2. Providing the Divestiture Businesses with sufficient financial and other resources to:

   a. Operate the Divestiture Businesses Assets and the Divestiture Businesses at least at the current rate of operation and staffing and to carry out, at their scheduled pace, all business plans, sales and promotional activities in place prior to the date the Acquisition was announced;

   b. Perform all maintenance to, and replacements or remodeling of, the assets of the Divestiture Businesses in the ordinary course of business and in accordance with past practice and current plans, and

   c. 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;

3. Preserving the Divestiture Businesses Assets and the Divestiture Businesses as ongoing businesses; and

4. Taking or failing to take any actions that would diminish the viability, competitiveness, and marketability of the Divestiture Businesses Assets or the Divestiture Businesses.

E. Until such time as the Acquirer replicates the manufacture, assembly, testing, packaging, and selling of products related to Flow Kit Consumables in a manner that fulfills the Acquirer's worldwide demand, Respondent Danaher:

1. Shall take actions as are necessary to operate the equipment related to Flow Kit Consumables in the regular and ordinary course of business and in accordance with past practices and in a manner consistent with applicable laws and regulation; and

2. Prevent the destruction, removal, wasting, deterioration, or impairment of the Flow Kit Consumables; and

3. Shall not take any actions to reduce the availability of the services of the current officers, employees, and agents of Respondent Danaher required to operate and maintain the equipment related to Flow Kit Consumables.

F. Until 12 months after the Divestiture Date, Respondent Danaher shall require that each sales or marketing employee who was employed by Pall Corporation prior to the Divestiture Date sign a confidentiality agreement that prohibits the employee from disclosing Confidential Business Information regarding the Divestiture Businesses and opportunities for the sale of products marketed by the Divestiture Businesses.

G. Until 3 days after the Divestiture Date, Respondent Danaher shall continue the Special Sales Incentive Program and Clarifications to the Sales Incentive Program listed in non-public Appendix G, and shall provide Pall Corporation sales and marketing staff with written notification explaining the Special Sales Incentive Program and Clarifications to the Sales Incentive Program on or before the Acquisition Date. Written notification shall be reviewed and approved by the Monitor, and shall include a requirement that the recipient acknowledge receipt and confirm his or her understanding of the notification.

VII. Confidentiality

IT IS FURTHER ORDERED that:

A. Respondent Danaher shall:

1. Maintain the confidentiality, and prevent the disclosure of, Confidential Business Information regarding the Divestiture Businesses Assets and the Divestiture Businesses ("Confidential Divestiture Information") by, *inter alia*:

a. Providing, disclosing or using Confidential Divestiture Information only as necessary to provide Transition Services to the Acquirer, supply Transition Products to the Acquirer, or comply with any legal or regulatory requirement, and

b. Requiring all employees and representatives who possess or are provided with Confidential Divestiture Information to execute non-disclosure agreements that prevent the use or disclosure of Confidential Divestiture Information for purposes not authorized by this Order;

2. Institute procedures and requirements to ensure that the employees providing Transition Services or supplying Transition Products to the Acquirer do not provide, disclose, or otherwise make available, directly or indirectly, any Confidential Divestiture Information in contravention of the

Orders and do not solicit, access, or use any Confidential Divestiture Information that they are prohibited from receiving for any reason or purpose;

3. Upon the request of the Acquirer, destroy any copies of Confidential Divestiture Information (other than electronic copies of Confidential Divestiture Information created as a result of automatic back-up procedures) within 30 days of such request *except* as otherwise agreed to between Respondent Danaher and the Acquirer or to the extent necessary to comply with applicable law; and

4. Take all action necessary and appropriate to prevent access to, and the disclosure or use of, the Confidential Divestiture Information by or to any Person(s) not authorized to access, receive, and/or use such information pursuant to the terms of the Orders, including:

   a. Establishing and maintaining appropriate firewalls, confidentiality protections, internal practices, training, communications, protocols, and system and network controls and restriction, and

   b. Ensuring by other reasonable and appropriate means that the Confidential Divestiture Information is not shared with any employee of Respondent Danaher personnel engaged in any business that competes with one or more of the Divestiture Businesses.

B. Not later than 30 days after the Divestiture Date, Respondent Danaher shall provide written notification of the restrictions on the use and disclosure of the Confidential Divestiture Information to all employees who (i) may be in possession of such Confidential Business Information or (ii) may have access to such Confidential Business Information. Respondent Danaher 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 Divestiture Date. Respondent Danaher shall provide a copy of the notification to the Acquirer. Respondent Danaher shall maintain complete records of all such notifications at Respondent Danaher's registered office within the United States of America. Respondent Danaher shall provide the Acquirer with copies of all certifications, notifications, and reminders sent to Respondent Danaher's personnel.

VIII. Monitor

IT IS FURTHER ORDERED that:

A. Mazars LLP is appointed Monitor to ensure that Respondent Danaher expeditiously complies with all of its obligations and perform all of its responsibilities as required by the Order.

B. No later than one day after the Commission issues this Order, Respondent Danaher shall, pursuant to the Monitor Agreement, attached as Appendix D and Non-Public Appendix E (Compensation), transfer to the Monitor all the rights, powers, and authorities necessary to permit the Monitor to perform his duties and responsibilities in a manner consistent with the purposes of this Order.

C. The Monitor shall serve, without bond or other security, at the expense of Respondent Danaher, on such reasonable and customary terms and conditions as the Commission may set. The Monitor shall have authority to employ, at the expense of Respondent Danaher, such consultants, accountants, attorneys and other representatives and assistants as are reasonably necessary to carry out the Monitor's duties and responsibilities. The Monitor shall account for all expenses incurred, including fees for services rendered, subject to the approval of the Commission;

D. Respondent Danaher shall provide the Monitor with the power and authority to monitor Respondent Danaher's compliance with the terms of this Order and the Divestiture Agreements, and shall exercise such power and authority and carry out the duties and responsibilities of the Monitor in a manner consistent with the purposes of this Order and in consultation with the Commission, including, but not limited to:

1. Ensuring that Respondent Danaher expeditiously complies with all obligations and performs all responsibilities as required by this Order, and the Divestiture Agreements;

2. Monitoring any transition services agreements; and

3. Ensuring that Confidential Business Information is not received or used by Respondent Danaher, except as allowed in this Order;

4. Subject to any demonstrated legally recognized privilege, full and complete access to Respondent Danaher'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 Danaher's compliance with their obligations under this Order and the Divestiture Agreements. Respondent Danaher 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 Danaher's compliance with this Order and the Divestiture Agreements;

5. Provide the Monitor with copies of all reports Respondent Danaher is required to submit to the Commission or Commission staff pursuant to the Order.

E. The Monitor is an independent third party and not as an employee or agent of the Respondent Danaher or of the Commission;

F. The Monitor's appointment shall last for such time as is necessary to monitor Respondent Danaher's compliance with the provisions of this Order and the Divestiture Agreements;

G. Respondent Danaher 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. In connection with its appointment by the Commission, the Monitor shall report in writing to the Commission evaluating reports Respondent Danaher has submitted to the Commission and describing Respondent Danaher's performance of its obligations under this Order. The Monitor shall submit a report to staff of the Commission one month after the Commission issues the Order, every 60 days thereafter, and at such other times as staff of the Commission may request.

I. Respondent Danaher may require the Monitor and each of the Monitor's consultants, accountants, attorneys, and other representatives and assistants to sign a customary confidentiality agreement so long as such agreement shall not restrict the Monitor's ability to provide information to the Commission or require the Monitor to inform Respondent Danaher of the substance of communications with 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 relating 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. In the event a substitute Monitor is required, the Commission shall select the Monitor, subject to the consent of Respondent Danaher, which consent shall not be unreasonably withheld. If Respondent Danaher has not opposed, in writing, including the reasons for opposing, the selection of a proposed Monitor within 10 days after notice by the staff of the Commission to Respondent Danaher of the identity of any proposed Monitor, Respondent Danaher shall be deemed to have consented to the selection of the proposed Monitor. Not later than ten 10 days after appointment of a substitute Monitor, Respondent Danaher 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 Danaher's compliance with the terms of this Order and the Divestiture Agreements in a manner consistent with the purposes of this 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 this Order and the Divestiture Agreements.

M. The Monitor appointed pursuant to this Order may be the same Person appointed as a Divestiture Trustee pursuant to this Order.

IX. Divestiture Trustee

IT IS FURTHER ORDERED that:

A. If Respondent Danaher has not fully complied with the obligations imposed by Paragraph II of this Order, the Commission may appoint a Divestiture Trustee to divest any of the Divestiture Businesses and perform Respondent Danaher's 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, Respondent Danaher 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 IX 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 Respondent Danaher to comply with this Order.

B. The Commission shall select the Divestiture Trustee, subject to the consent of Respondent Danaher, which consent shall not be unreasonably withheld. The Divestiture Trustee shall be a person with experience and expertise in acquisitions and divestitures. If Respondent Danaher has not opposed, in writing, and stated in writing its reasons for opposing, the selection of any proposed Divestiture Trustee within ten 10 days after notice by the staff of the Commission to Respondent Danaher of the identity of any proposed Divestiture Trustee, Respondent Danaher 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 Danaher 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 IX, Respondent Danaher 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 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 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 up to 2 times 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 divested by this Order and to any other relevant information, as the Divestiture Trustee may request. Respondent Danaher shall develop such financial or other information as the Divestiture Trustee may request and shall cooperate with the Divestiture Trustee. Respondent Danaher shall take no action to interfere with or impede the Divestiture Trustee's accomplishment of the divestiture. Any delays caused by Respondent Danaher shall extend the time for divestiture under this Paragraph IX 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 Respondent Danaher's absolute and unconditional obligation to divest expeditiously and at no minimum price and in a manner and to an Acquirer approved by the Commission.

5. 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 Danaher from among those approved by the Commission unless the Respondent Danaher fails to make a selection within 5 days after receiving notification of the Commission's approval;

6. The Divestiture Trustee shall serve, without bond or other security, at the cost and expense of Respondent Danaher, 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 Danaher, 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 Danaher, 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;

7. Respondent Danaher 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;

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

9. The Divestiture Trustee shall report in writing to Respondent Danaher and to the Commission every 30 days concerning the Divestiture Trustee's efforts to accomplish the divestiture;

10. Respondent Danaher 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; and

11. 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 IX.

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.

X. Prior Approval and Prior Notice

IT IS FURTHER ORDERED that:

A. For a period lasting until 3 years after the Divestiture Date, Sartorius shall not sell, transfer or otherwise convey, directly or indirectly, any interest in the Pall Businesses to any Person without the prior approval of the Commission.

B. For a period lasting until 3 years after the Divestiture Date, Sartorius shall not acquire any interest in the Prior Approval Business (as defined in non-public Appendix F) or any assets used in the Prior Approval Business without the prior approval of the Commission.

C. For a 2 year period commencing 3 years after the Divestiture Date, Sartorius shall not, without providing prior notification to the Commission in the manner described in this Paragraph IX, acquire any assets of, or any financial, ownership, or interest in the Prior Approval Business.

1. Said prior notification under this Paragraph shall be in the form of a letter submission with attachments, and shall contain the following:

a. A written description of the transaction, including the identification of the assets involved, Sartorius' plans for the Prior Notice Business; and how the acquired assets will be integrated into Sartorius' existing businesses;

b. The proposed acquisition agreement with all attachments or, if no agreement exists, a detailed term sheet for the proposed acquisition;

c. All recommendation or approval materials, including any analyses used to support those recommendations or approvals, relating to the proposed acquisition (including materials prepared by or for any board, management committee, or executive committee);

d. A description of the projected or likely effects of the transaction on revenues, operations, or capital expenditures; and

e. All other documents that would be responsive to Items 4(c) and 4(d) of the Premerger Notification and Report Form under the Hart-Scott-Rodino Premerger Notification Act, Section 7A of the Clayton Act, 14 U.S.C. § 18a, and Rules, 16 C.F.R. § 801-803, relating to the proposed transaction and not otherwise provided.

2. Sartorius shall verify the notification in the manner set forth in 28 U.S.C. § 1746 by the Chief Executive Officer or another officer or employee specifically authorized to perform this function, and shall attest that a contract, agreement in principle, or letter of intent to merge or acquire has been executed, and further attest to the good faith intention of Sartorius to complete the noticed transaction. Sartorius shall file an original and one copy of the notification only with the Secretary of the Commission, and need not make any filing to the United States Department of Justice. Notification is required from Sartorius and not from any other party to the transaction. No filing fee will be required for any such notification.

3. Sartorius shall provide prior notification to the Commission at least 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), Sartorius shall not consummate the transaction until 30 days after submitting such additional information or documentary material. Early termination of the waiting periods in this Paragraph X may be requested and, where appropriate, granted by letter from staff of the Bureau of Competition.

Provided, however, that prior notification shall not be required by this Paragraph X 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.

XI. Compliance Reports

IT IS FURTHER ORDERED that:

A. Respondent Danaher shall:

1. Notify Commission staff via email at bccompliance@ftc.gov of the Acquisition Date and of the Divestiture Date no later than 5 days after the occurrence of each; and

2. Submit the complete Divestiture Agreement to the Commission at ElectronicFilings@ftc.gov and bccompliance@ftc.gov no later than 30 days after the Divestiture Date.

B. Respondent Danaher shall file verified written reports ("compliance reports") in accordance with the following:

1. Respondent Danaher shall submit interim compliance reports 30 days after the Order is issued, and every 30 days thereafter until Respondent Danaher has fully complied with the provisions of Paragraphs II and VI of the Order; annual compliance reports one year after the date this Order is issued, and annually for the next 9 years on the anniversary of that date; and additional compliance reports as the Commission or its staff may request;

2. Each compliance report shall contain sufficient information and documentation to enable the Commission to determine independently whether Respondent Danaher is in compliance with the Order. Conclusory statements that Respondent Danaher has complied with its obligations under the Order are insufficient. Respondent Danaher shall include in its reports, among other information or documentation that may be necessary to demonstrate compliance, a full description of the measures Respondent Danaher has implemented or plans to implement to ensure that it has complied or will comply with each paragraph of the Order, a description of all substantive contacts or negotiations for the divestitures and the identities of all parties contacted.

3. Respondent Danaher shall retain all material written communications with each party identified in the compliance report and all non-privileged internal memoranda, reports, and recommendations concerning fulfilling Respondent Danaher's obligations under the Order and provide copies of these documents to Commission staff upon request.

4. Respondent Danaher shall verify each compliance report in the manner set forth in 28 U.S.C. § 1746 by the Chief Executive Officer or another officer or employee specifically authorized to perform this function. Respondent Danaher shall submit an original and 2 copies of each compliance report as required by Commission Rule 2.41(a), 16 C.F.R. § 2.41(a), including a paper original submitted to the Secretary of the Commission and electronic copies to the Secretary at ElectronicFilings@ftc.gov and to the Compliance Division at bccompliance@ftc.gov. In addition, Respondent Danaher shall provide a copy of each compliance report to the Monitor if the Commission has appointed one in this matter.

XII. Change in Respondent Danaher

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

A. The dissolution of Danaher Corporation;

B. The acquisition, merger or consolidation of Danaher Corporation; or

C. Any other change in Respondent Danaher, including assignment and the creation, sale, or dissolution of subsidiaries, if such change may affect compliance obligations arising out of this Order.

XIII. Access

IT IS FURTHER ORDERED that, for purposes of determining or securing compliance with this Order, and subject to any legally recognized privilege, upon written request and 5 days' notice to Respondent Danaher, made to its principal place of business as identified in this Order, registered office of its United States subsidiary, or its headquarters office, Respondent Danaher shall, without restraint or interference, permit any duly authorized representative of the Commission:

A. Access, during business office hours of Respondent Danaher and in the presence of counsel, to all facilities and access to inspect and copy all business and other records and all documentary material and electronically stored information as defined in Commission Rules 2.7(a)(1) and (2), 16 C.F.R. § 2.7(a)(1) and (2), in the possession or under the control of Respondent Danaher related to compliance with this Order, which copying services shall be provided by Respondent Danaher at the request of the authorized representative of the Commission and at the expense of the Respondent Danaher; and

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

XIV. Purpose

IT IS FURTHER ORDERED that the purpose of this Order is to ensure the continuation of the Divestiture Businesses as ongoing viable businesses engaged in the same business in which the assets were engaged at the time of the announcement of the Acquisition, and to remedy the lessening of competition resulting from the Acquisition as alleged in the Commission's Complaint in this matter.

XV. Term

IT IS FURTHER ORDERED that this Order shall terminate 10 years from the date it is issued.

By the Commission.

NON-PUBLIC APPENDIX A

DIVESTITURE AGREEMENTS

[Redacted From the Public Version But Incorporated by Reference]

NON-PUBLIC APPENDIX B

EXCLUDED ASSETS

[Redacted From the Public Version But Incorporated by Reference]

NON-PUBLIC APPENDIX C

KEY EMPLOYEES

[Redacted From the Public Version But Incorporated by Reference]

APPENDIC D

AMENDED AND RESTATED MONITOR AGREEMENT

This Amended and Restated Monitor Agreement ("Monitor Agreement") entered into this 19th day of February 2020, by and between Mazars LLP ("Monitor"), who has been chosen to act as Monitor, and Danaher ("Danaher" or "Respondent") (Monitor and Respondent are each individually referred to herein as a "Party" and collectively referred to herein as the "Parties"), provides as follows:

WHEREAS, on February 25, 2019, Danaher entered into an Equity and Asset Purchase Agreement (the "GE Biopharma Purchase Agreement") with the General Electric Company ("GE") pursuant to which, upon the terms and subject to the conditions set forth in the GE Biopharma Purchase Agreement, Danaher will acquire GE's Biopharma business (the "Acquisition");

WHEREAS, it is expected that the United States Federal Trade Commission (the "Commission") and Respondent will enter into an Agreement Containing Consent Order, which includes a proposed Decision and Order (the "Order");

WHEREAS, the Order provides for the appointment of a Monitor to assure that Respondent complies with all of its obligations and performs all of its responsibilities required by the Order and the Divestiture Agreements;

WHEREAS, the Order further provides that Respondent shall execute an agreement, subject to prior approval of the Commission, conferring all the rights, powers, and authority necessary to permit the Monitor to perform its duties and responsibilities pursuant to the Order;

WHEREAS, this Monitor Agreement, although executed by the Monitor and Respondent, is not effective for any purpose, including but not limited to, imposing rights and responsibilities on Respondent or the Monitor, until this Monitor Agreement has been approved by the Commission;

WHEREAS, the Monitor is well versed in the operation of the Divestiture Businesses Assets and wishes to accept such appointment upon the terms and conditions stated herein; and

WHEREAS, the Parties to this Monitor Agreement intend to be legally bound.

NOW, THEREFORE, the Parties agree as follows:

1. Capitalized terms used herein and not specifically defined herein shall have the respective definitions given to them in the Order.

2. The Monitor shall have all of the powers, authority, and responsibilities Respondent is required to confer upon the Monitor by the Order, including, without limitation, the responsibility, consistent with the Order, for monitoring Respondent's compliance with its obligations under the Order and the Divestiture Agreements. The Monitor shall have the authority, in its sole discretion, to consult with third parties in the exercise of its duties under the

Order and this Monitor Agreement; provided, that the Monitor shall not have the authority to execute any documents or enter into any agreements on behalf of Danaher, GE Biopharma or any of their affiliates.

3. In the performance of its functions and duties under this Monitor Agreement, the Monitor will perform its obligations hereunder in good faith, using its best efforts to perform these services in accordance with generally accepted industry standards.

4. If the Monitor becomes aware during the term of this Monitor 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 Monitor Agreement, the Monitor shall promptly inform Respondent and the Commission of any such conflict.

5. The Monitor shall have reasonable access, subject to any legally recognized privilege of Respondent, to Respondent's personnel, books, records, documents, facilities and technical information to the extent relating to the Respondent's compliance with its obligations under the Order, including its obligations related to the Divesture Businesses Assets, as the Monitor may reasonably require to perform the services set forth herein, subject to the limitations contained in the Order. Such access shall include, inter alia, access to all relevant information related to the Divesture Businesses Assets. Respondent shall cooperate with any reasonable request of the Monitor, including but not limited to complying with Monitor's requests for onsite visits and interviews with employees of Respondent. Respondent shall take no action to interfere with or impede the Monitor's ability to monitor Respondent's compliance with the Order and the Divestiture Agreements.

6. Respondent shall designate a senior employee(s) of Respondent to be a primary contact ("Primary Contact") for the Monitor and to notify the Monitor regarding any changes in the contact personnel. Respondent shall notify the Monitor of meetings and other critical events relating to the Divesture Businesses Assets, the Order, or the Agreements, and provide any available minutes of such meetings to the Monitor.

7. Respondent shall provide and the Monitor shall evaluate the reports submitted by Respondent pursuant to the Order.

8. The Monitor shall report to the Commission pursuant to the terms of the Order and as otherwise requested by the Commission Staff.

9. Monitor shall be compensated by Respondent for its services under this Monitor Agreement, including all work in connection with the negotiation and preparation of this Monitor Agreement, pursuant to the fee schedule attached as Confidential Exhibit A for time spent in connection with the discharge of its duties under this Monitor Agreement and the Order. In addition, Respondent will pay all documented out-of-pocket expenses reasonably incurred by the Monitor in the performance of the Monitor's duties, including all fees and disbursements reasonably incurred by such consultants, accountants, attorneys, and other representatives and assistants as are reasonably necessary to carry out the Monitor's duties and responsibilities. Payments under this Paragraph 12 shall be made on a monthly basis until the Monitor ceases its activities under this Monitor Agreement. The Monitor shall provide Respondent with monthly invoices for time and expenses that include details and an explanation of all matters for which the Monitor submits an invoice to Respondent. Respondent shall pay such invoices

within 30 days of receipt. The Monitor and Respondent shall submit any disputes about invoices to the Commission's Compliance Division for assistance in resolving such disputes.

10. Respondent hereby confirms its obligation to indemnify the Monitor (and all Persons retained by the Monitor) and hold the Monitor harmless against any liabilities arising out of the performance of the Monitor's duties, except to the extent that such liabilities result from the willful default, recklessness, gross negligence, or bad faith of the Monitor, its employees, agents or advisors.

11. In the event of a disagreement or dispute between Respondent 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 arbitrator(s) may be entered in any court having jurisdiction thereof. Binding arbitration shall not be available, however, to resolve any disagreement or dispute concerning Respondent's obligations pursuant to any Order entered by the Commission.

12. The term of this Monitor Agreement shall continue until the latter of (i) the completion of all divestitures required by the Order, and (ii) the end of any Transition Services Agreement in effect with any Commission-Approved Acquirer; provided further, however, that the Commission may extend or modify this period as may be necessary or appropriate to accomplish the purposes of the Order. In the event that Monitor is no longer able to perform the duties described in this Monitor Agreement, Monitor may terminate this Monitor Agreement by providing Respondent 30 days written notice. In the event of such termination, Monitor shall cooperate with Respondent pursuant to Paragraph 15.

13. Upon termination of the Monitor's duties under this Monitor Agreement, the Monitor shall consult with the Commission's staff regarding disposition of any written and electronic materials (including materials that Respondent provided to the Monitor) in the possession or control of the Monitor that relate to the Monitor's duties, and the Monitor shall dispose of such materials, which may include sending such materials to the Commission's staff, as directed by the staff. In response to a request by Respondent to return or destroy materials that Respondent provided to the Monitor, the Monitor shall inform the Commission's staff of such request and, if the Commission's staff does not object, shall comply with the Respondent's request. Nothing herein shall abrogate the Monitor's duty of confidentiality, which includes an obligation not to disclose any non-public information that was obtained while acting as a Monitor.

14. Should the Commission appoint a substitute monitor pursuant to an Order to Maintain Assets or should the Monitor terminate this Monitor Agreement pursuant to Paragraph 13, the Monitor shall cooperate with Respondent and the substitute monitor in order to effect a prompt transition to the substitute monitor. Such cooperation shall include, but is not limited to, (i) the prompt return to Respondent of all confidential materials as required by the preceding Paragraph of this Monitor Agreement, and (ii) the provision of access to the Monitor and any

personnel hired by the Monitor for interviews by Respondent and/or the substitute monitor for purposes of gathering relevant information relating to the Monitor's performance of its duties.

15. Any notices or other communication required to be given hereunder shall be deemed to have been properly given if sent by mail or e-mail to the applicable Party at its address below (or to such other address as to which such Party shall hereafter notify the other party):

If to the Monitor, to:

Justin Menezes
Mazars LLP
Tower Bridge House, St. Katharine's Way, London, E1W 1DD
Justin.Menezes@mazars.co.uk

If to Respondent, to:

Attila Bodi
Danaher Corporate Office
2200 Pennsylvania Avenue, NW
Suite 800W Washington, DC 20037
Attila.Bodi@danaher.com

16. The Monitor Agreement may not be assigned by Respondent or the Monitor without the prior written consent of the other Party and the Commission.

17. It is understood and agreed that the Monitor shall act in consultation with the Commission or its staff, and shall serve as an independent third party and not as an employee or agent of the Respondent or the Commission in the undertaking of this Monitor Agreement and the Monitor shall exercise control over and employ its own means and methods of accomplishing the projects and tasks in performing services hereunder.

18. This Monitor Agreement may be executed in any number of counterparts, each of which shall be deemed to be an original and all of which together shall be deemed to be one and the same instrument.

19. This Monitor Agreement contains the entire agreement between the Parties relating to the subject matter hereof and supersedes all previous negotiations, agreements, undertakings and representations, documents, minutes of meetings, letters or notices (whether oral or written) between the Parties and/or their respective affiliates with respect to the subject matter.

20. This Monitor Agreement shall not become binding until it has been approved by the Commission and the Order has been accepted for public comment. The Order shall govern this Monitor Agreement and any provisions herein that conflict or are inconsistent with such orders may be declared void by the Commission and any provision not in conflict shall survive and remain a part of this Monitor Agreement.

21. This Monitor Agreement shall be deemed to have been entered into and shall be construed and enforced in accordance with the laws of New York.

22. For the avoidance of doubt, each of the Parties expressly acknowledges that the Non-Disclosure Agreement, dated as of November 16, 2019 (the "NDA"), by and between the Parties, shall apply to all Confidential Information (as defined in the NDA) provided by Danaher to the Monitor in connection with the Monitor Agreement.

23. This Monitor Agreement amends and restates, in its entirety, and replaces, the prior Monitor Agreement entered into the 13 day of February 2020.

(Signature Page Follows)

IN WITNESS WHEREOF, the parties hereto have executed this Monitor Agreement as of the date first above written.

Respondent:

By

Name: Attila Bodi
Title: Vice President and Chief Counsel

Monitor:

By:

Name: Justin Menezes
Title: Partner

NON-PUBLIC APPENDIX E

MONITOR COMPENSATION

[Redacted From the Public Version But Incorporated by Reference]

NON-PUBLIC APPENDIX F

PRIOR APPROVAL BUSINESS
(NON-PUBLIC EVEN AS TO RESPONDENTS)

[Redacted From the Public Version But Incorporated by Reference]

NON-PUBLIC APPENDIX G

SPECIAL SALES INCENTIVE PROGRAM
AND
CLARIFICATIONS TO THE SALES INCENTIVE PROGRAM

[Redacted From the Public Version But Incorporated by Reference]

ANALYSIS OF CONSENT ORDERS TO AID PUBLIC COMMENT

INTRODUCTION

The Federal Trade Commission ("Commission") has accepted, subject to final approval, an Agreement Containing Consent Orders ("Consent Agreement") from Danaher Corporation ("Danaher") designed to remedy the anticompetitive effects resulting from Danaher's proposed acquisition of the GE Biopharma business of General Electric Company's ("GE") GE Healthcare Life Sciences division. Under the terms of the proposed Consent Agreement, Danaher is required to divest all of the rights and assets related to the following products to Sartorius AG ("Sartorius"):

(1) microcarrier beads; (2) conventional low-pressure liquid chromatography ("LPLC") columns; (3) conventional LPLC skids; (4) single-use LPLC skids; (5) three affected chromatography resins; (6) LPLC continuous chromatography systems; (7) single-use TFF systems; and (8) label-free molecular characterization instruments.

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

Under the terms of the Equity and Asset Purchase Agreement dated February 25, 2019, Danaher will acquire the GE Biopharma business in exchange for $21.4 billion (the "Acquisition"). The Commission's Complaint alleges that the proposed Acquisition, if consummated, would violate Section 7 of the Clayton Act, as amended, 15 U.S.C. § 18, and Section 5 of the Federal Trade Commission Act, as amended, 15 U.S.C. § 45, by substantially lessening competition in the markets for: (1) microcarrier beads; (2) conventional low-pressure liquid chromatography ("LPLC") columns; (3) conventional LPLC skids; (4) single-use LPLC skids; (5) three affected chromatography resins; (6) LPLC continuous chromatography systems; (7) single-use TFF systems; and (8) label-free molecular characterization instruments. The proposed Consent Agreement will remedy the alleged violations by preserving the competition that otherwise would be lost in these markets as a result of the proposed Acquisition.

THE PARTIES

Headquartered in Washington, DC, Danaher is a leading global manufacturer of professional, medical, industrial, and commercial products and services through more than twenty operating companies. Danaher sells bioprocessing products primarily through its wholly owned subsidiary Pall Corporation ("Pall"), including instruments and consumables that support research, discovery, process development, and manufacturing workflows of biopharmaceutical drugs. Danaher sells other life science instruments, including molecular characterization used primarily in biopharmaceutical research applications, through its Molecular Devices, LLC operating company.

GE is a global conglomerate headquartered in Boston, Massachusetts. GE Biopharma is a division of GE Healthcare Life Sciences that manufactures and sells instruments, consumables, and software that support the research, discovery, process development, and manufacturing workflows of biopharmaceutical drugs.

PRODUCTS AND MARKET STRUCTURES

I. Microcarrier Beads

Microcarrier beads are used in cell culture bioprocessing. They provide a surface for the anchorage of dependent cells to attach and grow in cell culture vessels and bioreactors. Danaher and GE are the two leading global suppliers of microcarrier beads and are each other's closest competitors. The only other significant supplier of microcarrier beads is Corning, Inc., which is

substantially smaller than GE, the dominant supplier. The market for microcarrier beads is highly concentrated. The parties have a combined market share of greater than 70 percent. The Acquisition would increase concentration in the microcarrier bead market substantially and reduce the number of major suppliers from three to two.

II. Conventional Low-Pressure Liquid Chromatography Columns

LPLC columns separate wanted from unwanted molecules by using a liquid or gaseous phase to carry the cell mass through an adsorbent serving as a stationary phase. Conventional LPLC columns are containers that hold chromatography resins used as the adsorbent during the stationary phase. These columns are made of glass, stainless steel, acrylic glass, or plastic. This market is highly concentrated, with only four main suppliers, including Danaher and GE. The parties have a combined market share of greater than 45 percent. Further, Danaher and GE are two of very few suppliers that offer larger, process-scale conventional LPLC columns, which is a segment of the market that is even more concentrated. Other remaining chromatography suppliers consist of fringe of firms, each of which account for a small share of the market.

III. Conventional Low-Pressure Liquid Chromatography Skids

Conventional LPLC skids control the flow of liquid in the chromatography process. Conventional LPLC skids contain a system of pumps, valves, sensors, tubing, electronic components, software, and flow paths composed of multi-use components. GE is the leading supplier of conventional LPLC skids with a market share of over 30 percent. Danaher and GE currently compete directly for sales in the market for conventional LPLC skids, and there are few other significant suppliers. The Acquisition would substantially increase concentration in the market for conventional LPLC skids.

IV. Single-Use Low Pressure Liquid Chromatography Skids

Single-use LPLC skids control the flow of liquid in the chromatography process and have the same function as conventional LPLC skids except that the flow path is composed of single-use components. As is the case for conventional ones, GE is the dominant supplier of single-use LPLC skids. According to market participants, in addition to GE and Danaher are two of only three significant suppliers. The only other suppliers are fringe firms with few sales. Danaher and GE have a combined market share of greater than 80 percent for single-use LPLC skids.

V. Chromatography Resins

Chromatography resins are chemically treated consumables that constitute the stationary phase of the LPLC process. The parties both supply resins, although GE has a broad portfolio of resins while Danaher has more limited offerings. Each resin type differs in its chemical characteristics and features, and specific purification and production steps require different resins for the processing of particular molecules. Because of their distinct attributes and uses, each type of resin appears to constitute a distinct antitrust market. The parties have competitively significant overlaps in three resin markets: affinity resins, ion exchange resins, and mixed mode resins. Affinity resins use binding interactions between a ligand and its binding partner to capture the

target molecule. Ion exchange resins separate molecules based on their total electric charge. Mixed mode resins use matrices functionalized with ligands capable of multiple interactions that make this type of resin useful to purify target proteins when other methods fail.

Danaher and GE are two of a limited number of competitors in the markets for affinity, ion exchange, and mixed mode resins. Similar to the markets for chromatography hardware, GE is dominant in chromatography resins, holding market shares of between 65 and 73 percent, 57 and 65 percent, and 56 and 64 percent in affinity, ion exchange, and mixed mode resins, respectively, while Danaher's market share is significant but no greater than ten percent in each resin market.

VI. Low-Pressure Liquid Chromatography Continuous Chromatography Systems

A LPLC continuous chromatography system consists of a skid and columns that functions by regulating the flow of resins through the affixed columns in a continuous process that, for some uses, provides greater efficiency and cost savings. The parties, however, appear to be the leading suppliers in the market. Currently, Danaher has approximately 28 percent market share and GE has approximately 14 percent share. Only three other suppliers compete in this market, and the combined firm would have a market share of over 40 percent.

VII. Single-Use Tangential Flow Filtration Systems

Single-use TFF systems control the filtration process, which removes unwanted molecules during the cell growth phase of the bioprocessing workflow by running liquids through porous membranes. Single-use TTF systems include sensors, valves, safety and security items, software, and network communication hardware, as well as flow kits, manifolds, and pumps composed of single-use components. Customers typically use TFF for cell clarification and for diafiltration, concentration, and microfiltration. TFF systems are configurable as conventional or single-use platforms. With single-use TFF systems, suppliers sell disposable flow kits (single-use tubing) that are used as a consumable. In contrast, conventional TFF systems are made with stainless steel and must be cleaned and validated after each use. Customers typically do not switch between single-use and conventional TFF systems, and they do not view other types of filtration systems as an economic or practical substitute for single-use TFF systems. Danaher and GE are two important competitors in the market for single-use TFF systems. GE's system has gained share since recently entering the market and currently competes closely with Danaher's system. The parties have a combined share of the single-use TFF filtration systems market of more than 35 percent.

VIII. Label-Free Molecular Characterization Instruments

Label-free molecular characterization instruments characterize protein binding interaction and protein concentration based on measurement of the optical, calorimetric, electrical, acoustic, and other physical reactions to various stimuli. Researchers use these instruments for a number of applications, including drug discovery and other biological research. Label-free molecular characterization instruments are a distinct relevant product market within the broader universe of molecular characterization instruments By their own estimates Danaher has approximately 23 percent share and GE has about 39 percent leaving the combined firm with share greater than 60

percent. The remainder of the market is highly fragmented and consists of less established instrument manufacturers and firms offering niche products.

COMPETITIVE EFFECTS OF THE ACQUISITION

The proposed Acquisition would likely result in substantial competitive harm to consumers in the markets for microcarrier beads; conventional LPLC columns; conventional LPLC skids; single-use LPLC skids; three chromatography resins; LPLC continuous chromatography systems; single-use TFF systems; and label-free molecular characterization. The parties are two of few significant suppliers of these products worldwide. Eliminating the head-to-head competition between Danaher and GE in these concentrated markets would allow the combined firm to exercise market power unilaterally, likely resulting in higher prices, reduced innovation, and less choice for consumers.

ENTRY CONDITIONS

De novo entry in the relevant markets would not be timely, likely, or sufficient in magnitude, character, and scope to deter or counteract the anticompetitive effects of the proposed Acquisition. Entry into each of the relevant product markets requires a significant amount of time and resources. In each relevant market, a new entrant would need to develop products with high levels of performance and reliability to establish the brand recognition necessary to compete effectively due to the premium customers place on suppliers' track records and reputations for reliable, high-quality products. Attaining requisite technological expertise and intellectual property often prevents suppliers from developing new products in the relevant markets. These barriers can delay the launch of new products and prevent existing suppliers of other equipment from developing new projects. Moreover, a potential entrant must establish a sufficient sales force that offers high-quality technical support and is capable of establishing relationships with customers. Such development efforts are difficult, time-consuming, and expensive, and often fail to result in a competitive product reaching the market.

THE CONSENT AGREEMENT

The Consent Agreement eliminates the competitive concerns raised by the proposed Acquisition by requiring Danaher to divest its microcarrier beads; chromatography hardware including conventional LPLC chromatography columns, conventional LPLC chromatography skids, and single-use LPLC chromatography skids; three chromatography resins; LPLC continuous chromatography systems; single-use TFF filtration systems; and label-free molecular characterization instruments to Sartorius. Danaher must divest all assets and rights to research, develop, manufacture, market, and sell these products, including all related intellectual property and other confidential business information, manufacturing technology, existing inventory, and all related agreements to manufacture and distribute the products. Additionally, to ensure that the divestiture is successful and to maintain continuity of supply, the proposed Order requires Danaher to supply Sartorius with these products for a limited time while Sartorius establishes its own manufacturing capability. Further, the proposed Order requires Sartorius to seek the Commission's approval in the event that it seeks to sell certain divested assets or acquire certain assets that compete with the divested assets for a period of three years. The provisions of the

Consent Agreement ensure that Sartorius becomes an independent, viable, and effective competitor to maintain the competition that currently exists.

Based in Göttingen, Germany, Sartorius is a leading provider of instruments, manufacturing systems, and associated consumables for the life sciences industry including bioprocessing equipment used for drug discovery, development, and commercialization. Sartorius's existing biopharma business includes products that are highly complementary to the divestiture assets. Sartorius has the expertise, worldwide sales infrastructure, and resources to restore the competition that otherwise would have been lost due to the proposed Acquisition.

Danaher must accomplish the divestitures no later than 45 days after consummating the proposed Acquisition or ten days after receiving all regulatory approvals necessary to consummate the divestiture. Until Danaher completes the divestiture, the proposed Order requires Danaher to hold separate the entire Pall operating company and the molecular characterization business, as well as to maintain the divested assets. Danaher is also required to submit compliance reports to staff and to the proposed monitor demonstrating compliance with these asset maintenance provisions.

If the Commission determines that Sartorius is not an acceptable acquirer, or that the manner of the divestitures is not acceptable, the proposed Order requires Danaher to unwind the sale of rights and assets to Sartorius and then divest the affected products to a Commission-approved acquirer within six months of the date the Order becomes final. To ensure compliance with the Order, the Commission has agreed to appoint a Monitor to ensure that Danaher complies with all of its obligations pursuant to the Consent Agreement and to keep the Commission informed about the status of the transfer of the product rights and assets to Sartorius. The proposed Order further allows the Commission to appoint a trustee in the event that Danaher fails to divest the products as required.

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 Order or to modify its terms in any way.

Complaint

IN THE MATTER OF

AXON ENTERPRISE, INC.,
AND
SAFARILAND, 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. 9389; File No. 181 0162
Complaint, January 3, 2020 – Decision, June 11, 2020

This consent order addresses the $30 million acquisition by Axon Enterprise, Inc. of certain assets of Safariland, LLC. The complaint alleges that the merger violated Section 7 of the Clayton Act, and Section 5 of the Federal Trade Commission Act by substantially lessening competition in the market for body-worn camera systems in large metropolitan police departments. The complaint further alleged that the parties' agreements, including several non-compete and customer non-solicitation provisions, barred Safariland from competing with Axon now and in the future on all of Axon's products, limited solicitation of customers and employees by either company, stifled potential innovation or expansion by Safariland, substantially lessened actual and potential competition and were not reasonably limited to protect a legitimate business interest. The consent order enjoins Safariland from entering into any agreement with Axon that incorporates the language or substance of the agreement provisions the complaint alleges are anticompetitive, which were rescinded by the parties since the complaint issued.

Participants

For the *Commission*: *J. Alexander Ansaldo, Llewellyn Davis, Mika Ikeda, Nicole Lindquist, Lincoln Mayer, Jennifer Milici, Merrick Pastore, Blake Risenmay, Z. Lily Rudy, Connor B. Shively,* and *Steven L. Wilensky.*

For the *Respondents*: *Caroline L. Jones, Joseph Ostoyich,* and *Christine Ryu-Naya, Baker Botts LLP; Debra R. Belott, Aaron M. Healey, Michael H. Knight, Julia E. McEvoy,* and *Jeremy P. Morrison, Jones Day;* and *Lee K. Van Voorhis, Jenner & Block.*

COMPLAINT

Pursuant to the provisions of the Federal Trade Commission Act ("FTC Act"), and by virtue of the authority vested in it by the FTC Act, the Federal Trade Commission ("Commission"), having reason to believe that Respondent Axon Enterprise, Inc., ("Respondent Axon") acquired VieVu, LLC ("VieVu") from Safariland, LLC ("Respondent Safariland"), and executed agreements in violation of Section 5 of the FTC Act, as amended, 15 U.S.C. § 45, and Section 7 of the Clayton Act, as amended, 15 U.S.C. § 18, 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. Respondent Axon is the leading manufacturer and supplier of body-worn cameras ("BWCs") and digital evidence management systems ("DEMS") (collectively "BWC Systems"). BWCs are cameras specifically designed to withstand the rigorous demands of police usage and capture video and audio of police actions. BWCs operate in conjunction with DEMs, the software component. DEMS enable police departments to store BWC data in a central location, redact non-relevant images such as the faces of bystanders, share pertinent evidence with prosecutors, and maintain chain of custody of the video for evidentiary use.

2. On May 3, 2018, Respondent Axon acquired VieVu (the "Merger"), its closest competitor in the market for BWC Systems sold to large, metropolitan police departments. The Merger eliminated direct and substantial competition between Respondent Axon and the "#2 competitor," further entrenching Respondent Axon's position as the dominant supplier of BWC Systems to large, metropolitan police departments.

3. Prior to the Merger, VieVu aggressively challenged Respondent Axon for the sale of BWC Systems to large, metropolitan police departments in the United States. This competition resulted in substantially lower prices for these customers, and provided customers with robust features and significant improvements. For example, Respondent Axon told its Board in May 2018 that the "VieVu business strategy [was to] [u]ndercut on price: Typically [redacted] less than Axon." VieVu also focused on improving its products in part because Axon "is aggressively pushing feature set and existing customers are demanding those features."

4. VieVu was successful in winning accounts at prices substantially below Respondent Axon's for several large, metropolitan police departments, including [redacted] Respondent Axon's CEO admitted that it acquired VieVu to obtain the New York City Police Department ("NYPD") account.

5. The competition between Respondent Axon and VieVu was intense, especially after VieVu won New York City with a substantially lower bid. VieVu's former General Manager acknowledged that, "[w]e started a price war. . . ." Respondent Axon's CEO testified that after losing the contract Respondent Axon made a free offer of 1,000 body-worn cameras to New York City. Respondent Axon eventually expanded its promotion, on or around April 5, 2017, when it offered free BWC Systems for one year to every police agency in the United States.

6. Post-merger, customers lost the benefit of this head-to-head competition, and Respondent Axon began to tout its pricing power, enacting "substantial price increases of [redacted] - including on body cameras and on the TASER weapon." This is exactly what Respondent Safariland predicted after the parties signed the Letter of Intent leading to the Merger: "I believe this will greatly improve their ability to increase price in the BWC market and I can easily see the stock lifting by 20% or more." The stock actually increased by more than 40% in the month following the acquisition.

7. In addition to increasing price on BWCs, Respondent Axon limited the availability of VieVu BWC Systems to customers and stopped developing new generations of VieVu hardware and software. [redacted]

8. The Merger will likely entrench Respondent Axon's already dominant share of the relevant market and would significantly increase market concentration. Pre-Merger, Respondent Axon held over [redacted] share and VieVu held over a [redacted] share of sales by officer count of BWC Systems to large, metropolitan police departments in the United States.

9. Under the 2010 U.S. Department of Justice and Federal Trade Commission Horizontal Merger Guidelines ("Merger Guidelines"), a post-merger market-concentration level above 2,500 points, as measured by the Herfindahl-Hirschman Index ("HHI"), and an increase in market concentration of more than 200 points renders a merger presumptively unlawful. Post-Merger market concentration would be more than 2,500, and the Merger would increase HHIs in an already concentrated market by well over 200 points. Thus, the Merger is presumptively unlawful.

10. New entry or repositioning by existing producers would not be timely, likely, or sufficient to counteract the anticompetitive effects of the Merger. Barriers to entry are high because of the substantial up-front capital investment required, switching costs, and the need for large, metropolitan police department references.

11. Respondent Axon cannot show that the Merger resulted in merger-specific efficiencies sufficient to outweigh the competitive harm caused by the Merger. Respondent Axon did not analyze or anticipate efficiencies when deciding to acquire VieVu.

12. As part of the Merger, Respondent Safariland entered several non-compete and customer non-solicitation agreements covering products and services not related to the Merger, and both Respondents entered company-wide non-solicitation agreements that all run for 10 or more years (together, "Non-Competes"). The Non-Competes are not reasonably limited to protect a legitimate business interest. The Non-Competes are contained in the Membership Interest Purchase Agreement ("Merger Agreement") itself and in Exhibit E, the Product Development and Supplier Agreement ("Holster Agreement").

13. The Holster Agreement is a decade-long supply agreement whereby Respondent Safariland would develop and exclusively supply conducted electrical weapons ("CEW") holsters to Respondent Axon for its Taser-branded CEW. Respondent Axon is the dominant supplier of CEWs, and its Taser brand is synonymous with the category. Respondents Axon and Safariland executed the Holster Agreement as additional consideration for the Merger.

II. JURISDICTION

14. Respondents 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.

15. The Merger constitutes an acquisition subject to Section 7 of the Clayton Act, 15 U.S.C. § 18.

III. RESPONDENTS

16. Respondent Axon is the dominant provider of BWC Systems. The majority of the largest metropolitan police departments in the United States use Respondent Axon's BWC System solution. Respondent Axon's newest model BWC is the "Axon Body 3," and its DEMS is known as "Evidence.com." Respondent Axon changed its name in 2017 from TASER International, Inc.

17. Respondent Axon is also the dominant supplier of CEWs under the "Taser" brand, which is Respondent Axon's flagship product and is employed by more than [redacted] of all police departments. In 2018, Respondent Axon had annual revenues of $420 million.

18. Respondent Safariland manufactures and sells holsters (including for use with CEWs and other weapons), body armor, armor systems, and other safety and forensics equipment for the law enforcement, military, and recreational markets. Respondent Safariland purchased VieVu in 2015.

IV. THE MERGER AND ASSOCIATED AGREEMENTS

19. Pursuant to the Merger Agreement, Respondent Axon consummated the purchase of VieVu from Respondent Safariland on May 3, 2018 for approximately [redacted] million in cash, stock, earn-outs, and the Holster Agreement, which is included as Exhibit E in the Merger Agreement and was executed as additional consideration for the Merger. Pursuant to the Holster Agreement, Respondent Safariland agreed for 10 years, *inter alia*, to develop a new CEW holster for Respondent Axon's next-generation CEW and to supply CEW holsters exclusively to Respondent Axon. Respondent Axon agreed, *inter alia*, to make Respondent Safariland its preferred supplier of CEW holsters. Respondents Axon and Safariland also agreed, as part of the Merger Agreement and Holster Agreement, to Non-Competes related for products and services, customers, and employees.

V. RELEVANT MARKET

20. The relevant market in which to analyze the effects of the Merger is the sale of BWC Systems, comprising BWCs and DEMS, to large, metropolitan police departments in the United States. A hypothetical monopolist in this relevant market would find it profit-maximizing to impose at least a small but significant and non-transitory increase in price ("SSNIP").

A. Relevant Product Market

21. The relevant product market in which to assess the effects of the Merger is the sale of BWC Systems to large, metropolitan police departments. BWCs are the hardware component, and DEMS are the software component, of an integrated BWC System.

22. Large, metropolitan police departments frequently issue requests for proposals seeking to purchase BWCs and DEMS together as an integrated BWC System. The products are closely related, and it is important for the hardware and software to interoperate effectively.

23. Both Respondent Axon and VieVu focused on selling their products to large, metropolitan police departments, which have distinct requirements for BWC Systems that differ from the needs and preferences of other law enforcement organizations. Due to their particular needs, large, metropolitan police departments may require or prefer elements such as feature-rich and cloud-based DEMS, scalability for the BWC Systems deployment, references from other large metropolitan police departments, secured layers for authorized personnel access, automatic population of metadata for a video (e.g., officer, location, etc.), and tools that enable faster redaction of bystanders' faces when a video is being prepared for public disclosure or use in court. VieVu recognized this. According to VieVu's former General Manager, "VIEVU played in the large agency market, cloud, tech forward agencies, which is the same spot where Axon played."

24. There are no reasonably interchangeable substitutes for BWC Systems, and large, metropolitan police departments could not realistically switch to other products in the face of a SSNIP for BWC Systems.

25. In-car camera systems are not substitutes for BWC Systems for large, metropolitan police departments. In-car camera systems are mounted in the vehicle, usually a front-facing camera to record what takes place in front of the vehicle, and a rear-facing camera to record what takes place inside the vehicle. In-car systems are more often used by highway patrol officers, or other officers who spend most of their time working in or directly outside of their patrol vehicles. Most officers in large, metropolitan police departments, however, are rarely in patrol cars and generally conduct their policing by other means, such as on foot, horse, and bike. Given the nature of policing in metropolitan areas, these officers need cameras that can capture video when a police officer is not near a police vehicle, but is instead on the street or in a building. In-car systems are also significantly more expensive than BWC Systems. Respondent Axon's Chief Revenue Officer testified that in-car systems and BWC Systems are not good substitutes.

26. Records Management Systems ("RMS") are not substitutes for DEMS for large, metropolitan police departments. RMS collect and centralize in one source, in digital format, the many types of written reports generated by police agencies, including arrest, probation, and crime scene reports, whereas DEMS are designed principally to record video and audio evidence captured by BWCs. Industry participants do not view RMS as a substitute for BWC Systems or for the DEMS component of those systems.

B. Relevant Geographic Market

27. The relevant geographic market in which to assess the competitive effects of the Merger is customers in the United States. The relevant market is a bid market in which it is possible to price discriminate to specific customers. Customers based in the United States cannot arbitrage or substitute based on different prices offered to customers outside the United States.

28. Many police departments also are required to comply with the FBI's Criminal Justice Information Service ("CJIS") standards. CJIS compliance requires storing BWC- generated data in the United States. Additionally, U.S.-based police departments look mostly to other U.S.-based police departments to vet potential BWC System vendors.

29. A hypothetical monopolist in the market for BWC Systems sold to large, metropolitan police departments in the United States would find it profit-maximizing to impose at least a small but significant and non-transitory increase in price ("SSNIP").

VI. MARKET STRUCTURE AND THE MERGER'S PRESUMPTIVE ILLEGALITY

30. The market for the sale of BWC Systems to large, metropolitan police departments based in the United States is highly concentrated. Prior to the Merger, Respondent Axon was already the dominant BWC System provider to these customers, with over [redacted] of the relevant market by officer count. Respondent Axon acknowledges this dominance—in a company presentation, it implored its salespeople to "embrace being the gorilla"—and Respondent Axon's CEO confirmed that Respondent Axon is a "really strong market leader." VieVu was the next largest competitor with over [redacted] of the relevant market by officer count. Post-Merger, the relevant market is even more highly concentrated, with Respondent Axon controlling over [redacted] of the relevant market by officer count.

31. Motorola, Panasonic, WatchGuard and Utility largely make up the rest of the relevant market. None of these other competitors pose the same competitive constraint on Respondent Axon as did VieVu. In particular, the other competitors' BWC Systems [redacted]. Consequently, these other competitors rarely provided significant competition to Respondent Axon in RFP processes conducted by large, metropolitan police departments.

32. Even when considering all customers (i.e., not just large, metropolitan police departments), Respondent Axon believed that post-Merger it had "about [redacted] of the US market."

33. The Merger Guidelines and courts often measure concentration using HHIs. HHIs are calculated by totaling the squares of the market shares of every firm in the relevant market. Under the Merger Guidelines, a merger is presumed likely to create or enhance market power and is presumptively illegal when the post-merger HHI exceeds 2,500 and the merger increases the HHI by more than 200 points.

34. The Merger significantly increased concentration in the relevant market, as one firm now controls more than [redacted] of the relevant market by officer count. Motorola/WatchGuard, the next largest competitor, controls less than [redacted] of the relevant market by officer count. The Merger resulted in a post-Merger HHI in excess of 2,500, and increased concentration by more than 200 points. Therefore, the Merger is presumptively anticompetitive under the Merger Guidelines and applicable case law.

VII. ANTICOMPETITIVE EFFECTS

A. The Merger Eliminated Vital Competition Between VieVu and Respondent Axon

35. The Merger eliminated intense price and innovation competition between Respondent Axon and VieVu in the relevant market. The result is likely to be higher prices, inferior service, and reduced quality and innovation.

36. Respondent Axon and VieVu were each other's closest competitors. For example, Respondent Safariland acknowledged: "We own the #2 player in the market, and to date we have seen no other credible market entrant," and "VieVu and Taser are consistently the finalists in major opportunities." Respondent Axon's Vice President of Investor Relations touted that by purchasing VieVu, Respondent Axon had "acquired #2 competitor."

37. Stock analysts and the financial press also recognize that VieVu was Respondent Axon's most significant competitor. A Raymond James stock report states: "In May 2018, Axon closed the $7.1 million strategic tuck-in acquisition of its most formidable body cam competitor, VieVu." A Bloomberg article dated May 4, 2018, entitled "The Biggest Police Body Cam Company Is Buying Its Main Competitor," declares that "[t]he combination of the two largest providers of the recording devices will create a dominant force in police surveillance." A May 18, 2018 article from the Motley Fool, entitled "Axon Enterprise Now Owns the Police Body Cam Market," asserts that "[t]here is going to be no stopping Axon Enterprise (NASDAQ:AAXN) now that it has acquired its main body camera rival VIEVU."

38. Prior to the Merger, VieVu and Respondent Axon were the competitors that could best satisfy the RFP requirements, from both a technical and price perspective, for many of the largest metropolitan police agencies in the United States. For example, [redacted] all found that, of multiple bidders, Respondent Axon and VieVu had the best offerings by a significant margin.

39. Respondent Axon and VieVu vigorously and consistently competed on price in an effort to win large, metropolitan police department contracts. After Respondent Safariland acquired VieVu in 2015, VieVu lowered its pricing in an explicit effort to take market share from Respondent Axon. VieVu's former General Manager confirmed that in early 2016, VieVu "made a relatively deliberate decision to take price down in the market considerably," and VieVu admittedly "took [Axon] by surprise with disruptive pricing and nearly comparable technology." As late as 2018, VieVu's strategy was to "win on price typically [redacted] less than Axon."

40. Competition between Respondent Axon and VieVu resulted in substantially lower prices for police departments. For example, [redacted] all received substantially lower bids from VieVu as compared to Respondent Axon. VieVu's lower pricing for [redacted] caused Respondent Axon to reduce its own bids. VieVu at times responded to Respondent Axon's competing bids by offering better terms.

41. Respondent Axon and VieVu also competed vigorously on non-price aspects of BWC Systems, including the development of various innovative features such as auto-activation of BWCs in the event of an officer unholstering a gun or Taser, and computer-assisted facial redaction tools for DEMS videos. Consumers benefited from this innovation competition.

42. Post-merger, customers lost the benefit of this head-to-head price and innovation competition, and Respondent Axon began to tout its pricing power, enacting "substantial price increases of [redacted] - including on body cameras and on the Taser weapon." Respondent Axon has acknowledged the negative consequence of price increases on budget constrained law enforcement officers: "It's no secret that budget constraints are a constant inconvenience for law enforcement agencies. Long needs lists + short funds = under equipped officers and potentially underserved communities."

43. Existing BWC System providers are unlikely to replace the competition that was lost as a result of the Merger between Respondents, the two closest competitors in the relevant market. While each remaining competitor has different strengths and weaknesses, each competitor faces real and significant challenges in replacing competition lost through Respondent Axon's merger with VieVu. These challenges include, but are not limited to, reputation or lack of references from large, metropolitan police department customers, service levels that are inadequate for such customers, and software with limited functionality. Moreover, some of the other BWC System providers price significantly higher than VieVu and would not sufficiently replace VieVu's aggressive pricing. The remaining firms in the relevant market are not likely to replace the competitive constraint of VieVu's lower-priced offerings in a timely and sufficient way.

B. As Part of the Merger, Respondents Agreed to Additional Provisions that Substantially Lessen Competition

44. As part of the Merger Agreement, Respondents Axon and Safariland entered into the Non-Competes: Respondent Safariland agreed not to compete (i) for products and services that Respondent Axon supplies and in industries where Respondent Axon is active, irrespective of their relation to the Merger and (ii) for Respondent Axon's customers; and both Respondents agreed not to affirmatively solicit each other's employees. These agreements each last 10 or more years. The Non-Competes prevent actual and potential competition between Respondents Axon and Safariland. The Non-Competes are contained in the Merger Agreement itself and in Exhibit E, the Holster Agreement.

Non-Compete Agreements for Respondent Axon's Products/Services and Industries

45. In Section 5.03(a) of the Merger Agreement, Respondent Safariland agreed not to engage in "(a) body worn video products and services, (b) in-car video products and services, (c) digital evidence management products and services provided to third parties that ingest digital evidence audio and video files, and (d) enterprise records management systems provided to third parties," anywhere in the world for 10 years.

46. In Section 15.1 of the Holster Agreement, Respondent Safariland agreed not to compete in the "CEW industry, BWC industry, fleet or vehicle camera industry, surveillance room

camera industry, and digital evidence management system and storage industry, with regard to law enforcement, military, security or consumers," anywhere in the world for 12 years. Respondent Axon was concerned about Respondent Safariland potentially entering into competition with Respondent Axon's lucrative CEW business. Respondent Axon's CEO called the 12-year CEW non-compete a "hidden jewel in the deal."

Non-Compete Agreements for Respondent Axon's Customers

47. In Section 5.03(c) of the Merger Agreement, Respondent Safariland agreed not to solicit or entice any of Respondent Axon's customers or potential customers for purposes of diverting business or services away from Respondent Axon, for 10 years.

48. In Section 15.3 of the Holster Agreement, Respondent Safariland agreed not to solicit or entice any of Respondent Axon's customers or potential customers for purposes of diverting CEW, CEW holster, or CEW accessory business or purchases away from Respondent Axon, for 11 years.

Employee Non-Solicitation Agreements

49. In Section 5.03(b) of the Merger Agreement, Respondent Safariland agreed not to hire or solicit any of Respondent Axon's employees, or encourage any employees to leave Respondent Axon, or hire certain former employees of Respondent Axon, except pursuant to a general solicitation. Respondent Safariland agreed to refrain from this activity for 10 years.

50. In Section 5.06(a) of the Merger Agreement, Respondent Axon agreed not to hire or solicit any of Respondent Safariland's employees, or encourage any employees to leave Respondent Safariland, or hire certain former employees of Respondent Safariland, except pursuant to a general solicitation. Respondent Axon agreed to refrain from this activity for 10 years.

51. In Section 15.4 of the Holster Agreement, Respondents Axon and Safariland agreed not to solicit each other's employees for the purpose of inducing the employees to leave their respective employers, except pursuant to a general solicitation. Respondents Axon and Safariland agreed to refrain from this activity for 11 years.

52. By prohibiting Respondent Safariland from competing against Respondent Axon--in terms of products and services Respondent Safariland can offer as well as customers Respondent Safariland can solicit--these provisions harm customers who would otherwise benefit from potential or actual competition by Respondent Safariland. By prohibiting Respondents Axon and Safariland from affirmatively soliciting each other's employees, these provisions eliminate a form of competition to attract skilled labor and deny employees and former employees of Respondents Axon and Safariland access to better job opportunities. They restrict workers' mobility, and deprive them of competitively significant information that they could use to negotiate better terms of employment.

53. The Non-Competes are not reasonably limited in scope to protect a legitimate business interest. A mere general desire to be free from competition is not a legitimate business interest. The Non-Competes go far beyond any intellectual property, goodwill, or customer relationship necessary to protect Respondent Axon's investment in VieVu. Moreover, even if a legitimate interest existed, the lengths of the Non-Competes are longer than reasonably necessary, because they prevent Respondent Safariland from competing for products and services, customers, and employees for 10 years or longer.

VIII. LACK OF COUNTERVAILING FACTORS

A. High Barriers to Entry and Expansion

54. Respondents cannot demonstrate that new entry or expansion by existing firms would be timely, likely, or sufficient to offset the anticompetitive effects of the Merger. *De novo* entrants into this market would face considerable barriers in replicating the competition that the Merger has eliminated. Effective entry into this market would require substantial, costly upfront investments in creating a new BWC System offering. The system also must be designed for use by law enforcement agencies, with features such as secured layers for authorized personnel access and strict recordation of file access history for chain of custody purposes. There are high switching costs related to the transfer of metadata for video files, and customers are sticky because moving data to a new provider and training officers on a new platform is challenging and expensive.

B. Efficiencies

55. Respondent Axon cannot show that merger-specific efficiencies would result from the Merger that will offset the anticompetitive effects. Respondent Axon's President admitted that potential efficiencies played no role in Respondent Axon's analysis of the Merger**.**

C. Failing Firm

56. Respondents cannot demonstrate that Respondent Safariland was a failing firm under the criteria set out in the Horizontal Merger Guidelines.

IX. VIOLATIONS

Count I – Illegal Agreement

57. The allegations of Paragraphs 1 through 56 above are incorporated by reference as though fully set forth herein.

58. The Merger 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 Merger

59. The allegations of Paragraphs 1 through 56 above are incorporated by reference as though fully set forth herein.

60. The Merger, including the Non-Competes, constitutes 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.

NOTICE

Notice is hereby given to the Respondents that the nineteenth day of May, 2020, 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 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 merger with VieVu violated Section 7 of the Clayton Act, as amended, or Section 5 of the Federal Trade Commission Act, as amended, as alleged in the complaint, the Commission may order such relief as is supported by the record and is necessary and appropriate ("Order"), including:

1. Ordering Respondent Axon to divest, absolutely and in good faith, at no minimum price, in a manner and to an acquirer approved by the Commission, assets to establish a distinct, separate, and viable business to design, produce, license, and sell BWC Systems in a manner that restores the level of competition to the market today that was lost through Respondent Axon's acquisition of VieVu, including ordering divestiture of the assets acquired from Respondent Safariland, and as necessary, facilitating customer migration from Axon to an appropriate divestiture buyer, divestiture or licensing of other assets, including but not limited to those necessary for research and development, production, marketing and sale, and servicing of Respondent Axon's BWC Systems products.

2. Ordering Respondent Axon to provide transitional assistance to enable the acquirer to conduct the divested BWC Systems business and serve BWC Systems customers at a level that restores the competitive dynamics in the current market that was lost through the Merger, including facilitating the recruitment of Respondent Axon employees, providing technical assistance, know-how, and other information, acting, as necessary, as subcontractor to provide, at direct cost, services to enable the acquirer to successfully operate the divested BWC Systems business during the transition period, and subsidizing the direct costs of switching customers from Respondent Axon to the acquirer's BWC Systems.

3. Ordering Respondent Axon to, among other things, remove legal impediments, facilitate migration of data, and provide file structure, formatting, organization, and other technical information regarding Respondent Axon's DEMS and content and information accessible by the customer through the DEMS in order to enable a customer to move all videos and other data accessed through a DEMS supplied by Respondent Axon to a DEMS supplied by a competitor without the customer losing the ability to use or access metadata and other information connected with videos.

4. Ordering Respondents to void all existing agreements between them that are found to be anticompetitive and to obtain the prior approval from the Commission before entering into, enforcing, or soliciting any other agreement or understanding that restricts competition between Respondents.

5. Ordering Respondent Axon to provide at least thirty (30) days prior notice to the Commission before acquiring any firm engaged in the design, development, production, sale, or marketing of BWC Systems.

6. Requiring that Respondent Axon's compliance with the Order be monitored at Respondent Axon's expense by an independent monitor, pursuant to terms and conditions determined by the Commission.

7. Ordering each Respondent to establish an antitrust compliance program and ordering each Respondent to submit at least one report to the Commission sixty (60) days after issuance of the Order, an annual report for the term of the Order, and other reports requested by staff of the Commission, that describe how the submitting Respondent has complied, is complying, and will comply with the Order.

8. Issuing an Order that terminates ten (10) years from the date it becomes final.

9. Ordering such other or additional relief as is necessary to ensure the creation of a viable, competitive, and independent entity offering BWC Systems with the level of features and capabilities necessary to restore the level of competition lost as a result of the acquisition of VieVu, and remedy the anticompetitive effects of conduct alleged in the complaint.

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 third day of January, 2020.

By the Commission.

DECISION
(Safariland)

The Federal Trade Commission ("Commission") having heretofore issued its complaint charging Safariland, LLC, 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 Safariland, LLC, having been served with a copy of that complaint together with a notice of contemplated relief, and Safariland, LLC, having answered the complaint denying said charges; and Safariland, LLC, its attorneys, and counsel for the Commission having thereafter executed an agreement containing a consent Order, an admission by Safariland, LLC, of all the jurisdictional facts, as those facts relate to the First and Second Violations set forth in the complaint, a statement that the signing of said agreement is for settlement purposes only and does not constitute an admission by Safariland, LLC, that the law has been violated as alleged in such complaint, or that the facts as alleged in such complaint, other than jurisdictional facts related to the First and Second Violations of the complaint, are true, and waivers and other provisions as required by the Commission's Rules; and

The Secretary of the Commission having thereafter withdrawn this matter from adjudication in accordance with § 3.25(c) of its Rules; and

The Commission having considered the matter and having thereupon accepted the executed Consent Agreement and placed it on the public record for a period of 30 days for the receipt and consideration of public comments. In further conformity with the procedure described in Commission Rule 2.34, 16 C.F.R. § 2.34, the Commission makes the following jurisdictional findings and issues the following Decision and Order ("Order"):

1. Safariland, 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 executive offices and principal place of business located at 13386 International Parkway, Jacksonville, Florida 32218.

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

ORDER

I. Definitions

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

A. "Axon" means Axon Enterprise, Inc., its directors, officers, employees, agents, representatives, successors, and assigns; and the joint ventures, subsidiaries, partnerships, divisions, groups, and affiliates controlled by Axon Enterprise, Inc., and the respective directors, officers, employees, agents, representatives, successors, and assigns of each.

B. "Safariland" or "Respondent Safariland" means Safariland, LLC, its directors, managers, officers, employees, agents, representatives, successors, and assigns; and the joint ventures, subsidiaries, partnerships, divisions, groups, and affiliates controlled by Safariland, LLC, and the respective directors, managers, officers, employees, agents, representatives, successors, and assigns of each.

C. "Commission" means the Federal Trade Commission.

D. "Antitrust Compliance Program" means a program, including an effective in-person or web-based antitrust training program, to ensure compliance with this Order.

E. "Business" means a joint venture, subsidiary, partnership, division, group, affiliate, firm, corporation, association, unincorporated organization, or other asset participating in the sales of products or services.

F. "Holster Agreement" means the Product Development and Supplier Agreement executed by Axon Enterprise, Inc., and Safariland, LLC, and attached to the Purchase Agreement as Exhibit E.

G. "Purchase Agreement" means the Membership Interest Purchase Agreement between Axon Enterprise, Inc., and Safariland, LLC, dated May 3, 2018.

H. "Operative Amendments" means the First Amendment to the Purchase Agreement and the First Amendment to the Holster Agreement, dated January 16, 2020 (attached as Confidential Exhibit A).

I. "Prohibited Provisions" are provisions 5.03(a), 5.03(b), 5.03(c), and 5.06(a) of the Purchase Agreement and provisions 15.1, 15.3, and 15.4 of the Holster Agreement.

II. Prohibition

IT IS FURTHER ORDERED that Respondent Safariland, having rescinded the Prohibited Provisions through execution of the Operative Amendments, shall not, directly or indirectly, modify the Operative Amendments, or enter into any agreement or understanding with Axon that, in whole or part, incorporates or reproduces the language or substance, directly or indirectly, expressed or implied, of any of the Prohibited Provisions.

III. Prior Approval

IT IS FURTHER ORDERED that Respondent Safariland shall not, without the prior approval of the Commission, enter into, enforce, or solicit any agreement or understanding, whether written or oral, expressed or implied, entered into with Axon after the date this Order is issued, that in whole or part prohibits or restricts competition between Safariland and Axon, including through prohibiting or restricting:

1. Hiring or soliciting employees,

2. Selling or supplying a product or service,

3. Acquiring an interest in a Business, or

4. Soliciting or selling to any customer or customers,

IV. Litigation Assistance Obligations

IT IS FURTHER ORDERED that until a final determination of the litigation with Axon in Docket 9389, including any appeals, and in any Commission action related to Docket 9389 that the Commission may take against Axon, and with the understanding that Complaint Counsel agrees to use reasonable efforts to reduce the burden and expense on Safarliand of any efforts Safariland is asked to undertake under this Section IV, Respondent Safariland shall:

A. At the request of Complaint Counsel, authenticate any documents and/or data that Respondent Safariland produces or has produced to the Commission;

B. At the request of Complaint Counsel, make representatives of Safariland available, upon reasonable notice, for in-person or telephone interviews with Commission staff;

C. Agree to service of process of subpoenas issued by Complaint Counsel under Rule 3.34 of the Commission Rules of Practice;

D. Respond to any outstanding discovery requests issued by Complaint Counsel and not object on the basis that Respondent Safariland is not a party to the litigation in Docket No. 9389;

E. Make available at least 3 Safariland officers, directors, agents, or employees, or corporate representatives (designated under Rule 3.33(c)(1) of the Commission Rules of Practice) selected by Complaint Counsel for deposition at a mutually-agreed date, time and location;

F. Make available Safariland deponents to provide hearing testimony if requested to do so by Complaint Counsel;

G. Provide to Complaint Counsel the best available contact information (current addresses, phone numbers, and email addresses) for the former Safariland employees identified on Confidential Exhibit B attached, and, upon request, contact information for any other former Safariland employees; and

H. Not withhold information, testimony or documents based on a joint defense agreement or common interest basis when responding to discovery or testimony sought by Complaint Counsel after this Order is issued.

V. Compliance Program

IT IS FURTHER ORDERED that Respondent Safariland, to assure compliance with this Order, shall for 5 years from the date this Order is issued either include in its Antitrust Compliance Program or, if such a Program does not or ceases to exist, include in a newly designed, maintained, and operated Antitrust Compliance Program:

A. Designation of an officer or director to supervise personally the design, maintenance, and operation of the program, and to be available on an ongoing basis to respond to any questions by officers and directors of Respondent Safariland;

B. Distribution of a copy of this Order to all officers and directors:

1. Within thirty (30) days after the Order is issued; and,

2. Annually within thirty (30) days of the anniversary of the Order Date until the Order terminates;

C. Annual training on the requirements of its obligations under Paragraphs II, III, and V of this Order for Respondent Safariland's officers and directors; and,

D. Retention of documents and records sufficient to record Respondent's compliance with its obligations under Paragraphs II, III, and V of this Order.

VI. Compliance Reports

IT IS FURTHER ORDERED that Respondent Safariland shall file verified written reports ("compliance reports") in accordance with the following:

A. Respondent Safariland shall submit an interim compliance report 30 days after the Order is issued; annual compliance reports one year after the date this Order is issued, and annually for the next 4 years on the anniversary of that date; and additional compliance reports as the Commission or its staff may request.

B. Each compliance report shall contain sufficient information and documentation to enable the Commission to determine independently whether Respondent Safariland is in compliance with the Order. Conclusory statements that Respondent Safariland has complied with its obligations under the Order are insufficient. Respondent Safariland shall include in its report, among other information or documentation that may be necessary to demonstrate compliance:

1. A full description of the measures Respondent Safariland has implemented or plans to implement to ensure that it has complied or will comply with each paragraph of the Order; and

2. Full descriptions of each agreement or modification thereto, whether written or oral, between Respondent Safariland and Axon to the extent not submitted in prior reports.

C. Respondent Safariland shall retain all material written communications with each party identified in the compliance report and all non-privileged internal memoranda, reports, and recommendations concerning fulfilling Respondent Safariland's obligations under the Order and provide copies of these documents to Commission staff upon request.

D. Respondent Safariland shall verify each compliance report in the manner set forth in 28 U.S.C. § 1746 by the Chief Executive Officer or another officer or employee specifically authorized to perform this function. Respondent Safariland shall submit an original and 2 copies of each compliance report as required by Commission Rule 2.41(a), 16 C.F.R. § 2.41(a), including a paper original submitted to the Secretary of the Commission and electronic copies to the Secretary at

ElectronicFilings@ftc.gov and to the Compliance Division at bccompliance@ftc.gov.

VII. Change in Respondent Safariland

IT IS FURTHER ORDERED that Respondent Safariland shall notify the Commission at least 30 days prior to:

A. The dissolution of Safariland, LLC;

B. The acquisition, merger or consolidation of Safariland, LLC; or

C. Any other change in Respondent Safariland, including assignment and the creation, sale, or dissolution of subsidiaries, if such change may affect compliance obligations arising out of this Order.

VIII. Access

IT IS FURTHER ORDERED that, for purposes of determining or securing compliance with this Order, and subject to any legally recognized privilege, upon written request and 5 days' notice to Respondent Safariland, made to its principal place of business as identified in this Order, registered office of its United States subsidiary, or its headquarters office, Respondent Safariland shall, without restraint or interference, permit any duly authorized representative of the Commission:

A. Access, during business office hours of Respondent Safariland and in the presence of counsel, to all facilities and access to inspect and copy all business and other records and all documentary material and electronically stored information as defined in Commission Rules 2.7(a)(1) and (2), 16 C.F.R. § 2.7(a)(1) and (2), in the possession or under the control of Respondent Safariland related to compliance with this Order, which copying services shall be provided by Respondent Safariland at the request of the authorized representative of the Commission and at the expense of Respondent Safariland; and

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

IX. Purpose

IT IS FURTHER ORDERED that the purpose of this Order is to remedy the harm alleged in Paragraphs 44-53 and 59-60 of the complaint filed in this civil action as it relates to Respondent Safariland.

X. Term

IT IS FURTHER ORDERED that this Order shall terminate on June 11, 2030.

By the Commission, Commissioner Slaughter not participating.

ANALYSIS OF CONSENT ORDER TO AID PUBLIC COMMENT

I. Introduction

The Federal Trade Commission ("Commission") has accepted, subject to final approval, an Agreement Containing Consent Order ("Consent Agreement") with Safariland, LLC ("Safariland"). The Consent Agreement seeks to resolve allegations against Safariland in the administrative complaint issued by the Commission on January 3, 2020.

The Commission has placed the Consent Agreement 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 issue the Order.

II. Challenged Conduct

This matter involves Safariland's sale to Axon Enterprise, Inc. ("Axon") of its body-worn camera systems division, VieVu, LLC ("VieVu"). The merger eliminated direct and substantial price and innovation competition between dominant supplier Axon and its closest competitor, VieVu, to serve large metropolitan police departments. According to the complaint, customers lost VieVu as a bidder for new contracts, which enabled Axon to impose substantial price increases.

In addition to transferring VieVu from Safariland to Axon, the parties' agreements included several non-compete and customer non-solicitation provisions, which grounded the inclusion of Safariland as a party to the administrative proceeding. These provisions barred Safariland from competing with Axon now and in the future on all of Axon's products, limited solicitation of customers and employees by either company, and stifled potential innovation or expansion by Safariland. These restraints, some of which were intended to last more than a decade, substantially lessened actual and potential competition and were not reasonably limited to protect a legitimate business interest, according to the complaint.

III. The Order

Since the complaint issued, Safariland and Axon rescinded the agreement provisions that the complaint alleges are anticompetitive. To ensure that the parties do not enter new agreements with similar anticompetitive provisions, **Part II** of the Order enjoins Safariland from entering into any agreement with Axon that incorporates the language or substance of the rescinded provisions.

Part III of the Order requires Safariland to obtain prior approval from the Commission before it enters into any agreement with Axon that restricts competition between Axon and Safariland. By permitting agreements between Axon and Safariland, subject to prior approval, rather than imposing an absolute ban on future agreements between the parties, the Order permits agreements the parties can demonstrate are competitively neutral or procompetitive.

Part IV of the Order addresses Safariland's litigation assistance obligations. These provisions will help facilitate efficient discovery from Safariland in the ongoing litigation against Axon.

Part V contains antitrust compliance program and recordkeeping requirements. **Part VI** requires Safariland to file with the Commission verified written compliance reports. **Part VII** requires Safariland to notify the Commission in advance of changes in Safariland's structure, including any acquisition, merger or consolidation of Safariland, irrespective of Hart-Scott-Rodino reporting obligations. **Part VIII** requires that Safariland provide the Commission with access to certain information for the purpose of determining or securing compliance with the Order, and **Part IX** states that the purpose of the Order is to remedy the harm alleged in Paragraphs 44-53 and 59-60 of the complaint.

Part X provides that the Order will terminate 10 years from the date it is issued.

The purpose of this Analysis to Aid Public Comment is to invite and facilitate public comment concerning the Order. It does not constitute an official interpretation of the Order or in any way to modify its terms.

Complaint

IN THE MATTER OF

MINICLIP S.A.

CONSENT ORDER, ETC. IN REGARD TO ALLEGED VIOLATIONS OF SECTION 5 OF THE FEDERAL TRADE COMMISSION ACT AND THE CHILDREN'S ONLINE PRIVACY PROTECTION ACT

Docket No. C-4722; File No. 192 3129
Complaint, June 29, 2020 – Decision, June 29, 2020

This consent order addresses Miniclip S.A.'s violation of Section 5 of the Federal Trade Commission Act by disseminating that it participated in the Children's Advertising Review Unit ("CARU") and complied with the Children's Online Privacy Protection Act of 1998 ("COPPA") when it did not. The complaint alleges that Respondent joined CARU's COPPA safe harbor program in July 2009 until July 6, 2015, when CARU terminated Respondent's participation in the COPPA safe harbor program. After CARU terminated Respondent from the safe harbor program, Respondent continued to make claims that it participated in the safe harbor program. The consent order requires Respondent must not misrepresent the extent to which Respondent participates in any privacy or security program sponsored by a government or any self-regulatory or standard-setting organization.

Participants

For the *Commission*: *Jonah Fabricant* and *Ryan Mehm.*

For the *Respondents*: *Jennifer Archie* and *Alexander Stout, Latham & Watkins.*

COMPLAINT

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

1. Respondent Miniclip S.A. is a Swiss corporation with its principal office or place of business at 18 Faubourg de l'Hôpital, 2000 Neuchâtel, Switzerland.

2. Respondent develops, publishes, and distributes mobile and online digital games. As of August 2019, Respondent had approximately 100 applications ("apps") available for download through Apple's App Store and Google Play. Consumers can also play online games via Respondent's website, www.miniclip.com, and through Facebook.

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.

COPPA Safe Harbor Programs

4. Congress enacted the Children's Online Privacy Protection Act of 1998 ("COPPA") to protect the safety and privacy of children online by prohibiting the unauthorized or unnecessary collection of children's personal information online by operators of Internet Web sites

and online services ("operators"). COPPA directed the Commission to promulgate a rule implementing COPPA. The Commission promulgated the COPPA Rule on November 3, 1999, under Section 1303(b) of COPPA, 15 U.S.C. § 6502(b), and Section 553 of the Administrative Procedure Act, 5 U.S.C. § 553. The Rule went into effect on April 21, 2000. The Commission promulgated revisions to the Rule that went into effect on July 1, 2013.

5. COPPA includes a provision enabling industry groups or others to submit for Commission approval self-regulatory safe harbor programs that implement the protections of the Commission's final Rule.

6. The COPPA safe harbor programs approved by the Commission review member operators' compliance with the safe harbor programs' guidelines. An operator who complies with the Commission-approved safe harbor program guidelines will be deemed in compliance with COPPA.

Relevant Business Practices

7. In 2001, the Commission approved the Children's Advertising Review Unit ("CARU") as a COPPA safe harbor program.

8. In July 2009, Respondent joined CARU's COPPA safe harbor program. Thereafter, Respondent began disseminating statements regarding its participation in CARU's COPPA safe harbor program.

9. From at least 2012 through June 2019, Respondent disseminated or caused to be disseminated the following statement on its Small Print website page (https://corporate.miniclip.com/advertising/small-print):

> In recognition of our focus on the quality and safety of our content, we have been accepted to join the CARU Kids Privacy Safe Harbor Program and have been certified as COPPA compliant.

10. From April 2019 through June 2019, Respondent disseminated or caused to be disseminated the same statement in Paragraph 9 on its Terms and Conditions website page (https://www.miniclip.com/terms). In addition to being available on Respondent's website, the Terms and Conditions also were available to users through the settings menu in Respondent's apps.

11. From at least November 2012 through July 2019, Respondent disseminated or caused to be disseminated the following statement on its Facebook Games Privacy Policy website page (https://www.miniclip.com/games/page/en/facebook-privacy-policy):

> Miniclip is a Certified Participant of the Better Business Bureau's, CARU Kids Privacy Safe Harbor Program: http://www.caru.org/caru.aspx?id=275582381. The information practices of Miniclip.com have been reviewed and meet the

standards of the Children's Advertising Review Unit's Kid's Privacy Safe Harbor Program.

12. Respondent remained a member of CARU's COPPA safe harbor program until July 6, 2015, when CARU terminated Respondent's participation in the COPPA safe harbor program.

13. After CARU terminated Respondent from CARU's COPPA safe harbor program, Respondent continued to make claims, as indicated in Paragraphs 9-11, that it participated in the CARU COPPA safe harbor program.

Count 1: COPPA Safe Harbor Misrepresentations

14. As described in Paragraphs 9-11, Respondent represented, directly or indirectly, expressly or by implication, that it was a current participant in the CARU COPPA safe harbor program.

15. In fact, as described in Paragraph 12, after CARU terminated Respondent from CARU's COPPA safe harbor program, Respondent was not a current participant in the CARU COPPA safe harbor program. Therefore, the representation set forth in Paragraph 14 is false or misleading.

Violations of Section 5 of the FTC Act

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 twenty-ninth day of June 2020, has issued this complaint against Respondent.

By the Commission.

DECISION

The Federal Trade Commission ("Commission") initiated an investigation of certain acts and practices of the Respondent named above in the caption. The Commission's Bureau of Consumer Protection ("BCP") prepared and furnished to Respondent a draft Complaint. BCP proposed to present the draft Complaint to the Commission for its consideration. If issued by the Commission, the draft Complaint would charge Respondent with violation of the Federal Trade Commission Act.

Respondent and BCP thereafter executed an Agreement Containing Consent Order ("Consent Agreement"). The Consent Agreement includes: 1) statements by Respondent that it neither admits nor denies any of the allegations in the Complaint, except as specifically stated in this Decision and Order, and that only for purposes of this action, it admits the facts necessary to establish jurisdiction; and 2) waivers and other provisions as required by the Commission's Rules.

The Commission considered the matter and determined that it had reason to believe that Respondent has violated the Federal Trade Commission Act, and that a Complaint should issue stating its charges in that respect. The Commission accepted the executed Consent Agreement and placed it 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 Rule 2.34, the Commission issues its Complaint, makes the following Findings, and issues the following Order:

Findings

1. Respondent Miniclip S.A. is a Swiss corporation with its principal office or place of business at 18 Faubourg de l'Hôpital, 2000 Neuchâtel, Switzerland.

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

ORDER

Definitions

For purposes of this Order, the following definition applies:

A. "Respondent" means Miniclip S.A., a corporation and its successors and assigns.

Provisions

I. Prohibition against Misrepresentations about Participation in or Compliance with Privacy Programs

IT IS ORDERED that Respondent and its officers, agents, employees, 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 the advertising, marketing, promotion, offering for sale, or sale of any product or service must 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 a government or any self-regulatory or standard-setting organization, including but not limited to the Children's Advertising Review Unit (CARU) Children's Online Privacy Protection Act of 1998 (COPPA) safe harbor.

II. Acknowledgments of the Order

IT IS FURTHER ORDERED that Respondent obtain acknowledgments of receipt of this Order:

A. Respondent, within ten (10) days after the effective date of this Order, must submit to the Commission an acknowledgment of receipt of this Order.

B. For five (5) years after the issuance date of this Order, Respondent must deliver a copy of this Order to: (1) all principals, officers, directors, and LLC managers and members; (2) all employees, agents, and representatives having managerial responsibilities for conduct related to the subject matter of the Order; and (3) any business entity resulting from any change in structure as set forth in the Provision titled Compliance Report and Notices. Delivery must occur within ten (10) days after the effective date of this Order for current personnel. For all others, delivery must occur before they assume their responsibilities.

C. From each individual or entity to which Respondent delivered a copy of this Order, Respondent must obtain, within thirty (30) days, a signed and dated acknowledgment of receipt of this Order.

III. Compliance Report and Notices

IT IS FURTHER ORDERED that Respondent make timely submissions to the Commission:

A. Sixty (60) days after the issuance date of this Order, Respondent must submit a compliance report, sworn under penalty of perjury, in which Respondent must: (a) identify the primary physical, postal, and email address and telephone number, as designated points of contact, which representatives of the Commission, may use to communicate with Respondent; (b) identify all of Respondent's businesses by all of their names, telephone numbers, and physical, postal, email, and Internet addresses; (c) describe the activities of each business; (d) describe in detail whether and how Respondent is in compliance with each Provision of this Order; and (e) provide a copy of each Acknowledgment of the Order obtained pursuant to this Order, unless previously submitted to the Commission.

B. Respondent must submit a compliance notice, sworn under penalty of perjury, within fourteen (14) days of any change in the following: (1) any designated point of contact; or (2) the structure of Respondent or any entity that Respondent has any ownership interest in or controls directly or indirectly that may affect compliance obligations arising under this Order, including: creation, merger, sale, or dissolution of the entity or any subsidiary, parent, or affiliate that engages in any acts or practices subject to this Order.

C. Respondent must submit notice of the filing of any bankruptcy petition, insolvency proceeding, or similar proceeding by or against Respondent within fourteen (14) days of its filing.

D. Any submission to the Commission required by this Order to be sworn under penalty of perjury must be true and accurate and comply with 28 U.S.C. § 1746, such as by concluding: "I declare under penalty of perjury under the laws of the United States of America that the foregoing is true and correct. Executed on: _____" and supplying the date, signatory's full name, title (if applicable), and signature.

E. Unless otherwise directed by a Commission representative in writing, all submissions to the Commission pursuant to this Order must 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 *Miniclip S.A.*, FTC File No. 1923129.

IV. Recordkeeping

IT IS FURTHER ORDERED that Respondent must create certain records for ten (10) years after the issuance date of the Order, and retain each such record for five (5) years. Specifically, Respondent must create and retain the following records:

A. accounting records showing the revenues from all goods or services sold;

B. personnel records showing, for each person providing services, whether as an employee or otherwise, that person's: name; addresses; telephone numbers; job title or position; dates of service; and (if applicable) the reason for termination;

C. all records necessary to demonstrate full compliance with each provision of this Order, including all submissions to the Commission; and

D. a copy of each widely disseminated representation by Respondent regarding Respondent's participation in any privacy or security program sponsored by a government or any self-regulatory or standard-setting organization, and all materials that were relied upon in making the representation.

V. Compliance Monitoring

IT IS FURTHER ORDERED that, for the purpose of monitoring Respondent's compliance with this Order:

A. Within ten (10) days of receipt of a written request from a representative of the Commission, Respondent must: submit additional compliance reports or other

requested information, which must be sworn under penalty of perjury, and produce records for inspection and copying.

B. For matters concerning this Order, representatives of the Commission are authorized to communicate directly with Respondent. Respondent must permit representatives of the Commission to interview anyone affiliated with Respondent who has agreed to such an interview. The interviewee may have counsel present.

C. The Commission may use all other lawful means, including posing through its representatives as consumers, suppliers, or other individuals or entities, to Respondent or any individual or entity affiliated with Respondent, without the necessity of identification or prior notice. Nothing in this Order limits the Commission's lawful use of compulsory process, pursuant to Sections 9 and 20 of the FTC Act, 15 U.S.C. §§ 49, 57b-1.

VI. Order Effective Dates

IT IS FURTHER ORDERED that this Order is final and effective upon the date of its publication on the Commission's website (ftc.gov) as a final order. This Order will terminate on June 29, 2040, or twenty (20) years from the most recent date that the United States or the Commission files a complaint (with or without an accompanying settlement) 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 Provision 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 Provision.

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 Provision as though the complaint had never been filed, except that the Order will not terminate between the date such complaint is filed and the later of the deadline for appealing such dismissal or ruling and the date such dismissal or ruling is upheld on appeal.

By the Commission.

Concurring Statement

STATEMENT OF COMMISSIONER ROHIT CHOPRA REGARDING MINICLIP AND THE COPPA SAFE HARBORS

Miniclip is a major player in the mobile gaming space, offering over 1,000 games to users,[1] including children, around the world. Miniclip is owned by Tencent, the Chinese tech conglomerate.[2]

Today, the FTC is taking action against Miniclip, but not for violations of the Children's Online Privacy Protection Act (COPPA). Instead, the Commission is ordering Miniclip to stop misrepresenting that it participates in a children's privacy self-regulatory program.

Miniclip was enrolled in a COPPA "Safe Harbor" program run by the Children's Advertising Review Unit (CARU). The Federal Trade Commission approves these Safe Harbor programs, and companies that participate in an approved program get special regulatory treatment. According to CARU, "Program participants who adhere to CARU's Guidelines are deemed in compliance with COPPA and essentially insulated from enforcement actions by the Federal Trade Commission (FTC)."[3]

In 2015, Miniclip was terminated from CARU's Safe Harbor program. According to my office's analysis of COPPA Safe Harbor reports submitted to the FTC, terminations are exceedingly rare.[4] I commend CARU for demonstrating its willingness to discipline its participants that violate its guidelines, but the specific details regarding Miniclip's violations that led to its termination remain a secret to the public. If the FTC does not promptly learn about or investigate terminations by COPPA Safe Harbors, the agency may be unable to obtain civil penalties, due to the five-year statute of limitations.

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1 *Miniclip The Ultimate Games Brand: About*, MINICLIP, https://corporate.miniclip.com/about/ (last visited May 15, 2020).

2 Surveillance and data collection on American children raise concerns that go beyond privacy. According to a State Department official, there are critical national security issues with respect to technology companies affiliated with the Chinese government, such as Huawei, ZTE, Alibaba, Baidu, and Tencent. Dr. Christopher Ashley Ford, Assistant Secretary, U.S. Department of State Bureau of International Security and Nonproliferation, Remarks at the Multilateral Action on Sensitive Technologies (MAST) Conference at the Loy Henderson Auditorium in Washington, D.C., Huawei and Its Siblings, the Chinese Tech Giants: National Security and Foreign Policy Implications (Sept. 11, 2019), https://www.state.gov/huawei-and-its-siblings-the-chinese-tech-giants-national-security-and-foreign-policy-implications/.

3 *The Children's Advertising Review Unit (CARU)*, BETTER BUSINESS BUREAU NATIONAL PROGRAMS., https://bbbprograms.org/programs/all-programs/caru/CARU-COPPA-safe-harbor (last visited May 15, 2020).

4Rohit Chopra, Commissioner, Fed. Trade Comm'n, Remarks at the Common Sense Media Truth About Tech Conference at Georgetown University (Apr. 4, 2019), https://www.ftc.gov/public-statements/2019/04/prepared-remarks-commissioner-rohit-chopra-common-sense-media-truth-about.

Analysis to Aid Public Comment

While I support this action, the Miniclip matter reinforces my concerns about the COPPA Safe Harbor programs. The Commission must take many steps to revamp its approach to these third- party privacy policing programs, such as:

- Subjecting the COPPA Safe Harbors to routine reviews and Commission votes to maintain accreditation, rather than the current "lifetime approval" approach
- Disclosing COPPA Safe Harbor performance data to the public, including complaints handled and disciplinary actions taken
- Limiting conflicts of interest by COPPA Safe Harbors by restricting additional fee-based consulting offered by affiliates of the Safe Harbor to participating websites and apps
- Seeking the prompt submission to the FTC of all documentation regarding disciplinary actions
- Terminating Safe Harbor programs that do not adequately fulfill their oversight requirements

Beefing up oversight of the COPPA Safe Harbor program is just one of many actions the Commission must take to strengthen our approach to protecting children's privacy. The Commission should also issue orders under Section 6(b) of the FTC Act to further study how companies are collecting, sharing, and monetizing data on children, as we look to modernize our rules and enforcement strategy to root out children's privacy violations.

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 Miniclip S.A. ("Respondent").

The proposed consent order ("proposed order") has been placed on the public record for thirty (30) days for receipt of comments from interested persons. Comments received during this period will become part of the public record. After thirty (30) days, the Commission will again review the 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 develops, publishes, and distributes mobile and online digital games. As of August 2019, Respondent had approximately 100 applications ("apps") available for download through Apple's App Store and Google Play. Consumers can also play online games via Respondent's website, *www.miniclip.com*, and through Facebook.

Analysis to Aid Public Comment

This matter concerns alleged false or misleading representations that Respondent made concerning its status in a Children's Online Privacy Protection Act of 1998 ("COPPA") safe harbor program. Congress enacted COPPA to protect the safety and privacy of children online by prohibiting the unauthorized or unnecessary collection of children's personal information online by operators of Internet Web sites and online services. COPPA directed the Commission to promulgate a rule implementing COPPA. The Commission promulgated the COPPA Rule on November 3, 1999, and the COPPA Rule went into effect on April 21, 2000. The Commission promulgated revisions to the Rule that went into effect on July 1, 2013. COPPA includes a provision enabling industry groups or others to submit for Commission approval self-regulatory safe harbor programs that implement the protections of the Commission's final Rule.

In 2001, the Commission approved the Children's Advertising Review Unit ("CARU") as a COPPA safe harbor program. In July 2009, Respondent joined CARU's COPPA safe harbor program. Thereafter, Respondent began disseminating statements regarding its participation in CARU's COPPA safe harbor program. Respondent remained a member of CARU's COPPA Safe Harbor Program until July 6, 2015, when CARU terminated Respondent's participation in the program. After CARU terminated Respondent from its safe harbor program, Respondent continued to make claims that it participated in the program.

The Commission's proposed one-count complaint alleges that Respondent violated Section 5(a) of the Federal Trade Commission Act. Specifically, the proposed complaint alleges that Respondent engaged in a deceptive act or practice by falsely representing that it was a current participant in the CARU COPPA safe harbor program when it was not.

Part I of the proposed order prohibits Respondent 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 CARU COPPA safe harbor.

Parts II through V of the proposed order are reporting and compliance provisions. Part II requires acknowledgement of the order and dissemination of the order now and in the future to persons with responsibilities relating to the subject matter of the order.

Part III ensures notification to the FTC of changes in corporate status and mandates that the company submit an initial compliance report to the FTC. Part IV requires the company to create certain documents relating to its compliance with the order for ten (10) years and to retain those documents for a five-year period. Part V mandates that the company make available to the FTC information or subsequent compliance reports, as requested.

Part VI is a provision "sun-setting" 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.

INTERLOCUTORY, MODIFYING, VACATING, AND MISCELLANEOUS ORDERS

IN THE MATTER OF

RAGINGWIRE DATA CENTERS, INC.

Docket No. 9386. Order, January 6, 2020

Order denying respondent's motion to stay further proceedings pending resolution of respondent's Motion to Dismiss Administrative Complaint in this proceeding and rescheduling the hearing to commence on July 21, 2020.

ORDER DENYING STAY AND REFERRAL AND CHANGING HEARING DATE

On December 2, 2019, Respondent RagingWire Data Centers, Inc. filed a Motion to Dismiss Administrative Complaint in this proceeding. In addition to seeking dismissal of the Commission's Complaint in its entirety, that Motion requests that the Commission (1) stay further proceedings pending resolution of the Motion to Dismiss and (2) refer the Motion to Dismiss to the Administrative Law Judge assigned to this proceeding. Complaint Counsel have contested the Motion to Dismiss and oppose the requests for stay and referral. As set forth below, we deny Respondent's requests for stay and referral. We grant in part a separate, uncontested motion by Respondent to delay commencement of the administrative hearing.

I. THE REQUEST FOR A STAY

As to the request for a stay, Commission Rule of Practice 3.22(b) states in relevant part: "A [dispositive] motion under consideration by the Commission shall not stay proceedings before the Administrative Law Judge unless the Commission so orders . . .." When the Commission first adopted this Rule, it explained that the provision's "purpose . . . was to ensure that discovery and other prehearing proceedings continue while the Commission deliberates over the dispositive motions . . .." Rules of Practice; Final Rule, 74 Fed. Reg. 1804, 1810 (Jan. 13, 2009) ("Final Rule"). *See also* Rules of Practice; Proposed Rule, 73 Fed. Reg. 58832, 58836 (Oct. 7, 2008) ("Proposed Rule") (explaining that "[t]he Commission anticipates that new paragraphs [3.22](b) and (e) would expedite cases by providing that proceedings before the ALJ will not be stayed while the Commission considers a motion, unless the Commission orders otherwise . . .").

Here, Respondent argues, "a stay will avoid wasting the resources of the Commission, the FTC, and RagingWire." Motion to Dismiss at 6. The expenses at issue, however, are normal consequences of litigation, routinely borne by litigants while dispositive motions are pending. *See In re La. Real Estate Appraisers Bd.*, 2018 FTC Lexis 7 (F.T.C. Jan. 12, 2018), *also available at* https://www.ftc.gov/system/files/documents/cases/d09374_lreab_commission_order_denying_respondents_expedited_motion.pdf. "Generally, routine discovery costs do not outweigh the competing public interest in the efficient and expeditious resolution of litigated matters." *Id*.; *see In re LabMD*, 2013 WL 6826948, at *2-3 (Dec. 13, 2013) (denying a motion to stay proceedings in order to avoid pretrial expenses pending the Commission's ruling on a motion

to dismiss); *N. Carolina Bd. of Dental Exam'rs*, 150 F.T.C. 851 (2010) (same).[1] Here, Respondent has not established that a stay would be appropriate.[2]

II. THE REQUEST FOR REFERRAL TO THE ADMISTRATIVE LAW JUDGE

Respondent seeks referral of its Motion to Dismiss to the administrative law judge assigned to this proceeding. The Commission's Rules of Practice, however, expressly provide that motions to dismiss filed before the evidentiary hearing "shall be ruled on by the Commission unless the Commission in its discretion refers the motion to the Administrative Law Judge." 16 C.F.R. § 3.22(a). This rule reflects an "inten[tion] to ensure that the Commission is appropriately involved earlier in the adjudicatory process," Proposed Rule, 73 Fed. Reg. at 58834, and a judgment that bringing the Commission's expertise to bear on dispositive motions will "improve the quality of the decisionmaking and . . . will expedite the proceeding," Final Rule, 74 Fed. Reg. at 1809; *see also* Proposed Rule, 73 Fed. Reg. at 58836. Respondent's sole reason for requesting referral—that the same Commissioners who voted to issue the Complaint might be unable to dispassionately review the motion—is unsupported by any facts indicating that the Commission cannot fairly and judiciously perform its statutory, adjudicatory duties under 45 U.S.C. § 45(b). Lacking any specific support, Respondent effectively asks the Commission to disregard Rule 3.22(a)'s core determination that, in view of its statutory role as an expert adjudicator, Final Rule, 74 Fed. Reg. at 1806, the Commission should rule upon motions to dismiss. We decline to do so.

III. RESPONDENT'S MOTION TO RESCHEDULE ADMINSTRATIVE HEARING

On December 4, 2019, Respondent filed a motion to reschedule the administrative hearing. Under the current schedule, the hearing will begin on July 7, 2020. Respondent moves that it be postponed until or after the week of August 3, 2020. Respondent suggests that the current date would interfere with the planned family vacation of its lead counsel. Complaint Counsel do not oppose Respondent's motion.

Commission Rule of Practice 3.41(a) provides that the Commission may order a later date for the commencement of an evidentiary hearing "upon a showing of good cause." Respondent's motion cites the fact that that its lead counsel "is scheduled to be absent on a planned family vacation the week immediately prior to the currently scheduled July 7, 2020 start of the administrative hearing." Motion of Administrative Hearing at 2. While that could justify a short delay in the start of the hearing, Respondent has provided no reason why the hearing should be delayed for nearly a month. Consequently, and in view of the public interest in resolving this matter

1 *See* Final Rule, 74 Fed. Reg. at 1805 (explaining that in amending its rules for adjudicative proceedings, the Commission "intended . . . to balance three important interests: the public interest in a high quality decisionmaking process, the interest of justice in an expeditious resolution of litigated matters, and the interest of the parties in litigating matters without unnecessary expense").

2 In addition to arguing that a stay would save resources, Respondent asserts that it has acted in good faith and has taken affirmative corrective steps, so that there is no reason to anticipate future non-compliance. Motion to Dismiss at 5. These assertions raise factual issues, which, if relevant, would need to be assessed in the context of evidence developed at trial.

efficiently and expeditiously, we find good cause to grant only a portion of the requested continuance and will reschedule the hearing to commence on July 21, 2020.

Accordingly,

IT IS HEREBY ORDERED that Respondent's request to stay further proceedings in this matter pending resolution of its Motion to Dismiss is **DENIED**;

IT IS FURTHER ORDERED that Respondent's request to refer its Motion to Dismiss to the Administrative Law Judge is **DENIED;**

IT IS FURTHER ORDERED that Respondent's Expedited Motion of Administrative Hearing is **GRANTED IN PART.** The evidentiary hearing shall begin on July 21, 2020, at 10:00 a.m. The Administrative Law Judge retains discretion to adjust any pre-hearing deadlines to the extent compatible with the hearing date as extended by this Order.

By the Commission.

Interlocutory Orders, Etc.

IN THE MATTER OF

RAGINGWIRE DATA CENTERS, INC.

Docket No. 9386. Order, February 3, 2020

Opinion and Order denying respondent's Motion to Dismiss Administrative Complaint in this proceeding.

ORDER DENYING RESPONDENT'S MOTION TO DISMISS

By Commissioner Christine S. Wilson, for the Commission:

On November 5, 2019, the Commission issued an administrative complaint against RagingWire Data Centers, Inc. ("RagingWire" or "Respondent"), alleging that the company engaged in deceptive acts or practices in violation of Section 5 of the Federal Trade Commission Act ("FTC Act") by making false or misleading representations regarding its participation in the EU-U.S. Privacy Shield Framework and/or the Safe Harbor Framework, and its compliance with Privacy Shield Principles. Respondent has moved to dismiss the Complaint for failure to state a claim. Respondent's motion rests on its assertion that the Complaint fails to plead materiality adequately, a required element for showing that an act or practice is deceptive. We find the Complaint, construed in a light most favorable to Complaint Counsel-as required in the context of a motion to dismiss-adequately pleads that RagingWire's alleged misrepresentations were material. We therefore deny Respondent's motion to dismiss.

I. COMPLAINT ALLEGATIONS AND PROCEDURAL BACKGROUND

We summarize the Complaint's allegations below:

Since 1995, European Union ("EU") law has prohibited (or required EU Member States to prohibit) the transfer of personal data outside the EU, with exceptions, unless the European Commission has made a determination that the recipient jurisdiction's laws ensure that such personal data are protected *(i.e.,* meet the EU's "adequacy" standard). Compl. ¶¶ 5-6. To satisfy this standard for certain commercial transfers, the U.S. Department of Commerce ("Commerce") and the European Commission negotiated the EU-U.S. Privacy Shield Framework ("Privacy Shield"). *Id.* ¶ 7. Privacy Shield provides a mechanism for companies to transfer personal data from the EU to the United States in a manner consistent with the requirements of EU law on data protection. *Id.* ¶¶ 5, 7. Accordingly, personal data from the EU may lawfully be transferred to companies in the United States that participate in Privacy Shield. *Id.* ¶ 7. Privacy Shield took effect on August 1, 2016, replacing the U.S.-EU Safe Harbor Framework, a mechanism for personal data transfer that was in effect for a number of years before that. *Id* ¶¶ 7-8. Under the EU's General Data Protection Regulation ("GDPR"), which took effect on May 25, 2018, transfers of personal information from the European Economic Area to the United States without the benefit of an authorized mechanism such as Privacy Shield are subject to severe penalties, including administrative fines of up to 20,000,000€ or 4% of the transferor's worldwide annual turnover from the preceding financial year, whichever is greater. *Id.* ¶¶ 6, 14.

To join Privacy Shield, a company must self-certify to Commerce that it complies with the Privacy Shield Principles and related requirements that have been deemed to meet the EU's standards. *Id.* ¶ 9. Participating companies must annually recertify their compliance. *Id.* As part of recertification, those companies must verify, through self-assessment or outside compliance review, that the assertions about their Privacy Shield privacy practices are true and that those practices have been implemented. *Id.* ¶ 26. They must also prepare a statement, signed by a corporate officer or outside reviewer, that a self-assessment or outside compliance review has been completed. *Id.* ¶ 27. Although the decision to participate in Privacy Shield is entirely voluntary, once a company self-certifies to Commerce and publicly declares its commitment to adhere to the Privacy Shield Principles, it must comply fully with them. *Id.* ¶ 10.

In some circumstances, Privacy Shield participants must ensure that third parties with which they do business provide comparable privacy protections. Under Privacy Shield Principle 3, "Accountability for Onward Transfer," participants must ascertain that any third-party agents to which they transfer data received pursuant to Privacy Shield are obligated to provide at least the same level of privacy protection as is required by the Privacy Shield Principles. *Id.* ¶ 11. One way to meet this requirement is to use an agent that is also a Privacy Shield participant. *Id.*

Respondent RagingWire is a Nevada corporation that provides data colocation services at its specialized storage facilities, or "data centers," located in the United States. Compl. ¶¶ 2, 16. These data centers are designed to house and protect servers owned and operated by other businesses. *Id.* ¶ 2. In addition to storing customer data, RagingWire provides various complementary services, including on site technical support, network connectivity, and physical security. *Id.* ¶¶ 2, 16. RagingWire customers that collect or process personal information from the European Economic Area and want to transfer that data to RagingWire in the United States can comply with the GDPR and/or their own Privacy Shield obligations if RagingWire participates in Privacy Shield. *Id.* ¶ 16.

Prior to June 2016, RagingWire participated in the Safe Harbor Framework. *Id.* ¶ 17. In January 2017, it obtained a Privacy Shield certification. *Id.* ¶ 18. One year later, however, RagingWire did not complete the steps necessary to renew its Privacy Shield certification, and its Privacy Shield certification lapsed in January 2018. *Id.* ¶ 19. Despite this lapse, RagingWire continued to represent in its online privacy policy that it participated in and complied with Privacy Shield and that it adhered to the Privacy Shield Principles. *Id.* ¶ 20. It also disseminated or caused to be disseminated sales materials containing representations that RagingWire was a participant in Privacy Shield and/or the Safe Harbor Framework after it was no longer participating in either framework. *Id.* ¶ 21. Further, RagingWire continued to represent that it was committed to resolving complaints regarding privacy and data collection or use in compliance with Privacy Shield, and it directed users to contact its third-party dispute resolution provider TRUSTe LLC in case of any unresolved privacy or data concerns. *Id.* ¶¶ 20, 33. In fact, however, RagingWire's subscription with TRUSTe LLC had been terminated as of October 1, 2017, and was not renewed until June 2018. Id. ¶ 34. Accordingly, during this time, RagingWire was not in compliance with the Privacy Shield requirement to maintain a readily available independent recourse mechanism for dispute resolution. *Id.* ¶¶ 30, 43.

Following the lapse of RagingWire's Privacy Shield certification in January 2018, Commerce warned the company in February 2018, and again in May 2018, to take down its claims that it participated in Privacy Shield unless and until such time as it completed the steps necessary to renew its participation. *Id.* ¶ 22. RagingWire did not remove its online Privacy Shield statements until October 2018, after RagingWire was contacted by the FTC. *Id.* ¶ 23. In June 2019, RagingWire again obtained Privacy Shield certification. *Id.* ¶ 24.

The Commission's Complaint against RagingWire alleges four counts of misrepresentation. In the first count, the Complaint asserts that RagingWire misrepresented that it was a current participant in Privacy Shield and/or the Safe Harbor Framework for a period of ten months after its certifications had lapsed. *Id.* ¶¶ 38-39; *see also id.* ¶¶ 22-23 (describing RagingWire's failure until October 2018 to take down the claim that it participated in Privacy Shield, despite the lapse of its certification in January 2018). The other three counts allege that RagingWire represented that it complied with Privacy Shield Principles when in fact it did not comply with those Principles by (1) failing to meet the compliance-verification requirements, (2) failing to maintain a readily available independent recourse mechanism, and (3) letting its certification lapse without affirming or verifying to Commerce that it either would delete or return personal information that it received during the time it participated in the program or would continue to apply the principles to such information. *Id.* ¶¶ 40-45. The Complaint alleges that the identified acts and practices "constitute deceptive acts or practices, in or affecting commerce, in violation of Section 5(a) of the Federal Trade Commission Act." *Id.* 46.

The Respondent filed an Answer on November 25, 2019. On December 2, 2019, Respondent moved to dismiss the Complaint for failure to state a claim.

II. STANDARD OF REVIEW

We review RagingWire's Motion to Dismiss Administrative Complaint ("Motion") using the standards applied by federal courts under Rule 12(b)(6) of the Federal Rules of Civil Procedure. *LabMD, Inc.,* 2014 WL 253518, at *2 (F.T.C. Jan. 16, 2014); *S.C. State Bd. of Dentistry,* 138 F.T.C. 229, 232-33 (2004). "Our task is to determine whether the Complaint contains sufficient factual matter to state a claim to relief that is plausible on its face." *LabMD,* 2014 WL 253518, at *2 (quoting *Resnick v. AvMed, Inc.,* 693 F.3d 1317, 1326 (11th Cir. 2012)) (internal quotation marks, ellipsis, and brackets omitted). We must "accept the allegations in the complaint as true and construe them in the light most favorable to Complaint Counsel." *LabMD,* 2014 WL 253518, at *2 (quoting *Am. Dental Ass'n* v. *Cigna Corp.,* 605 F.3d 1283, 1.288 (11th Cir. 2010)) (internal quotation marks and brackets omitted); *S.*C. *State Bd. of Dentistry,* 138 F.T.C. at 232-33.

III. ANALYSIS

The Complaint alleges that RagingWire engaged in deceptive acts or practices in violation of Section 5 of the FTC Act. An act or practice is deceptive if (1) there is a representation, omission, or practice (2) that is likely to mislead consumers acting reasonably under the circumstances and (3) the representation, omission, or practice is material. *FTC* v. *Gill,* 265 F.3d 944, 950 (9th Cir. 2001); *FTC Policy Statement on Deception,* appended to *Cliffdale Assocs., Inc.,* 103 F.T.C. 110,

175-76 (1984) *("Deception Statement"); Cliffdale Assocs.,* 103 F.T.C. at 164--65. Respondent urges us to dismiss the Complaint for failure to allege materiality.

A representation is considered material if it "involves information that is important to consumers and, hence, likely to affect their choice of, or conduct regarding, a product." *FTC* v. *Cyberspace.Com LLC,* 453 F.3d 1196, 1201 (9th Cir. 2006) (quoting *Cliffdale Assocs.,* 103 F.T.C. at 165); *FTC v. QT, Inc.,* 448 F. Supp. 2d 908,960 (N.D. Ill. 2006) (quoting *Kraft, Inc. v. FTC,* 970 F.2d 311,322 (7th Cir. 1992)), *aff'd,* 512 F.3d 858 (7th Cir. 2008); *Cambridge Analytica, LLC,* 2019 WL 6724446, at *10 (F.T.C. Nov. 25, 2019). Respondent argues that the Complaint fails to allege materiality because it does not directly state that Privacy Shield compliance is important to RagingWire customers or that Privacy Shield certification affected any customer's purchasing decisions. Motion at 4. Such allegations, however, are not required.

The Complaint alleges that RagingWire represented that it participated in Privacy Shield and complied with Privacy Shield Principles. Compl. ¶ 20. Its online privacy policy expressly asserted that "RagingWire complies with the EU-US Privacy Shield Framework" and directed users to "view our certification page." *Id.* It also stated that "RagingWire has certified that it adheres to the Privacy Shield Principles of Notice, Choice, Accountability for Onward Transfer, Security, Data Integrity and Purpose Limitation, Access, and Recourse, Enforcement and Liability." *Id.* In addition, RagingWire's online privacy policy stated that "In compliance with the EU-US Privacy Shield Principles, RagingWire commits to resolve complaints about your privacy and our collection or use of your personal information" and expressly invited clients with "an unresolved privacy or data use concern that we have not addressed satisfactorily" to "contact our U.S.-based third party dispute resolution provider" at a URL for TRUSTe. *Id* Further, RagingWire "disseminated or caused to be disseminated sales materials containing representations that RagingWire was a participant in Privacy Shield and/or the Safe Harbor Framework." *Id.* ¶ 21.

"In most cases, the very existence of an express claim is sufficient to demonstrate that the claim is material." *ECM Biofilms, Inc.,* 2015 WL 6384951, at *53 (F.T.C. Oct. 19, *2015),pet. for review denied,* 851 F.3d 599, 604 (6th Cir. 2017). Thus, express statements are presumed to be material. *Id; FTC* v. *Pantron I Corp.,* 33 F.3d 1088, 1095-96 (9th Cir. 1994); *Jerk, LLC,* 159 F.T.C. 885,906 (2015), *aff'd in relevant part, Fanning v. FTC,* 821 F.3d 164, 172-73 (1st Cir. 2016); *POM Wonderful LLC,* 155 F.T.C. l, 62 (2013) (citing *Novartis Corp.,* 127 F.T.C. 580, 686 (1999) (citing *Deception Statement,* 103 F.T.C. at 182)), *aff'd,*777 F.3d 478 (D.C. Cir. 2015). Express claims encompass not only the explicit statements in the representation but also necessary implications derived from the statements. *FTC v. Bronson Partners, LLC,* 564 F. Supp. 2d 119, 126 n.4 (D. Conn. 2008).

We recently applied the presumption of materiality to similar representations regarding Privacy Shield in *Cambridge Analytica.* In that case, as in this one, the respondent represented on its website that it participated in and complied with Privacy Shield, even though its certification had lapsed. *Cambridge Analytica,* 2019 WL 6724446, at *8 (F.T.C. Nov. 25, 2019). The Commission found that the representations were express and that therefore the presumption of materiality applied. *Id.* at *12. Similarly, because the representations cited in the Complaint here were express, they are presumptively material. That presumption, along with the Complaint's

allegations of false and misleading representations, Compl. ¶¶ 38-45, constitutes sufficient basis to state a deception claim that is plausible on its face. Respondent may seek to rebut the presumption with contrary evidence, but that raises issues for trial, not for a motion to dismiss.

Respondent asserts that the presumption should not apply because the Complaint does not specifically plead the presumption. RagjngWire Data Centers, Inc.'s Reply in Support of Motion to Dismiss Administrative Complaint and Request for Stay and Referral ("Reply") at 4. But a complaint "need not ... plead law or match facts to every element of a legal theory." *Rhodes v. Super. Ct. of D.C.,* 303 F. Supp. 3d 1, 3 (D.D.C. 2018) (quoting *Krieger v. Fadely,* 211 F.3d 134, 136 (D.C. Cir. 2000)) (internal quotation marks omitted). As the Supreme Court explained, a complaint need only provide the factual basis for a claim for relief and should not be dismissed "for imperfect statement of the legal theory supporting the claim asserted." *Johnson v. City of Shelby,* 574 U.S. 10, 11-12 (2014).[1]

Even without a presumption, the Complaint pleads sufficient facts to support a reasonable inference of materiality. *See Ashcroft v. Iqbal,* 556 U.S. 662, 678 (2009) (a claim survives a motion to dismiss "when the plaintiff pleads factual content that allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged."). We can reasonably infer materiality from RagingWire's own actions and from the legal obligations to which its customers that collect personal data from the EU are subject.

As to its actions, RagjngWire elected to join Privacy Shield and the Safe Harbor Framework and to publicize its participation on its website and in its marketing materials. Compl. ¶¶ 17-18, 20-21. Indeed, RagingWire went to considerable lengths to inform its clients that it was committed to resolve their complaints about privacy and data collection and use "[i]n compliance with the EU-U.S. Privacy Shield Principles." *Id.* 120. Further, after letting its certification lapse, and then removing its representations about Privacy Shield adherence from its website in October 2018, *id.* ¶ 23, RagingWire renewed its Privacy Shield Certification in 2019, *id.* ¶ 24. These allegations support a reasonable inference that RagingWire appears to have understood its Privacy Shield participation and its compliance with Privacy Shield principles were important to its customers, which supports a reasonable inference that such claims are likely to affect their conduct and are thus material.

The Complaint's allegations regarding customers' legal obligations also support a reasonable inference that RagingWire's participation in Privacy Shield is important to its customers. Companies that transfer data from the EU to the United States must do so through an authorized mechanism such as Privacy Shield or risk significant fines. *Id.* ¶ 14 (citing GDPR, Art. 83). Privacy Shield, in turn, requires these companies to ensure that third-party agents to which they transfer data provide at least the same level of privacy as required by Privacy Shield Principles. *Id.* ¶ 11. One way these companies may establish compliance is to ensure that any company to which they transfer data is also part of Privacy Shield. *Id.* It is therefore reasonable to infer that companies (including customers or potential customers of Raging Wire) that receive personal data pursuant to Privacy Shield and then transfer that data from the EU to the United States would find

1 Similarly, as Respondent itself acknowledges, the Complaint's omission of the words "material" and "materiality" does not warrant dismissal. *See* Reply at 2-3.

it important that the company that stores this data is a Privacy Shield participant. *See id.* ¶ 16 (alleging that RagingWire stores customer data at its U.S. centers).

Respondent urges us to dismiss the Complaint because it "does not allege that there are, in fact, customers that want to or do transfer protected data to RagingWire." Motion at 4-5. Further, Respondent asserts that there is no reason to believe that such customers even exist, "[i]n light of the nature of RagingWire's business." *Id.* at 5. Respondent admits, however, that some of its customers have locations in Europe, Answer at 4, though even its U.S.-based customers could be collecting data from the EU. To the extent that Respondent contends that its customers do not care about whether it complies with Privacy Shield because they do not actually "transfer" data to RagingWire, Respondent is free to make this argument in rebuttal to the presumption of materiality, but it is not an argument we can properly assess on a motion to dismiss. The argument raises factual issues regarding the nature of RagingWire's services- including the "technical support" and "network connectivity" alleged in Paragraph 2 of the Complaint-and the needs and concerns of its customers, so it cannot form a basis for dismissal. *See S.C. State Bd. of Dentistry,* 138 F.T.C. at 233 ("[T)he Commission should not dismiss the complaint if the motion, or Complaint Counsel's opposition to the same, raises disputed issues of material fact.").

Respondent also takes issue with the Complaint's failure to identify customers who actually viewed the Privacy Shield statements and relied on them in making their decisions. Reply at 5. The Complaint need not, however, identify customers who relied on the express claims. *See FTC v. Ideal Fin. Sols., Inc.,* 2014 WL 2565688, at *6 (D. Nev. June 5, 2014) ("Express claims are presumed material, and the FTC does not have to prove actual reliance by consumers."); *Deception Statement,* 103 F.T.C. at 183 (Commission will not generally require extrinsic evidence concerning the materiality of a challenged claim). The materiality standard requires only that a representation is "likely" to affect consumer choice, not that it actually did. *See, e.g., Cliffdale Assocs*., 103 F.T.C. at 165-66; *see also FTC v. Freecom Commc'ns, Inc.,* 401 F.3d 1192, 1203 (10th Cir. 2005) ("Neither proof of consumer reliance nor consumer injury is necessary to establish a § 5 violation. Otherwise, the law would preclude the FTC from taking preemptive action against those responsible for deceptive acts or practices, contrary to § 5's prophylactic purpose.") (citation omitted).

As noted above, Respondent may marshal evidence to rebut the presumption of materiality. Indeed, belying Respondent's claim that the Complaint fails to put it on notice regarding the basis for asserting materiality, Reply at 7-8, Respondent has already indicated that it is poised to offer rebuttal, Answer at 3-4. At this stage in the proceedings, however, Complaint Counsel have alleged sufficient facts to state a plausible claim to relief. The Complaint adequately alleges that RagingWire's misrepresentations about its participation in and compliance with Privacy Shield are material and hence deceptive.

Accordingly,

IT IS ORDERED THAT Respondent RagingWire's Motion to Dismiss Administrative Complaint is **DENIED.**

By the Commission.

Interlocutory Orders, Etc.

IN THE MATTER OF

RAG-STIFTUNG,
EVONIK INDUSTRIES AG,
EVONIK CORPORATION,
EVONIK INTERNATIONAL HOLDING B.V.,
ONE EQUITY PARTNERS SECONDARY FUND L.P.,
ONE EQUITY PARTNERS V, L.P.,
LEXINGTON CAPITAL PARTNERS VII (AIV I), L.P.,
PEROXYCHEM HOLDING COMPANY LLC,
PEROXYCHEM HOLDINGS, L.P.,
PEROXYCHEM HOLDINGS LLC,
PEROXYCHEM LLC,
AND
PEROXYCHEM COOPERATIEF U.A.

Docket No. 9384. Order, February 11, 2020

Order granting respondent's unopposed Motion to Withdraw this Matter from adjudication.

ORDER WITHDRAWING MATTER FROM ADJUDICATION
PURSUANT TO RULE 3.26(C) OF THE COMMISSION RULES OF PRACTICE

On February 7, 2020, counsel for all the Respondents in this proceeding filed a Motion to the Commission for Withdrawal of the Matter from Adjudication. Also on February 11, 2020, Complaint Counsel filed a Response to Respondent's Motion, advising that Complaint Counsel do not oppose Respondents' Motion. Accordingly,

IT IS ORDERED, pursuant to Rule 3.26(c) of the Commission Rules of Practice, 16 C.F.R. § 3.26(c), that this matter in its entirety be and it hereby is withdrawn from adjudication, and that all proceedings before the Administrative Law Judge be and they hereby are stayed.

By the Commission, Chairman Simons recused.

Interlocutory Orders, Etc.

IN THE MATTER OF

AXON ENTERPRISE, INC.,
AND
SAFARILAND, LLC

Docket No. 9389. Order, February 27, 2020

Opinion and Order denying respondent's motion to stay this administrative proceeding until entry of a final judgment on Axon's complaint seeking declaratory and injunctive relief in federal district court or, in the alternative, until entry of an order in that court on Axon's motion for a preliminary injunction.

ORDER DENYING RESPONDENT'S MOTION FOR A STAY

On January 10, 2020, Respondent Axon Enterprise, Inc. ("Axon") filed a motion to stay this administrative proceeding until entry of a final judgment on Axon's complaint seeking declaratory and injunctive relief in federal district court or, in the alternative, until entry of an order in that court on Axon's motion for a preliminary injunction. Complaint Counsel oppose the motion. For the reasons stated below, we deny Axon's motion to stay.

I. BACKGROUND

On January 3, 2020, the Commission filed an administrative complaint against Respondents Axon and Safariland, LLC ("Safariland") challenging Axon's acquisition of VieVu, LLC ("VieVu") from Safariland. According to the Complaint, Axon is a leading manufacturer and supplier of body-worn cameras and digital evidence management systems (collectively "BWC Systems"), and VieVu is its closest competitor. FTC Compl. ¶¶ 1-2, 36. Axon purchased VieVu from Safariland in May 2018. *Id.* ¶ 2. The Complaint alleges that, after the acquisition, Axon enacted substantial price increases, limited the availability of VieVu BWC Systems to customers, and stopped developing new generations of VieVu hardware and software. *Id.* ¶¶ 6-7. The Complaint asserts that Axon plans [redacted] *Id.* ¶ 7. Further, the Complaint alleges that, as part of the acquisition, Respondent Safariland agreed not to compete with Axon and not to solicit Axon's customers, including with respect to products and services not related to the acquisition, and both Axon and Safariland agreed not to affirmatively solicit each other's employees, all for 10 years or longer. *Id.* ¶¶ 12, 44-53. According to the Complaint, the acquisition agreement and the acquisition, including the non-compete agreements, violate Section 5 of the Federal Trade Commission Act (FTC Act) and/or Section 7 of the Clayton Act. *Id.* ¶¶ 57-60.

Hours before the Commission filed its complaint, Respondent Axon filed an injunctive and declaratory judgment action in the District of Arizona. Count I of that action alleges that "[t]he imminent administrative proceeding" against Axon violates Axon's Fifth Amendment due process and equal protection rights by subjecting Axon to unfair procedures before an administrative body rather than a trial before a neutral, federal judge. Axon Compl. ¶¶ 57-60. Count II alleges that the Commission's structure is on its face unconstitutional under Article II because Commissioners are

shielded from at-will removal and administrative law judges may be removed only for cause and only by officials who themselves cannot be removed at will. *Id.* ¶¶ 61-62. Count III seeks a declaratory judgment that Axon's acquisition of VieVu "did not violate Clayton Act § 7 or any other antitrust law." *Id.* ¶ 64.

On January 9, 2020, Axon moved the district court to preliminarily enjoin the Commission's administrative proceeding on the basis of the first two counts of Axon's complaint. The next day, Axon moved to stay this administrative proceeding until entry of a final judgment in Axon's federal action, or in the alternative, until entry of an order on the motion for a preliminary injunction. Mot. of Resp't Axon Enterprise, Inc., to Stay Admin. Proceeding ("Motion") at 1. On January 21, 2020, Axon filed an Answer in this matter asserting eighteen affirmative defenses, including defenses based on the same constitutional grounds alleged in its federal complaint. Answer at 20-22. The evidentiary hearing in the administrative proceeding is scheduled to begin on May 19, 2020.

II. ANALYSIS

Commission Rule of Practice 3.41(f) provides, in relevant part, that a pending "collateral federal court action that relates to the administrative adjudication shall not stay the proceeding unless a court of competent jurisdiction, or the Commission for good cause, so directs." 16 C.F.R. § 3.41(f) (2019). This rule reflects the Commission's commitment to expeditiously resolving administrative complaints and minimizing delay and the concomitant harm to the public interest. *See N.C. Bd. of Dental Exam'rs*, 151 F.T.C. 640, 641-42 (2011) (citing Rules of Practice, 74 Fed. Reg. 1816 (Jan. 13, 2009) (codified at 16 C.F.R. pts. 3 & 4) and 16 C.F.R. § 3.1 (2009)). The default rule is, thus, that the pendency of a collateral proceeding in federal court does not constitute a basis to stay the administrative proceeding. Axon has failed to show good cause to depart from this usual rule.

Axon argues that there is good cause to stay the administrative proceeding because doing so will conserve resources. Specifically, Axon asserts that, because its claims before the district court concern the constitutionality of the Commission's structure and proceedings, the district court's ruling could terminate this matter entirely. *See* Motion at 3. Accordingly, Axon claims, allowing the administrative action to continue would waste resources and subject Axon to the very proceeding it asserts is unconstitutional, *id.*, while intruding on the district court's decision-making. *Id.* at 5. At the same time, Axon argues, a stay would cause no harm to the Commission. *Id.* at 3-4. These arguments fail on all counts.

Proceeding administratively is unlikely to waste resources because Axon's federal action is likely to fail for lack of subject-matter jurisdiction. In attempting to convince the district court to upend a century-old administrative system, Axon seeks to bypass a comprehensive, statutorily-established process for judicial review. The FTC Act expressly lays out a process pursuant to which the Commission may bring an administrative action, and if it finds a violation of the Act, issue a cease-and-desist order. 15 U.S.C. § 45(b) (2006). After issuance of that order, the party subject to it may obtain judicial review in a federal court of appeals, which has "exclusive" jurisdiction. 15 U.S.C. § 45(c)-(d). Where Congress has set out an exclusive review process for

administrative actions, as it has in the FTC Act,[1] a litigant must follow that process. *See generally Elgin v. Dep't of the Treasury*, 567 U.S. 1 (2012); *Thunder Basin Coal Co. v. Reich*, 510 U.S. 200 (1994).[2]

In the context of similar review schemes, courts have consistently rejected attempts to bypass the administrative review process, dismissing for lack of subject-matter jurisdiction claims just like Axon's that assert that the administrative proceeding is unconstitutional. *See, e.g.*, *Bennett v. S.E.C.*, 844 F.3d 174, 177, 188 (4th Cir. 2016) (district court lacked jurisdiction where plaintiff's complaint alleged that the Security and Exchange Commission's provisions for appointing and removing administrative law judges violated Article II of the United States Constitution); *Hill v. S.E.C.*, 825 F.3d 1236, 1239-41 (11th Cir. 2016) (district court lacked jurisdiction where plaintiffs' complaints alleged that the administrative proceeding violated removal protections of Article II, the non-delegation doctrine under Article I, the Seventh Amendment right to a jury trial, and the Appointments Clause); *Tilton v. S.E.C.*, 824 F.3d 276, 291 (2d Cir. 2016) (district court lacked jurisdiction where plaintiffs' complaint alleged that the administrative proceeding violated the Appointments Clause); *Jarkesy v. S.E.C.*, 803 F.3d 9, 14-15, 29-30 (D.C. Cir. 2015) (district court lacked jurisdiction where plaintiffs' complaint alleged, *inter alia*, that the SEC had prejudged the charges and denied plaintiffs their fundamental right to a jury trial in violation of the Due Process Clause and the Equal Protection Clause); *Bebo v. S.E.C.*, 799 F.3d 765, 767-68, 775 (7th Cir. 2015) (district court lacked jurisdiction where plaintiff's complaint alleged that the SEC's administrative proceeding violated removal protections of Article II and that the governing statute violated the Constitution's equal protection and due process guarantees by giving the SEC "unguided" authority to choose which respondents would receive the procedural protections of a federal district court); *see also Arch Coal, Inc. v. Acosta*, 888 F.3d 493, 496 (D.C. Cir. 2018) (holding that a "comprehensive scheme of administrative review, followed by judicial review in a court of appeals, makes it clear that Congress implicitly precluded district court jurisdiction"). Because the district court likely lacks jurisdiction to adjudicate Axon's claims, there is no good cause to stay this proceeding.[3]

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1 The process for a Commission administrative action to enforce Section 7 of the Clayton Act is virtually identical. *Compare* 15 U.S.C. § 21(b)-(d) *with* 15 U.S.C. § 45(b)-(d). Like the FTC Act, the Clayton Act vests "exclusive" jurisdiction to review Commission cease-and-desist orders in the court of appeals. 15 U.S.C. § 21(c)-(d).

2 *Free Enter. Fund v. Pub. Co. Accounting Oversight Bd.*, 561 U.S. 477 (2010), in which the Supreme Court allowed a plaintiff to bring a constitutional challenge to actions of the Public Company Accounting Oversight Board directly in federal court, is distinguishable. There, the relevant administrative statute "provide[d] only for judicial review of [Securities and Exchange] *Commission* action, and not every Board action is encapsulated in a final Commission order or rule." *Id.* at 490 (emphasis in original). As a result, to have its claims heard through the agency route, plaintiff either would have had to "select and challenge a Board rule at random" or voluntarily "incur a sanction (such as a sizable fine)" in order to trigger the mechanism for administrative and judicial review. *Id.* Axon, in contrast, is already properly before the Commission by virtue of its alleged violations of the FTC Act.

3 Nor does the Administrative Procedure Act, 5 U.S.C. § 704, which allows a party to challenge in federal court "final agency action for which there is no other adequate remedy in a court," provide a basis for jurisdiction. The Commission has taken no "final" action in this case. *See FTC v. Standard Oil Co.*, 449 U.S. 232, 239 (1980) (holding that Commission issuance of its complaint is not "final agency action"). Having concluded that Axon's federal

Even apart from the likely dismissal of Axon's federal claims, allowing the administrative action to proceed through discovery will not waste resources or unduly burden Axon. The underlying antitrust claims will need to be litigated regardless of the forum: Axon's federal court complaint includes a declaratory relief claim concerning the allegations in the Commission's complaint, so discovery conducted in furtherance of the Commission's proceeding is likely to have utility in the federal case as well, in the event it were to go forward. In any case, it is well-established that "the expense and annoyance of litigation is part of the social burden of living under government" and does not constitute irreparable injury. *Standard Oil*, 449 U.S. at 244 (internal quotation marks and citation omitted); *see also La. Real Estate Appraisers Bd.*, No. 9374, 2018 FTC LEXIS 7, at *3 (F.T.C. Jan. 12, 2018) ("*LREAB*"); *LabMD, Inc.*, No. 9357, 2013 WL 6826948, at *6 (F.T.C. Dec. 13, 2013).

Axon's suggestion that a stay is warranted because it would suffer harm merely from having to participate in an allegedly unconstitutional administrative proceeding also lacks merit. If Axon ultimately prevails in the administrative proceeding, it will have suffered no harm from having litigated in an administrative tribunal rather than in federal court. If it loses, and the Commission issues a cease-and-desist order, it will have suffered no irreparable harm because its rights "can be vindicated by a reversal of the Commission's final order" by a court of appeals. *Jarkesy*, 803 F.3d at 27 (internal quotation marks and citation omitted); *see also Bennett*, 844 F.3d at 184–85 ("defending oneself in an unlawful administrative proceeding . . . does not amount to irreparable injury."). As the D.C. Circuit explained, even assuming the respondent is right that proceeding administratively is unconstitutional, the respondent "has no inherent right to avoid an administrative proceeding at all." *Jarkesy*, 803 F.3d at 27.

Axon's argument that a stay would not prejudice the Commission is also unavailing. The Commission represents the public interest,[4] and public interest factors strongly support denying the stay. The public has an interest in ensuring that Commission litigation proceeds efficiently and without delay. This interest is substantial. The Commission has repeatedly stated that "[g]enerally, routine discovery costs do not outweigh the competing public interest in the efficient and expeditious resolution of litigated matters." *RagingWire Data Ctrs., Inc.*, No. 9386, 2020 WL 91293, at *1 (F.T.C. Jan. 6, 2020); *LREAB*, 2018 FTC LEXIS 7, at *3. But there is an even more compelling reason to move quickly where, as here, a consummated merger is alleged to cause ongoing harm. The Complaint alleges that, after the acquisition, Axon enacted substantial price increases, limited the availability of VieVu BWC Systems to customers, and stopped developing new generations of VieVu hardware and software. FTC Compl. ¶¶ 6-7. The Complaint also asserts that Axon plans [redacted] *Id.* ¶ 7. If, as the complaint alleges, customers are paying supracompetitive prices as a result of an illegal merger of two close competitors, and if Axon is taking steps to curb innovation and diminish VieVu's viability as an independent

complaint likely fails for lack of subject-matter jurisdiction, we do not reach the issue of whether Axon is likely to succeed on the merits.

4 *See, e.g.*, *In re Sanctuary Belize Litig.*, 409 F. Supp. 3d 380, 418 (D. Md. 2019); *McWane, Inc.*, No. 9351, 2014 WL 1630460, at *4 (F.T.C. Apr. 11, 2014) (finding that Complaint Counsel are responsible for representing the public interest); *Cal. Dental Ass'n*, No. 9259, 1996 FTC LEXIS 277, at *8 (F.T. C. May 22, 1996) (same).

competitor, it is urgent that the Commission move quickly to remedy the violation. There is a strong public interest in arresting the continuation of consumer harm.

Axon argues that we should nevertheless stay this proceeding because the Commission could still litigate its antitrust claims in Axon's declaratory judgment matter in federal court. Motion at 3-4. In effect, Axon asks us to cede this administrative proceeding in favor of litigation in the forum of its own choosing. But we have previously explained that "[t]o allow respondents to stay FTC proceedings based on the pendency of collateral federal court actions that they themselves have initiated would create perverse incentives to attempt to create duplicative proceedings, and would place respondents, rather than the Commission, in control of the administrative proceedings schedule." *N.C. Bd. of Dental Exam'rs*, 151 F.T.C. at 642-43. As the D.C. Circuit recognized, "Congress granted the choice of forum to the Commission, and that authority could be for naught if respondents . . . could countermand the Commission's choice by filing a court action." *Jarkesy*, 803 F.3d at 17 (discussing the SEC).

The fact that Axon filed its suit first, a few hours before the FTC issued the administrative complaint, does not change the analysis. As courts repeatedly have found, when a party files a declaratory judgment action in order to preempt an imminent complaint and deprive the complainant of his choice of forum, the party should not be rewarded for winning a race to the courthouse. *See, e.g.*, *Chicago Ins. Co. v. Holzer*, No. 00-Civ-1062, 2000 WL 777907, at *2 (S.D.N.Y. June 16, 2000) (courts may "ignore the timing of a suit to avoid rewarding parties attempting to use the declaratory judgment action in a race to the courthouse") (citation and quotation marks omitted); *Southmark Corp. v. PSI, Inc.*, 727 F. Supp. 1060, 1063 (S.D. Miss. 1989) (denying motion to dismiss or stay pending an earlier-filed declaratory judgment action because the earlier action was filed "in an obvious attempt to deprive the potential plaintiff of its choice of forum"); *see also AmSouth Bank v. Dale*, 386 F.3d 763, 788 (6th Cir. 2004) ("Courts take a dim view of declaratory plaintiffs who file their suits mere days or weeks before the coercive suits filed by a 'natural plaintiff' and who seem to have done so for the purpose of acquiring a favorable forum."); *Hyatt Int'l Corp. v. Coco*, 302 F.3d 707, 718 (7th Cir. 2002) ("We have expressed wariness at the prospect of a suit for declaratory judgment aimed solely at wresting the choice of forum from the natural plaintiff.") (internal quotation marks and citation omitted); *cf. Hill*, 825 F.3d at 1248-49 ("it makes no difference that the Gray respondents filed their complaint in the face of an impending, rather than extant, enforcement action").

In light of the low likelihood of a favorable ruling for Axon in federal court, the absence of cognizable harm to Axon, and the significant countervailing interests in expeditious adjudication and stopping any ongoing competitive harm, we find no good cause to stay this proceeding.

Accordingly,

IT IS ORDERED THAT the Motion of Respondent Axon Enterprise, Inc., to Stay the Administrative Proceeding is **DENIED**.

By the Commission.

Interlocutory Orders, Etc.

IN THE MATTER OF

AXON ENTERPRISE, INC.,
AND
SAFARILAND, LLC

Docket No. 9389. Order, March 13, 2020

Opinion and Order granting the Joint Expedited Motion to Reschedule the Administrative Hearing.

ORDER GRANTING JOINT EXPEDITED MOTION TO RESCHEDULE THE ADMINISTRATIVE HEARING

On January 3, 2020, the Commission filed an administrative complaint against Respondents Axon Enterprise, Inc. and Safariland, LLC challenging Axon's acquisition of VieVu, LLC from Safariland. The Complaint was accompanied by a Notice specifying that the evidentiary hearing in this proceeding would begin on May 19, 2020. Respondents and Complaint Counsel have now filed a Joint Expedited Motion to Reschedule the Administrative Hearing. That motion requests that the hearing commence on June 23, 2020.

Commission Rule of Practice 3.41(b) provides that the Commission may order a later date for the commencement of an evidentiary hearing "upon a showing of good cause." 16 C.F.R. § 3.41(b). The Joint Motion explains that current public health risks are interfering with plans for depositions scheduled to begin on March 17. It states that approximately 50 depositions have been or are being scheduled, involving witnesses located throughout the country and will involve extensive air travel. According to the Joint Motion, issues regarding the availability of witnesses and counsel for the parties and for third parties are making the current deposition schedule infeasible, and extending the hearing date is necessary for the parties to reschedule depositions for dates that are more practicable.

Under the circumstances presented, we find that there is good cause for the requested continuance. Public health concerns have complicated scheduling and travel, and deferring commencement of the evidentiary hearing will facilitate the necessary adjustments. Accordingly,

IT IS HEREBY ORDERED that the Joint Expedited Motion to Reschedule the Administrative Hearing is **GRANTED.** The evidentiary hearing shall begin on June 23, 2020, at 10:00 a.m. The Administrative Law Judge retains discretion to adjust any pre-hearing deadlines to the extent compatible with the hearing date as extended by this Order.

By the Commission.

Interlocutory Orders, Etc.

IN THE MATTER OF

RAGINGWIRE DATA CENTERS, INC.

Docket No. 9386. Order, March 19, 2020

Order staying the administrative proceeding and rescheduling the evidentiary hearing date.

ORDER REGARDING SCHEDULING IN LIGHT OF PUBLIC HEALTH EMERGENCY

Because of the declared public health emergency[1] associated with the outbreak of the coronavirus disease 2019 ("COVID-19"), also known as SARS-CoV-2; and because it has been advised that gatherings of ten or more persons may facilitate the spread of the disease, the Commission has determined that it is in the public interest to mitigate the transmission and impact of COVID-19, and that good cause exists to stay this proceeding and reschedule the evidentiary hearing date. Accordingly,

IT IS HEREBY ORDERED that this proceeding be fully stayed for 30 calendar days; and

IT IS FURTHER ORDERED that the evidentiary hearing date and all pre-hearing deadlines in this proceeding be extended by the number of calendar days of this stay. The Administrative Law Judge retains discretion to adjust any such pre-hearing deadlines to the extent compatible with the hearing date as extended by this Order or to make a recommendationto the Commission regarding an alternative hearing date.

By the Commission.

1 Pursuant to the Public Health Services Act, 42 U.S.C. 247d, on January 31, 2020, the Secretary of the Department of Health and Human Services issued a declaration that a health emergency exists because of COVID-19; and on March 13, 2020, the President of the United States issued a proclamation that a national emergency exists concerning COVID-19. Remarks by President Trump, *available at* https://www.whitehouse.gov/briefings-statements/remarks-president-trump-vice-president-pence-members-coronavirus-task-force-press-conference-3/ (Mar. 13, 2020).

Interlocutory Orders, Etc.

IN THE MATTER OF

AXON ENTERPRISE, INC.,
AND
SAFARILAND, LLC

Docket No. 9389. Order, March 19, 2020

Order staying the administrative proceeding and rescheduling the evidentiary hearing date.

ORDER REGARDING SCHEDULING IN LIGHT OF PUBLIC HEALTH EMERGENCY

Because of the declared public health emergency[1] associated with the outbreak of the coronavirus disease 2019 ("COVID-19"), also known as SARS-CoV-2; and because it has been advised that gatherings of ten or more persons may facilitate the spread of the disease, the Commission has determined that it is in the public interest to mitigate the transmission and impact of COVID-19, and that good cause exists to stay this proceeding and reschedule the evidentiary hearing date. Accordingly,

IT IS HEREBY ORDERED that this proceeding be fully stayed for 30 calendar days; and

IT IS FURTHER ORDERED that the evidentiary hearing date and all pre-hearing deadlines in this proceeding be extended by the number of calendar days of this stay. The Administrative Law Judge retains discretion to adjust any such pre-hearing deadlines to the extent compatible with the hearing date as extended by this Order or to make a recommendationto the Commission regarding an alternative hearing date.

By the Commission.

1 Pursuant to the Public Health Services Act, 42 U.S.C. 247d, on January 31, 2020, the Secretary of the Department of Health and Human Services issued a declaration that a health emergency exists because of COVID-19; and on March 13, 2020, the President of the United States issued a proclamation that a national emergency exists concerning COVID-19. Remarks by President Trump, *available at* https://www.whitehouse.gov/briefings-statements/remarks-president-trump-vice-president-pence-members-coronavirus-task-force-press-conference-3/ (Mar. 13, 2020).

Interlocutory Orders, Etc.

IN THE MATTER OF

PEABODY ENERGY CORPORATION,
AND
ARCH COAL, INC.

Docket No. 9391. Order, March 19, 2020

Order staying the administrative proceeding and rescheduling the evidentiary hearing date.

ORDER REGARDING SCHEDULING IN LIGHT OF PUBLIC HEALTH EMERGENCY

Because of the declared public health emergency[1] associated with the outbreak of the coronavirus disease 2019 ("COVID-19"), also known as SARS-CoV-2; and because it has been advised that gatherings of ten or more persons may facilitate the spread of the disease, the Commission has determined that it is in the public interest to mitigate the transmission and impact of COVID-19, and that good cause exists to stay this proceeding and reschedule the evidentiary hearing date. Accordingly,

IT IS HEREBY ORDERED that this proceeding be fully stayed for 30 calendar days; and

IT IS FURTHER ORDERED that the evidentiary hearing date and all pre-hearing deadlines in this proceeding be extended by the number of calendar days of this stay. The Administrative Law Judge retains discretion to adjust any such pre-hearing deadlines to the extent compatible with the hearing date as extended by this Order or to make a recommendationto the Commission regarding an alternative hearing date.

By the Commission.

1 Pursuant to the Public Health Services Act, 42 U.S.C. 247d, on January 31, 2020, the Secretary of the Department of Health and Human Services issued a declaration that a health emergency exists because of COVID-19; and on March 13, 2020, the President of the United States issued a proclamation that a national emergency exists concerning COVID-19. Remarks by President Trump, *available at* https://www.whitehouse.gov/briefings-statements/remarks-president-trump-vice-president-pence-members-coronavirus-task-force-press-conference-3/ (Mar. 13, 2020).

Interlocutory Orders, Etc.

IN THE MATTER OF

AXON ENTERPRISE, INC.,
AND
SAFARILAND, LLC

Docket No. 9389. Order, March 26, 2020

Order granting the joint motion to withdraw respondent Safariland, LLC from the adjudication in this matter in order to enable the Commission to consider a proposed Consent Agreement.

ORDER WITHDRAWING RESPONDENT SAFARILAND, LLC FROM ADJUDICATION FOR THE PURPOSE OF CONSIDERING A PROPOSED CONSENT AGREEMENT

Complaint Counsel and Respondent Safariland, LLC ("Respondent Safariland"), having jointly moved for Respondent Safariland to be withdrawn from adjudication in this matter in order to enable the Commission to consider a proposed Consent Agreement;

Complaint Counsel and Respondent Safariland, having submitted a proposed Consent Agreement containing a proposed Decision and Order, executed by Respondent Safariland and by Complaint Counsel and approved by the Director of the Bureau of Competition that, if accepted by the Commission, would resolve the claims against Respondent Safariland in their entirety;

IT IS ORDERED, pursuant to Rules 3.25(c) and 0.7(a) of the Commission Rules of Practice, 16 C.F.R. §§ 3.25(c) and 0.7(a), that all claims against Respondent Safariland, as set forth in the Complaint, are hereby withdrawn in their entirety from adjudication until May 20, 2020, and that all proceedings against Respondent Safariland before the Administrative Law Judge are hereby stayed pending determination by the Commission with respect to the proposed Consent Agreement, pursuant to Rule 3.25(f), 16 C.F.R. § 3.25(f); and

IT IS FURTHER ORDERED, pursuant to Rule 3.25(b) of the Commission Rules of Practice, 16 C.F.R. § 3.25(b), that the proposed Consent Agreement shall not be placed on the public record unless and until it is accepted by the Commission; and

IT IS FURTHER ORDERED, pursuant to Rule 3.25(e) of the Commission Rules of Practice, 16 C.F.R. § 3.25(e), that all claims against Respondent Axon Enterprise, Inc. in this matter will remain in an adjudicative status, subject to any governing order of stay.

By the Commission.

Interlocutory Orders, Etc.

IN THE MATTER OF

ALTRIA GROUP, INC.,
AND
JUUL LABS, INC.

Docket No. 9393. Order, April 3, 2020

Order staying the administrative proceeding until April 20, 2020.

ORDER REGARDING SCHEDULING IN LIGHT OF PUBLIC HEALTH EMERGENCY

Because of the declared public health emergency[1] associated with the outbreak of the coronavirus disease 2019 ("COVID-19"), also known as SARS-CoV-2; because it has been advised that gatherings of ten or more persons may facilitate the spread of the disease; and because the District of Columbia, Maryland, and Virginia have issued "stay at home" orders that limit travel in and out of these jurisdictions, the Commission has determined that it is in the public interest to mitigate the transmission and impact of COVID-19, and that good cause exists to stay this proceeding and reschedule the evidentiary hearing date. Accordingly,

IT IS HEREBY ORDERED that this proceeding be fully stayed, except for matters of settlement, until April 20, 2020[2]; and

By the Commission.

1 Pursuant to the Public Health Services Act, 42 U.S.C. 247d, on January 31, 2020, the Secretary of the Department of Health and Human Services issued a declaration that a health emergency exists because of COVID-19; and on March 13, 2020, the President of the United States issued a proclamation that a national emergency exists concerning COVID-19. Remarks by President Trump, *available at* https://www.whitehouse.gov/briefings-statements/remarks-president-trump-vice-president-pence-members-coronavirus-task-force-press-conference-3/ (Mar. 13, 2020).

2 The Commission has stayed all other Part 3 proceedings until April 20, 2020. In order to better manage the Commission's docket in light of the current public health crisis, the Commission is synchronizing the date of this stay order with the stay orders in all other Part 3 proceedings.

Interlocutory Orders, Etc.

IN THE MATTER OF

RAGINGWIRE DATA CENTERS, INC.

Docket No. 9386. Order, April 7, 2020

Order lifting the stay to amend the Complaint to accommodate a name change and successor in interest.

ORDER GRANTING CONSENT MOTION TO LIFT STAY AND AMEND THE COMPLAINT TO SUBSTITUTE THE NAME OF RESPONDENT

Upon consideration of the agreement of the parties, and it otherwise appearing proper to do so, the Consent Motion to Lift Stay and Amend the Complaint to Substitute the Name of Respondent is **GRANTED**.

IT IS HEREBY ORDERED that the stay in the above-captioned action is lifted for the sole purpose of amending the Complaint to substitute the name of Respondent.

IT IS FURTHER ORDERED that the Complaint is amended to substitute NTT Global Data Centers Americas, Inc., as successor in interest to RagingWire Data Centers, Inc., into the action as a Respondent in place of RagingWire Data Centers, Inc.

IT IS FURTHER ORDERED that the case caption read:

COMMISSIONERS: **Joseph J. Simons, Chairman**
Noah Joshua Phillips
Rohit Chopra
Rebecca Kelly Slaughter
Christine S. Wilson

In the Matter of

NTT GLOBAL DATA CENTERS AMERICAS, INC., as successor in interest to RagingWire Data Centers, Inc.,
a corporation.

DOCKET NO. 9386

By the Commission.

Interlocutory Orders, Etc.

IN THE MATTER OF

NTT GLOBAL DATA CENTERS AMERICAS, INC.

Docket No. 9386. Order, April 13, 2020

Order lifting the stay to amend the Complaint to accommodate a name change and successor in interest.

SECOND ORDER REGARDING SCHEDULING IN LIGHT OF PUBLIC HEALTH EMERGENCY

By order dated March 19, 2020, the Commission has already stayed this proceeding and deferred the commencement of the evidentiary hearing by 30 days. Because of the declared public health emergency[1] associated with the outbreak of the coronavirus disease 2019 ("COVID-19"), also known as SARS-CoV-2; and because it has been advised that gatherings of ten or more persons may facilitate the spread of the disease, the Commission has determined thatit is in the public interest to mitigate the transmission and impact of COVID-19, and that good cause exists to stay this proceeding for an additional 45 days and to again reschedule the evidentiary hearing. Accordingly,

IT IS HEREBY ORDERED that this proceeding be fully stayed, except for matters of settlement, for an additional 45 calendar days; and

IT IS FURTHER ORDERED that the evidentiary hearing date and all pre-hearing deadlines in this proceeding be further extended by the number of calendar days of this additional stay. The Administrative Law Judge retains discretion to adjust any such pre-hearingdeadlines to the extent compatible with the hearing date as extended by this Order or to make arecommendation to the Commission regarding an alternative hearing date.

By the Commission.

1 Pursuant to the Public Health Services Act, 42 U.S.C. 247d, on January 31, 2020, the Secretary of the Department of Health and Human Services issued a declaration that a health emergency exists because of COVID-19; and on March 13, 2020, the President of the United States issued a proclamation that a national emergency exists concerning COVID-19. Remarks by President Trump, *available at* https://www.whitehouse.gov/briefings-statements/remarks-president-trump-vice-president-pence-members-coronavirus-task-force-press-conference-3/ (Mar. 13, 2020).

Interlocutory Orders, Etc.

IN THE MATTER OF

AXON ENTERPRISE, INC.,
AND
SAFARILAND, LLC

Docket No. 9389. Order, April 13, 2020

Order extending the stay of the administrative proceeding and rescheduling the evidentiary hearing date.

SECOND ORDER REGARDING SCHEDULING IN LIGHT OF PUBLIC HEALTH EMERGENCY

By order dated March 19, 2020, the Commission has already stayed this proceeding and deferred the commencement of the evidentiary hearing by 30 days. Because of the declared public health emergency[1] associated with the outbreak of the coronavirus disease 2019 ("COVID-19"), also known as SARS-CoV-2; and because it has been advised that gatherings of ten or more persons may facilitate the spread of the disease, the Commission has determined thatit is in the public interest to mitigate the transmission and impact of COVID-19, and that good cause exists to stay this proceeding for an additional 45 days and to again reschedule the evidentiary hearing. Accordingly,

IT IS HEREBY ORDERED that this proceeding be fully stayed, except for matters of settlement, for an additional 45 calendar days; and

IT IS FURTHER ORDERED that the evidentiary hearing date and all pre-hearing deadlines in this proceeding be further extended by the number of calendar days of this additional stay. The Administrative Law Judge retains discretion to adjust any such pre-hearingdeadlines to the extent compatible with the hearing date as extended by this Order or to make arecommendation to the Commission regarding an alternative hearing date.

By the Commission.

1 Pursuant to the Public Health Services Act, 42 U.S.C. 247d, on January 31, 2020, the Secretary of the Department of Health and Human Services issued a declaration that a health emergency exists because of COVID-19; and on March 13, 2020, the President of the United States issued a proclamation that a national emergency exists concerning COVID-19. Remarks by President Trump, *available at* https://www.whitehouse.gov/briefings-statements/remarks-president-trump-vice-president-pence-members-coronavirus-task-force-press-conference-3/ (Mar. 13, 2020).

Interlocutory Orders, Etc.

IN THE MATTER OF

PEABODY ENERGY CORPORATION,
AND
ARCH COAL, INC.

Docket No. 9391. Order, April 13, 2020

Order extending the stay of the administrative proceeding and rescheduling the evidentiary hearing date.

SECOND ORDER REGARDING SCHEDULING IN LIGHT OF PUBLIC HEALTH EMERGENCY

By order dated March 19, 2020, the Commission has already stayed this proceeding and deferred the commencement of the evidentiary hearing by 30 days. Because of the declared public health emergency[1] associated with the outbreak of the coronavirus disease 2019 ("COVID-19"), also known as SARS-CoV-2; and because it has been advised that gatherings of ten or more persons may facilitate the spread of the disease, the Commission has determined thatit is in the public interest to mitigate the transmission and impact of COVID-19, and that good cause exists to stay this proceeding for an additional 45 days and to again reschedule the evidentiary hearing. Accordingly,

IT IS HEREBY ORDERED that this proceeding be fully stayed, except for matters of settlement, for an additional 45 calendar days; and

IT IS FURTHER ORDERED that the evidentiary hearing date and all pre-hearing deadlines in this proceeding be further extended by the number of calendar days of this additional stay. The Administrative Law Judge retains discretion to adjust any such pre-hearingdeadlines to the extent compatible with the hearing date as extended by this Order or to make arecommendation to the Commission regarding an alternative hearing date.

By the Commission.

1 Pursuant to the Public Health Services Act, 42 U.S.C. 247d, on January 31, 2020, the Secretary of the Department of Health and Human Services issued a declaration that a health emergency exists because of COVID-19; and on March 13, 2020, the President of the United States issued a proclamation that a national emergency exists concerning COVID-19. Remarks by President Trump, *available at* https://www.whitehouse.gov/briefings-statements/remarks-president-trump-vice-president-pence-members-coronavirus-task-force-press-conference-3/ (Mar. 13, 2020).

Interlocutory Orders, Etc.

IN THE MATTER OF

THOMAS JEFFERSON UNIVERSITY,
AND
ALBERT EINSTEIN HEALTHCARE NETWORK

Docket No. 9392. Order, April 13, 2020

Order extending the stay of the administrative proceeding and rescheduling the evidentiary hearing date.

SECOND ORDER REGARDING SCHEDULING IN LIGHT OF PUBLIC HEALTH EMERGENCY

On April 7, 2020, Complaint Counsel and Respondents Thomas Jefferson University and Albert Einstein Healthcare Network submitted a joint motion requesting that the Commission stay this proceeding by an additional 45 days. The parties state that the ongoing public health emergency has rendered timely discovery and hearing preparation untenable. By order dated March 19, 2020, the Commission has already stayed this proceeding and deferred the commencement of the evidentiary hearing by 30 days.

Because of the declared public health emergency[1] associated with the outbreak of the coronavirus disease 2019 ("COVID-19"), also known as SARS-CoV-2, and because it has been advised that gatherings of ten or more persons may facilitate the spread of the disease, the Commission has determined that it is in the public interest to mitigate the transmission and impact of COVID-19, and that good cause exists to stay this proceeding for an additional 45 days and to again reschedule the evidentiary hearing. Accordingly, the Joint Motion to Stay the Administrative Proceeding for an Additional 45 Days is **GRANTED**; and

IT IS HEREBY ORDERED that this proceeding be fully stayed, except for matters of settlement, for an additional 45 calendar days; and

IT IS FURTHER ORDERED that the evidentiary hearing date and all pre-hearing deadlines in this proceeding be further extended by the number of calendar days of this additional stay. The Administrative Law Judge retains discretion to adjust any such pre- hearing deadlines to the extent compatible with the hearing date as extended by this Order or to make a recommendation to the Commission regarding an alternative hearing date.

By the Commission, Chairman Simons recused.

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1 Pursuant to the Public Health Services Act, 42 U.S.C. 247d, on January 31, 2020, the Secretary of the Department of Health and Human Services issued a declaration that a health emergency exists because of COVID-19; and on March 13, 2020, the President of the United States issued a proclamation that a national emergency exists concerning COVID-19. Remarks by President Trump, *available at* https://www.whitehouse.gov/briefings-statements/remarks-president-trump-vice-president-pence-members-coronavirus-task-force-press-conference-3/ (Mar. 13, 2020).

Interlocutory Orders, Etc.

IN THE MATTER OF

ALTRIA GROUP, INC.,
AND
JUUL LABS, INC.

Docket No. 9393. Order, April 13, 2020

Order extending the stay of the administrative proceeding and rescheduling the evidentiary hearing date.

SECOND ORDER REGARDING SCHEDULING IN LIGHT OF PUBLIC HEALTH EMERGENCY

By order dated April 3, 2020, the Commission has already stayed this proceeding until April 20, 2020. Because of the declared public health emergency[1] associated with the outbreak of the coronavirus disease 2019 ("COVID-19"), also known as SARS-CoV-2; and because it has been advised that gatherings of ten or more persons may facilitate the spread of the disease, the Commission has determined that it is in the public interest to mitigate the transmission and impact of COVID-19, and that good cause exists to stay this proceeding for an additional 45 days and to reschedule the evidentiary hearing, currently set to begin on January 5, 2021.

Accordingly,

IT IS HEREBY ORDERED that this proceeding be fully stayed, except for matters of settlement, for an additional 45 calendar days; and

IT IS FURTHER ORDERED that the evidentiary hearing date in this proceeding be extended by the number of calendar days of this additional stay. The Administrative Law Judge retains discretion to make a recommendation to the Commission regarding an alternative hearing date.

By the Commission.

1 Pursuant to the Public Health Services Act, 42 U.S.C. 247d, on January 31, 2020, the Secretary of the Department of Health and Human Services issued a declaration that a health emergency exists because of COVID-19; and on March 13, 2020, the President of the United States issued a proclamation that a national emergency exists concerning COVID-19. Remarks by President Trump, *available at* [1]https://www.whitehouse.gov/briefings-statements/remarks-president-trump-vice-president-pence-members-coronavirus-task-force-press-conference-3/ (Mar. 13, 2020).

Interlocutory Orders, Etc.

IN THE MATTER OF

FACEBOOK, INC.

Docket No. C-4365. Order, April 27, 2020

Order reopening and modifying the Commission's July 27, 2012 Decision and Order because it is necessary to enter the new administrative order to which Facebook consented in the settlement.

ORDER MODIFYING PRIOR DECISION AND ORDER

The Federal Trade Commission ("Commission") issued a Decision and Order against Facebook, Inc. ("Facebook) in Docket C-4365 on July 27, 2012 ("2012 order").[1] On July 24, 2019, the United States of America, acting upon notification and authorization to the Attorney General by the Commission, filed a complaint ("2019 complaint") in federal district court alleging that Facebook violated the 2012 order in three ways: (1) by misrepresenting the extent to which users could control the privacy of their data and the steps they needed to take to implement such controls; (2) misrepresenting the information the Company made accessible to third parties; and (3) failing to establish, implement, and maintain a privacy program reasonably designed to address privacy risks. The complaint also alleged that Facebook violated Section 5 of the FTC Act by misrepresenting how it would use telephone numbers that users provided to enable a security feature.

On April 23, 2020, Judge Timothy J. Kelly in the District for the District of Columbia entered a Stipulated Order for Civil Penalty, Monetary Judgment, and Injunctive Relief ("Stipulated Order") resolving the 2019 complaint. In Section II of the Stipulated Order, Facebook consented to: (1) reopening the 2012 proceeding in FTC Docket NO. C-4365; (2) waiving its rights under the show cause procedures set forth in Section 3.72(b) of the Commission's Rules of Practice, 16 C.F.R. § 3.72(b); and (3) modifying the 2012 Order with the new Decision and Order set forth below.

In view of the foregoing, the Commission has determined that it is in the public interest to reopen the proceeding in Docket No. C-4365 pursuant to Commission Rule 3.72(b), 16 C.F.R. § 3.72(b), and to issue a new order as set forth below. Accordingly,

IT IS ORDERED that this matter be, and it hereby is, reopened; and

IT IS FURTHER ORDERED that, Facebook having consented to modifying the 2012 order as set forth below, the Commission hereby modifies the 2012 order with the attached Decision and Order.

By the Commission, Commissioners Chopra and Slaughter dissenting.

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1 *In the Matter of Facebook*, C-4365, 2012 FTC LEXIS 135 (F.T.C. July 27, 2012).

Interlocutory Orders, Etc.

IN THE MATTER OF

MARC CHING,
D/B/A
WHOLE LEAF ORGANICS

Docket No. 9394. Order, May 8, 2020

Order staying the administrative proceeding and rescheduling the evidentiary hearing date.

ORDER REGARDING SCHEDULING IN LIGHT OF THE PUBLIC HEALTH EMERGENCY

Because of the declared public health emergency[1] associated with the outbreak of the coronavirus disease 2019 ("COVID-19"), also known as SARS-CoV-2; and because it has been advised that gatherings of ten or more persons may facilitate the spread of the disease, the Commission has determined that it is in the public interest to mitigate the transmission and impact of COVID-19, and that good cause exists to stay this proceeding and to reschedule the evidentiary hearing. Accordingly,

IT IS HEREBY ORDERED that this proceeding be fully stayed until June 4, 2020, except for matters of settlement; the filing of an Answer pursuant to Commission Rule of Practice 3.12(b)(2), 16 C.F.R. § 3.12(b)(2); the filing of a stipulation of facts and an agreed order pursuant to Commission Rule of Practice 3.26(g), 16 C.F.R. § 3.26(g); and other stipulations or joint filings; and

IT IS FURTHER ORDERED that the evidentiary hearing date and all pre-hearing deadlines in this proceeding be extended by the number of calendar days of this stay. The Administrative Law Judge retains discretion to adjust any such pre-hearing deadlines to the extent compatible with the hearing date as extended by this Order or to make a recommendation to the Commission regarding an alternative hearing date.

By the Commission.

1 Pursuant to the Public Health Services Act, 42 U.S.C. § 247d, on January 31, 2020, the Secretary of the Department of Health and Human Services issued a declaration that a health emergency exists because of COVID-19; and on March 13, 2020, the President of the United States issued a proclamation that a national emergency exists concerning COVID-19. Remarks by President Trump, *available at* https://www.whitehouse.gov/briefings-statements/remarks-president-trump-vice-president-pence-members-coronavirus-task-force-press-conference-3/ (Mar. 13, 2020).

Interlocutory Orders, Etc.

IN THE MATTER OF

MARC CHING,
D/B/A
WHOLE LEAF ORGANICS

Docket No. 9394. Order, May 28, 2020

Order granting Complaint Counsel motion to withdraw this matter from adjudication for the purpose of the Commission's consideration of a proposed consent agreement that would resolve this matter in its entirety.

ORDER WITHDRAWING MATTER FROM ADJUDICATION
FOR THE PURPOSE OF CONSIDERING A PROPOSED CONSENT AGREEMENT

Complaint Counsel having moved to withdraw this matter from adjudication in order to enable the Commission to consider a proposed Consent Agreement, and Respondent Ching having no objection to the motion;

Complaint Counsel and Respondent Ching, having submitted a proposed Consent Agreement containing a proposed Decision and Order, executed by Respondent Marc Ching and Complaint Counsel and approved by the Director of the Bureau of Consumer Protection that, 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 withdrawn from adjudication until July 17, 2020, and that all proceedings before the Administrative Law Judge are hereby stayed while the Commission evaluates the proposed Consent Agreement, pursuant toRule 3.25(f), 16 C.F.R. § 3.25(f); and

IT IS FURTHER ORDERED, pursuant to Rule 3.25(b) of the Commission Rules of Practice, 16 C.F.R. § 3.25(b), that the proposed Consent Agreement 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

AXON ENTERPRISE, INC.,
AND
SAFARILAND, LLC

Docket No. 9389. Order, June 3, 2020

Order extending the stay of the administrative proceeding and rescheduling the evidentiary hearing date.

THIRD ORDER REGARDING SCHEDULING IN LIGHT OF PUBLIC HEALTH EMERGENCY

By orders dated March 19, 2020, and April 13, 2020, the Commission has already stayed this proceeding and deferred the commencement of the evidentiary hearing by 75 days. Becauseof the declared public health emergency[1] associated with the outbreak of the coronavirus disease 2019 ("COVID-19"), also known as SARS-CoV-2, and because it has been advised that gatherings of people in close proximity may facilitate the spread of the disease, the Commission has determined that it is in the public interest to mitigate the transmission and impact of COVID-19, and that good cause exists to stay this proceeding for an additional period of approximately 30 days and to again reschedule the evidentiary hearing. Accordingly,

IT IS HEREBY ORDERED that this proceeding be fully stayed, except for matters of settlement, through July 6, 2020; and

IT IS FURTHER ORDERED that the evidentiary hearing be rescheduled to commence on October 13, 2020, and all pre-hearing deadlines in this proceeding be further extended by 32 calendar days. The Administrative Law Judge retains discretion to adjust any such pre-hearing deadlines to the extent compatible with the hearing date as set by this Order or to make a recommendation to the Commission regarding an alternative hearing date.

By the Commission, Commissioner Slaughter not participating.

1 Pursuant to the Public Health Services Act, 42 U.S.C. § 247d, on January 31, 2020, the Secretary of the Department of Health and Human Services issued a declaration that a health emergency exists because of COVID-19; and on March 13, 2020, the President of the United States issued a proclamation that a national emergency exists concerning COVID-19. Remarks by President Trump, *available at* https://www.whitehouse.gov/briefings-statements/remarks-president-trump-vice-president-pence-members-coronavirus-task-force-press-conference-3/ (Mar. 13, 2020).

Interlocutory Orders, Etc.

IN THE MATTER OF

PEABODY ENERGY CORPORATION,
AND
ARCH COAL, INC.

Docket No. 9391. Order, June 3, 2020

Order extending the stay of the administrative proceeding and rescheduling the evidentiary hearing date.

THIRD ORDER REGARDING SCHEDULING IN LIGHT OF PUBLIC HEALTH EMERGENCY

By orders dated March 19, 2020, and April 13, 2020, the Commission has already stayed this proceeding and deferred the commencement of the evidentiary hearing by 75 days. Becauseof the declared public health emergency[1] associated with the outbreak of the coronavirus disease 2019 ("COVID-19"), also known as SARS-CoV-2, and because it has been advised that gatherings of people in close proximity may facilitate the spread of the disease, the Commission has determined that it is in the public interest to mitigate the transmission and impact of COVID-19, and that good cause exists to stay this proceeding for an additional period of approximately 30 days and to again reschedule the evidentiary hearing. Accordingly,

IT IS HEREBY ORDERED that this proceeding be fully stayed, except for matters of settlement, through July 6, 2020; and

IT IS FURTHER ORDERED that the evidentiary hearing be rescheduled to commence on December 1, 2020, and all pre-hearing deadlines in this proceeding be further extended by 32 calendar days. The Administrative Law Judge retains discretion to adjust any such pre-hearing deadlines to the extent compatible with the hearing date as set by this Order or to make a recommendation to the Commission regarding an alternative hearing date.

By the Commission, Commissioner Slaughter not participating.

1 Pursuant to the Public Health Services Act, 42 U.S.C. § 247d, on January 31, 2020, the Secretary of the Department of Health and Human Services issued a declaration that a health emergency exists because of COVID-19; and on March 13, 2020, the President of the United States issued a proclamation that a national emergency exists concerning COVID-19. Remarks by President Trump, *available at* https://www.whitehouse.gov/briefings-statements/remarks-president-trump-vice-president-pence-members-coronavirus-task-force-press-conference-3/ (Mar. 13, 2020).

Interlocutory Orders, Etc.

IN THE MATTER OF

THOMAS JEFFERSON UNIVERSITY,
AND
ALBERT EINSTEIN HEALTHCARE NETWORK

Docket No. 9392. Order, June 3, 2020

Order extending the stay of the administrative proceeding and rescheduling the evidentiary hearing date.

THIRD ORDER REGARDING SCHEDULING IN LIGHT OF PUBLIC HEALTH EMERGENCY

By orders dated March 19, 2020, and April 13, 2020, the Commission has already stayed this proceeding and deferred the commencement of the evidentiary hearing by 75 days. Becauseof the declared public health emergency[1] associated with the outbreak of the coronavirus disease 2019 ("COVID-19"), also known as SARS-CoV-2, and because it has been advised that gatherings of people in close proximity may facilitate the spread of the disease, the Commission has determined that it is in the public interest to mitigate the transmission and impact of COVID-19, and that good cause exists to stay this proceeding for an additional period of approximately 30 days and to again reschedule the evidentiary hearing. Accordingly,

IT IS HEREBY ORDERED that this proceeding be fully stayed, except for matters of settlement, through July 6, 2020; and

IT IS FURTHER ORDERED that the evidentiary hearing be rescheduled to commence on January 5, 2021, and all pre-hearing deadlines in this proceeding be further extended by 32 calendar days. The Administrative Law Judge retains discretion to adjust any such pre-hearing deadlines to the extent compatible with the hearing date as set by this Order or to make a recommendation to the Commission regarding an alternative hearing date.

By the Commission, Commissioner Slaughter not participating.

1 Pursuant to the Public Health Services Act, 42 U.S.C. § 247d, on January 31, 2020, the Secretary of the Department of Health and Human Services issued a declaration that a health emergency exists because of COVID-19; and on March 13, 2020, the President of the United States issued a proclamation that a national emergency exists concerning COVID-19. Remarks by President Trump, *available at* https://www.whitehouse.gov/briefings-statements/remarks-president-trump-vice-president-pence-members-coronavirus-task-force-press-conference-3/ (Mar. 13, 2020).

Interlocutory Orders, Etc.

IN THE MATTER OF

ALTRIA GROUP, INC.,
AND
JUUL LABS, INC.

Docket No. 9393. Order, June 3, 2020

Order extending the stay of the administrative proceeding and rescheduling the evidentiary hearing date.

THIRD ORDER REGARDING SCHEDULING IN LIGHT OF PUBLIC HEALTH EMERGENCY

By orders dated April 3, 2020, and April 20, 2020, the Commission has already stayed this proceeding and deferred the commencement of the evidentiary hearing by 62 days. Becauseof the declared public health emergency[1] associated with the outbreak of the coronavirus disease 2019 ("COVID-19"), also known as SARS-CoV-2, and because it has been advised that gatherings of people in close proximity may facilitate the spread of the disease, the Commission has determined that it is in the public interest to mitigate the transmission and impact of COVID-19, and that good cause exists to stay this proceeding for an additional period of approximately 30 days and to again reschedule the evidentiary hearing. Accordingly,

IT IS HEREBY ORDERED that this proceeding be fully stayed, except for matters of settlement, through July 6, 2020; and

IT IS FURTHER ORDERED that the evidentiary hearing be rescheduled to commence on April 13, 2021, and all pre-hearing deadlines in this proceeding be further extended by 32 calendar days. The Administrative Law Judge retains discretion to adjust any such pre-hearing deadlines to the extent compatible with the hearing date as set by this Order or to make a recommendation to the Commission regarding an alternative hearing date.

By the Commission, Commissioner Slaughter not participating.

1 Pursuant to the Public Health Services Act, 42 U.S.C. § 247d, on January 31, 2020, the Secretary of the Department of Health and Human Services issued a declaration that a health emergency exists because of COVID-19; and on March 13, 2020, the President of the United States issued a proclamation that a national emergency exists concerning COVID-19. Remarks by President Trump, *available at* https://www.whitehouse.gov/briefings-statements/remarks-president-trump-vice-president-pence-members-coronavirus-task-force-press-conference-3/ (Mar. 13, 2020).

Interlocutory Orders, Etc.

IN THE MATTER OF

NTT GLOBAL DATA CENTERS AMERICAS, INC.

Docket No. 9386. Order, June 12, 2020

Order extending the withdrawal of this Matter from adjudication.

ORDER EXTENDING WITHDRAWAL FROM ADJUDICATION

On April 15, 2020, under provisions of Commission Rule of Practice 3.25(c), 16 C.F.R. § 3.25(c), the Commission issued an order withdrawing this matter from adjudication until June 15, 2020, to enable the Commission to consider a proposed Consent Agreement. The Commission has now determined that there is good cause to extend the withdrawal by an additional two weeks in order to give full consideration to the issues presented. Accordingly,

IT IS ORDERED, pursuant to Commission Rule of Practice 4.3(b), 16 C.F.R. § 4.3(b), that all claims against Respondent in this proceeding shall continue to be withdrawn in their entirety from adjudication until June 29, 2020; and

IT IS FURTHER ORDERED, pursuant to Commission Rule of Practice 3.25(b), 16 C.F.R. § 3.25(b), that the proposed Consent Agreement shall not be placed on the public record unless and until it is accepted by the Commission.

By the Commission, Commissioner Slaughter not participating.

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