

FEDERAL TRADE COMMISSION DECISIONS

**FINDINGS, OPINIONS, AND ORDERS
JANUARY 1, 2005 TO JUNE 30, 2005**

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MEMBERS OF THE FEDERAL TRADE COMMISSION
DURING THE PERIOD JANUARY 1, 2005 TO JUNE 30, 2005

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Took oath of office August 16, 2004.

ORSON SWINDLE, *Commissioner**
Took oath of office December 18, 1997.

THOMAS B. LEARY, *Commissioner*
Took oath of office November 17, 1999.

PAMELA JONES HARBOUR, *Commissioner*
Took oath of office August 4, 2003.

JON LEIBOWITZ, *Commissioner*
Took oath of office September 3, 2004.

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

*Resigned, effective June 30, 2005.

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Complaint

IN THE MATTER OF

SUNBELT LENDING SERVICES, INC.

CONSENT ORDER, ETC., IN REGARD TO ALLEGED VIOLATIONS OF
THE GLB SAFEGUARDS RULE AND THE GLB PRIVACY RULE

Docket C-4129; File No. 0423153
Complaint, January 3, 2005--Decision, January 3, 2005

This consent order, among other things, prohibits the respondent, a Florida-based corporation, from violating the GLB Safeguards Rule and the GLB Financial Privacy Rule, and requires the respondent, for ten years, to secure biennial assessments and reports to ensure that its information security program complies with the Safeguards Rule and is sufficiently effective to provide reasonable assurance that the security, confidentiality, and integrity of customer information is protected.

Participants

For the Commission: *Susan E. McDonald, Kathryn Ratte, Jessica L. Rich, Joel Winston, and Louis Silversin.*

For the Respondent: *Richard Andreano, Jr., and Mitchel H. Kider, Weiner Brodsky Sidman Kider PC.*

COMPLAINT

The Federal Trade Commission (“Commission”), having reason to believe that Sunbelt Lending Services, Inc. has violated the provisions of the Commission’s Standards for Safeguarding Customer Information Rule (“Safeguards Rule”), 16 C.F.R. Part 314, and the Commission’s Privacy of Consumer Financial Information Rule (“Privacy Rule”), 16 C.F.R. Part 313, each issued pursuant to Title V of the Gramm-Leach-Bliley Act (“GLB Act”), 15 U.S.C. § 6801 *et seq.*, and it appearing to the Commission that this proceeding is in the public interest, alleges:

1. Respondent Sunbelt Lending Services, Inc. (“Sunbelt”) is a Florida corporation with its principal office or place of business at 300 South Park Place Blvd., Suite 150, Clearwater, Florida 33759.

Sunbelt is a wholly-owned subsidiary of Cendant Mortgage Corporation. In addition to conducting business from its headquarters location in Clearwater, Sunbelt conducts business through loan officers located in Coldwell Banker Residential Real Estate, Inc. (“CB Residential”) offices throughout the state of Florida. CB Residential is a subsidiary of Cendant Mortgage’s parent company, Cendant Corporation.

2. Sunbelt, a mortgage company, is a “financial institution,” as that term is defined in Section 509(3)(A) of the GLB Act, and is therefore subject to the requirements of the Safeguards Rule and the Privacy Rule.

3. The acts and practices of respondent alleged in this complaint have been in or affecting commerce, as “commerce” is defined in Section 4 of the FTC Act, 15 U.S.C. § 44.

SAFEGUARDS RULE

4. The Safeguards Rule, which implements Section 501(b) of the GLB Act, was promulgated by the Commission on May 23, 2002, and became effective on May 23, 2003. The Rule requires financial institutions to protect the security, confidentiality, and integrity of customer information by developing a comprehensive written information security program that contains reasonable administrative, technical, and physical safeguards, including:

- A. Designating one or more employees to coordinate the information security program;
- B. Identifying reasonably foreseeable internal and external risks to the security, confidentiality, and integrity of customer information, and assessing the sufficiency of any safeguards in place to control those risks;

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- C. Designing and implementing information safeguards to control the risks identified through risk assessment, and regularly testing or otherwise monitoring the effectiveness of the safeguards' key controls, systems, and procedures;
- D. Overseeing service providers, and requiring them by contract to protect the security and confidentiality of customer information; and
- E. Evaluating and adjusting the information security program in light of the results of testing and monitoring, changes to the business operation, and other relevant circumstances.

VIOLATIONS OF THE SAFEGUARDS RULE

- 5. Through loan officers located throughout the state of Florida, Sunbelt collects nonpublic personal information from its customers, including customer names, social security numbers, credit histories, bank account numbers, and income tax returns. From the Rule's effective date until at least April 2004, respondent failed to implement reasonable policies and procedures to protect the security and confidentiality of the information it collects.
- 6. For example, respondent failed to assess the risks to its customer information; implement reasonable policies and procedures in key areas, such as employee training and appropriate oversight of the security practices of loan officers working from remote locations; or oversee the collection and handling of information through the Sunbelt Website. Respondent also failed to take steps to ensure that its service providers were providing appropriate security for Sunbelt's customer information.
- 7. By failing to implement reasonable security policies and procedures, respondent engaged in violations of the Safeguards Rule, including but not limited to:

A. Failing to identify reasonably foreseeable internal and external risks to the security, confidentiality, and integrity of customer information;

B. Failing to implement information safeguards to control the risks to customer information and failing to regularly test and monitor them;

C. Failing to develop, implement, and maintain a comprehensive written information security program;

D. Failing to oversee service providers and failing to require them by contract to implement safeguards to protect respondent's customer information; and

E. Failing to designate one or more employees to coordinate the information security program.

8. A violation of the Safeguards Rule constitutes an unfair or deceptive act or practice in violation of Section 5(a)(1) of the FTC Act.

PRIVACY RULE

9. The Privacy Rule, promulgated under Section 502 of the GLB Act, went into effect on July 1, 2001. The Rule requires financial institutions, *inter alia*, to provide customers with clear and conspicuous notices, both when the customer relationship is formed and annually for the duration of the customer relationship, that accurately reflect the financial institution's privacy policies and practices.

VIOLATIONS OF THE PRIVACY RULE

10. From the Rule's effective date until at least April 2004, respondent failed to provide its online customers with the notices required by the Privacy Rule.

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11. A violation of the Privacy Rule constitutes an unfair or deceptive act or practice in violation of Section 5(a)(1) of the FTC Act.

12. The acts and practices of respondent as alleged in this complaint constitute unfair or deceptive acts or practices in violation of Section 5(a)(1) of the FTC Act.

THEREFORE, the Federal Trade Commission this third day of January, 2005, has issued this complaint against respondent.

DECISION AND ORDER

The Federal Trade Commission having initiated an investigation of certain acts and practices of the Respondent named in the caption hereof, and Respondent having been furnished thereafter with a copy of a draft Complaint that the Bureau of Consumer Protection proposed to present to the Commission for its consideration and which, if issued by the Commission, would charge Respondent with violation of the Federal Trade Commission's Standards for Safeguarding Customer Information Rule ("Safeguards Rule"), 16 C.F.R. Part 314, and the Federal Trade Commission's Privacy of Consumer Financial Information Rule ("Privacy Rule"), 16 C.F.R. Part 313, each issued pursuant to Title V of the Gramm-Leach-Bliley Act, 15 U.S.C. § 6801 *et seq.*, and Section 5(a)(1) of the Federal Trade Commission Act, 15 U.S.C. § 45(a)(1); and

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

The Commission having thereafter considered the matter and having determined that it has reason to believe Respondent has violated the said Rules, and that a Complaint should issue stating its charges in that respect, and having thereupon accepted the executed Consent Agreement and placed such Consent Agreement on the public record for a period of thirty (30) days for the receipt and consideration of public comments, now in further conformity with the procedure described in Section 2.34 of its Rules, the Commission hereby issues its Complaint, makes the following jurisdictional findings and enters the following Order:

Decision and Order

1. Respondent Sunbelt Lending Services, Inc. is a Florida corporation with its principal office or place of business at 300 South Park Place Blvd., Suite 150, Clearwater, Florida 33759. Sunbelt is a wholly-owned subsidiary of Cendant Mortgage Corporation.

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

ORDER

DEFINITIONS

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

1. "Commerce" shall mean as defined in Section 4 of the Federal Trade Commission Act, 15 U.S.C. § 44.
2. Unless otherwise specified, "respondent" shall mean Sunbelt Lending Services, Inc., its successors and assigns and its officers, agents, representatives, and employees.
3. All other terms are synonymous in meaning and equal in scope to the usage of such terms in the Gramm-Leach-Bliley Act, 15 U.S.C. § 6801 *et seq.*

I.

IT IS ORDERED that respondent shall not, directly or through any corporation, subsidiary, division, Web site, or other device, violate any provision of the Gramm-Leach-Bliley Act's ("GLB Act") Standards for Safeguarding Customer Information Rule ("Safeguards Rule"), 16 C.F.R. Part 314, or the Gramm-Leach-Bliley Act's Privacy of Consumer Financial Information Rule ("Privacy Rule"), 16 C.F.R. Part 313.

In the event the Safeguards Rule or Privacy Rule is hereafter amended or modified, respondent's compliance with these Rules as so amended or modified shall not be a violation of this order.

II.

IT IS FURTHER ORDERED that, in connection with its compliance with the Safeguards Rule, respondent shall obtain an assessment and report (an "Assessment") from a qualified, objective, independent third-party professional, using procedures and standards generally accepted in the profession, within one hundred and eighty (180) days after service of the order, and biennially thereafter for ten (10) years after service of the order, that:

- A. sets forth the specific administrative, technical, and physical safeguards that respondent has implemented and maintained during the reporting period;
- B. explains how such safeguards are appropriate to respondent's size and complexity, the nature and scope of respondent's activities, and the sensitivity of the nonpublic personal information collected from or about consumers;
- C. explains how such safeguards meet or exceed the protections required by the Safeguards Rule; and
- D. certifies that respondent's security program is operating with sufficient effectiveness to provide reasonable assurance that the security, confidentiality, and integrity of nonpublic personal information is protected and, for biennial reports, has so operated throughout the reporting period.

Each Assessment shall be prepared by a person qualified as a Certified Information System Security Professional (CISSP); a person qualified as a Certified Information Systems Auditor

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(CISA); a person holding Global Information Assurance Certification (GIAC) from the SysAdmin, Audit, Network, Security Institute (SANS); or by a similarly qualified person or organization approved by the Associate Director for Enforcement, Bureau of Consumer Protection, Federal Trade Commission.

Respondent shall provide the first Assessment, as well as all plans, reports, studies, reviews, audits, audit trails, policies, training materials, and assessments, whether prepared by or on behalf of respondent, relied upon to prepare such Assessment to the Associate Director for Enforcement, Bureau of Consumer Protection, Federal Trade Commission, Washington, D.C. 20580, within ten (10) days after the Assessment has been prepared. Respondent shall retain all subsequent biennial Assessments until the order is terminated and shall retain all materials relied upon in preparing each such Assessment, as listed above, for a period of three (3) years after the date of preparation of such Assessment. Respondent shall provide such subsequent Assessments and related materials to the Associate Director of Enforcement within ten (10) days of request.

III.

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

IV.

IT IS FURTHER ORDERED that respondent shall notify the Commission at least thirty (30) days prior to any change in the corporation that may affect compliance obligations arising under

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

V.

IT IS FURTHER ORDERED that respondent shall within one hundred eighty (180) days after service of this order, and at such other times as the Federal Trade Commission may require, file with the Commission a report, in writing, setting forth in detail the manner and form in which it has complied with this order. This report shall include a copy of the initial biennial Assessment required by Part II of this order.

VI.

This order will terminate on January 3, 2025, or twenty (20) years from the most recent date that the United States or the Federal Trade Commission files a complaint (with or without an accompanying consent decree) in federal court alleging any violation of the order, whichever comes later; provided, however, that the filing of such a complaint will not affect the duration of:

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

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- B. This order's application to any respondent that is not named as a defendant in such complaint; and
- C. This order if such complaint is filed after the order has terminated pursuant to this Part.

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

Analysis of Proposed Consent Order to Aid Public Comment

The Federal Trade Commission (“Commission”) has accepted a consent agreement, subject to final approval, from Sunbelt Lending Services, Inc. (“Sunbelt”). Sunbelt is a mortgage broker with headquarters in Clearwater, Florida. Sunbelt collects sensitive customer information, including customer names, social security numbers, credit histories, bank account numbers, and income tax returns, and is a “financial institution” subject to the Gramm-Leach-Bliley Act’s Standards for Safeguarding Customer Information Rule, 16 C.F.R. Part 314 (“Safeguards Rule”) and Privacy of Consumer Financial Information Rule, 16 C.F.R. Part 313 (“Privacy Rule”).

The proposed consent agreement has been placed on the public record for thirty (30) days for receipt of comments by interested persons. Comments received during this period will become part of the public record. After thirty (30) days, the Commission will again review the 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 Sunbelt’s alleged violations of the Safeguards and Privacy Rules. The Safeguards Rule, which became effective on May 23, 2003, requires financial institutions to implement reasonable policies and procedures to ensure the security and confidentiality of customer information, including:

- Designating one or more employees to coordinate the information security program;
- Identifying reasonably foreseeable internal and external risks to the security, confidentiality, and integrity of customer information, and assessing the sufficiency of any safeguards in place to control those risks;
- Designing and implementing information safeguards to control the risks identified through risk assessment, and regularly testing or otherwise monitoring the effectiveness of the safeguards’ key controls, systems, and procedures;

Analysis

- Overseeing service providers, and requiring them by contract to protect the security and confidentiality of customer information; and
- Evaluating and adjusting the information security program in light of the results of testing and monitoring, changes to the business operation, and other relevant circumstances.

The Privacy Rule, which became effective on July 1, 2001, requires financial institutions to provide customers with clear and conspicuous notices that explain the financial institution's information collection and sharing practices and allow customers to opt out of having their information shared with certain non-affiliated third parties.

The Commission's proposed complaint charges that Sunbelt failed to implement the protections required by the Safeguards Rule and, specifically, that it failed to: (1) identify reasonably foreseeable internal and external risks to the security, confidentiality, and integrity of customer information; (2) implement information safeguards to control the risks to customer information and regularly test and monitor them; (3) develop, implement, and maintain a comprehensive written information security program; (4) oversee service providers and require them by contract to implement safeguards to protect respondent's customer information; and (5) designate one or more employees to coordinate the information security program. The proposed complaint also alleges that Sunbelt failed to provide its online customers with the notice required by the Privacy Rule.

The proposed order contains provisions designed to prevent Sunbelt from future practices similar to those alleged in the complaint. Specifically, Part I of the proposed order prohibits Sunbelt from violating the Safeguards Rule or the Privacy Rule. Part II of the proposed order requires that Sunbelt obtain, within 180 days after being served with the final order approved by the Commission, and on a biennial basis thereafter for ten (10) years, an assessment and report from a qualified, objective, independent third-party professional, certifying that: (1) Sunbelt has in place a

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security program that provides protections that meet or exceed the protections required by the Safeguards Rule and (2) Sunbelt's security program is operating with sufficient effectiveness to provide reasonable assurance that the security, confidentiality, and integrity of consumer's personal information has been protected. This provision is substantially similar to comparable provisions obtained in prior Commission orders under Section 5 of the FTC Act. *See Tower Records*, FTC Docket No. C-4110 (June 2, 2004); *Guess?, Inc.*, FTC Docket No. C-4091 (July 30, 2003); and *Microsoft Corp.*, FTC Docket No. C-4069 (Dec. 20, 2002).

Part II of the proposed order requires Sunbelt to retain documents relating to compliance. For the assessments and supporting documents, Sunbelt must retain the documents for three years after the date that each assessment is prepared.

Parts III through VI of the proposed order are reporting and compliance provisions. Part III requires dissemination of the order now and in the future to persons with supervisory responsibilities. Part IV ensures notification to the FTC of changes in corporate status. Part V mandates that Sunbelt submit compliance reports to the FTC. Part VI is a provision "sunsetting" the order after twenty (20) years, with certain exceptions.

The purpose of this analysis is to facilitate public comment on the proposed order. It is not intended to constitute an official interpretation of the proposed order or to modify its terms in any way.

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IN THE MATTER OF

WHITE SANDS HEALTH CARE SYSTEM, L.L.C., ET AL.

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

Docket C-4130; File No. 0310135

Complaint, January 11, 2005--Decision, January 11, 2005

This consent order, among other things, prohibits the respondents from entering into, participating in, implementing, or otherwise facilitating any combination, conspiracy, agreement, or understanding between or among any licensed health care professionals (“providers”) -- including but not limited to physicians and nurse anesthetists -- (1) to negotiate on behalf of any provider with any payor; (2) to deal, refuse to deal, or threaten to refuse to deal with any payor; (3) regarding any term, condition, or requirement upon which any provider deals, or is willing to deal, with any payor, including, but not limited to, price terms; or (4) not to deal individually with any payor, or not to deal with any payor through any arrangement other than Respondent White Sands or Respondent Alamogordo Physicians. The order also prohibits the individual respondents, for three years, from negotiating with any payor on behalf of Respondent White Sands, Respondent Alamogordo Physicians, or any provider who participates or has participated in either of those respondents. In addition, the order requires each respondent, for three years, to notify the Commission at least sixty days before entering into any arrangement with any providers under which such respondent would act as their messenger or agent with payors regarding contracts.

Participants

For the Commission: *Steve Vieux, Aaron Hewitt, David R. Pender, Jeffrey W. Brennan, Daniel P. Ducore, and Louis Silvia.*

For the Respondents: *Robert L. Wilson, Jr., Smith Moore LLP.*

COMPLAINT

Pursuant to the provisions of the Federal Trade Commission Act, as amended, 15 U.S.C. § 41 *et seq.*, and by virtue of the authority vested in it by said Act, the Federal Trade Commission (“Commission”), having reason to believe that White Sands Health Care System, L.L.C. (“White Sands”), Alamogordo

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Physicians' Cooperative, Inc. ("Alamogordo Physicians"), Dacite, Inc. ("Dacite"), and James R. Laurenza, hereinafter referred to as "Respondents," have violated Section 5 of the Federal Trade Commission Act, 15 U.S.C. § 45, and it appearing to the Commission that a proceeding by it in respect thereof would be in the public interest, hereby issues this Complaint stating its charges in that respect as follows:

NATURE OF THE CASE

1. This matter concerns horizontal agreements among competing health care providers in the Alamogordo, New Mexico, area, to fix prices charged to health care plans and other third-party payors ("payors"), and to refuse to deal with payors except on collectively agreed upon terms. These health care providers, who constitute most of the health care providers in the Alamogordo area, orchestrated these price-fixing agreements and refusals to deal through the respondents. The respondents' conduct raised the price of health care services in the Alamogordo area.

RESPONDENTS

2. White Sands, a physician-hospital organization ("PHO"), is a for-profit limited liability company, organized, existing, and doing business under and by virtue of the laws of the State of New Mexico, with its principal address at 3310 N. White Sands Boulevard, Alamogordo, NM 88311. White Sands was formed in 1996, and consists of a non-profit hospital, Gerald Champion Regional Medical Center; Alamogordo Physicians, which is an independent practice association ("IPA"); and 31 non-physician licensed health care professionals, five of which are certified registered nurse anesthetists ("nurse anesthetists").

3. Alamogordo Physicians, an IPA consisting of 45 physicians in Alamogordo and other locations in Otero County, New Mexico, is a cooperative association, incorporated, organized, existing, and doing business under and by virtue of the laws of the State of New

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Mexico, with its principal address at P.O. Box 309, Alamogordo, NM 88310.

4. Dacite is a for-profit corporation, organized, existing, and doing business under and by virtue of the laws of the State of Wyoming, with its principal address at 106 Sweetbriar Lane, Louisville, KY 40207. Dacite provides consulting services, including managed care contracting, to White Sands.

5. James R. Laurenza is Dacite's founder and President, White Sands' General Manager, and White Sands' principal contract negotiator with payors. His principal address is 106 Sweetbriar Lane, Louisville, KY 40207.

THE FTC HAS JURISDICTION OVER RESPONDENTS

6. At all times relevant to this Complaint, White Sands, Dacite, and James R. Laurenza have been engaged in the business of contracting with payors, on behalf of White Sands' members, for the provision of medical services to persons for a fee.

7. Except to the extent that competition has been restrained as alleged herein, White Sands' nurse anesthetist members have been, and are now, in competition with each other for the provision of health care services in the Alamogordo area for a fee. Additionally, except to the extent that competition has been restrained as alleged herein, Alamogordo Physicians' physician members have been, and are now, in competition with each other for the provision of medical services in the Alamogordo area for a fee.

8. Alamogordo Physicians was founded by, is controlled by, and carries on business for the pecuniary benefit of its physician members. Accordingly, Alamogordo Physicians is a corporation within the meaning of Section 4 of the Federal Trade Commission Act, as amended, 15 U.S.C. § 44.

9. Respondents' general business practices, including the acts

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and practices herein alleged, are in or affecting “commerce” as defined in the Federal Trade Commission Act, as amended, 15 U.S.C. § 44.

**OVERVIEW OF PHYSICIAN AND NURSE ANESTHETIST
CONTRACTING WITH PAYORS**

10. Alamogordo is in south-central New Mexico. The closest major cities to Alamogordo are Las Cruces, New Mexico, approximately 70 miles to the south; El Paso, Texas, approximately 90 miles to the south; Albuquerque, the largest city in New Mexico, is approximately 210 miles to the north.

11. White Sands’ nurse anesthetist members are licensed in the State of New Mexico as anesthesia specialists, and comprise all of the nurse anesthetists practicing in the Alamogordo area. All of White Sands’ nurse anesthetist members operate their own independent practices. There are no physician anesthesiologists in the Alamogordo area. Therefore, to be marketable in the Alamogordo area, a payor’s health insurance plan must have access to White Sands’ nurse anesthetist members.

12. Alamogordo Physicians’ physician members are licensed to practice allopathic or osteopathic medicine in the State of New Mexico, and engaged in the business of providing physician services to patients in the Alamogordo area. In addition, all of Alamogordo Physicians’ physician members are members of White Sands and account for approximately 80% of the physicians who independently practice in the Alamogordo area. To be marketable in the Alamogordo area, a payor’s health insurance plan must have access to a large number of primary care physicians and specialists who are members of White Sands.

13. Physicians and nurse anesthetists contract with payors to establish the terms and conditions, including price terms, under which they render services to the payors’ subscribers. Physicians and nurse anesthetists entering into such contracts often agree to lower compensation to obtain access to additional patients made

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available by the payors' relationship with insureds. These contracts may reduce payors' costs and enable them to lower the price of insurance, and thereby result in lower medical care costs for subscribers to the payors' health insurance plans. Absent agreements among them on the terms, including price, on which they will provide services to enrollees in payors' health care plans, competing physicians and competing nurse anesthetists decide individually whether to enter into payor contracts to provide services to their subscribers or enrollees, and what prices they will accept pursuant to such contracts.

14. The Medicare Resource Based Relative Value Scale ("RBRVS") is a system used by the Centers for Medicare and Medicaid Services to determine the amount to pay physicians for the services they render to Medicare patients. In general, payors in the Alamogordo area make contract offers to individual physicians or groups at a price level specified as some percentage of the RBRVS fee for a particular year (*e.g.*, "110% of 2003 RBRVS").

15. Contracts between payors and nurse anesthetists contain payment provisions based on procedure guidelines established by the American Society of Anesthesiologists ("ASA"). Under these guidelines, payment for most procedures is determined by multiplying an agreed upon dollar amount, or "conversion factor," by the sum of "ASA units." ASA units are divided into "procedure units" and "time units." The number of procedure units varies, depending on the type of procedure that the nurse anesthetist provides. One time unit is equal to fifteen minutes. For example, if a payor and nurse anesthetist agree to a conversion factor of \$40, and a procedure is worth six procedure units and takes 45 minutes (*i.e.*, 3 time units) to perform, then the payment is \$360 [$\$40 \times (6 + 3) = \360]. Payors in New Mexico negotiate the conversion factor with nurse anesthetists for the provision of anesthesia. For procedures related to pain management, payment mirrors the RBRVS approach described in paragraph 14 above.

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**WHITE SANDS NEGOTIATED PAYOR CONTRACTS ON
BEHALF OF ITS MEMBER PHYSICIANS AND NURSE
ANESTHETISTS**

16. Gerald Champion Regional Medical Center and Alamogordo Physicians organized White Sands in 1996 to “develop pricing policies and . . . negotiate and enter into Managed Care Contracts” on behalf of its members. Its business plan promotes the PHO as “enabl[ing] . . . physicians to be part of a delivery structure that will leverage the collective power of the members in obtaining more favorable reimbursement rates than could be negotiated . . . individually.” White Sands’ Board of Directors approves all contracts with payors on behalf of all White Sands’ members.

17. Alamogordo Physicians was incorporated in 1996 “to represent and advance the interests of independent physicians practicing in Otero County, New Mexico . . . and to participate effectively in managed care programs.” Alamogordo Physicians’ Board of Directors develops “contracting guidelines” for Mr. Laurenza to use in making demands to payors on price and other contracting terms for physician services. The Alamogordo Physicians Board must “fully support” a contract’s price and other terms as they relate to physician services, before Mr. Laurenza submits the contract to White Sands’ Board for final approval. The Alamogordo Physicians Board has authority to expel physician members from Alamogordo Physicians if they refuse to participate in Board-approved payor contracts.

18. Physician members of Alamogordo Physicians are eligible to be members of White Sands and can participate in White Sands’ payor contracts by entering into a “Physician Provider Agreement” with White Sands. Under the “Physician Provider Agreement,” a physician member of White Sands is automatically bound to a single-signature payor contract, signed by White Sands’ General Manager, if the contract’s prices meet the “guideline fee schedule then in force for White Sands,” and if the General Manager of White Sands and White Sands’ Board

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approve the contract. Nurse anesthetists can become eligible members of White Sands and participate in White Sands' single-signature payor contracts by signing a "Professional Provider Agreement." White Sands' payor contracts include a uniform fee schedule that applies to the entire membership.

19. Through Dacite, Mr. Laurenza – White Sands' General Manager – has provided contracting and consulting services to White Sands since White Sands' inception in 1996. Mr. Laurenza negotiates with payors on prices and other contract terms pursuant to which White Sands' physician and nurse anesthetist members will provide services to subscribers of the payors' health plans. He reports to both Alamogordo Physicians and the White Sands Board on developments in payor negotiations. White Sands compensates Mr. Laurenza with a daily consulting rate, along with a fee for each payor contract that he negotiates for White Sands. The greater the number of a payor's enrollees, the greater the fee. Mr. Laurenza strongly influences White Sands' contracting decisions. He advises the Boards of both White Sands and Alamogordo Physicians on what prices they should accept. Both groups generally agree with his recommendations.

20. White Sands' physician and nurse anesthetist members have agreed with each other and with White Sands not to deal individually, or through any other organization besides White Sands, with any payor with which White Sands was attempting to negotiate a contract jointly on behalf of White Sands' members. Physician and nurse anesthetist members, at Mr. Laurenza's urging, refuse payor offers made to them individually, hindering payors' efforts to establish competitive physician and nurse anesthetist networks in the Alamogordo area. Due to White Sands' large share of Alamogordo-area physicians and nurse anesthetists, payors have repeatedly acceded to respondents' price demands for all physician and nurse anesthetist members. One payor determined that the Alamogordo area is "the most expensive location in New Mexico . . . to conduct business," due to White Sands' prices.

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CIMARRON HEALTH PLAN

21. Cimarron Health Plan (“Cimarron”) is a payor doing business in the Alamogordo area. In October 2000, Mr. Laurenza demanded substantial price increases from Cimarron for physician services on surgical procedures and for nurse anesthetist services regarding its HMO product, on behalf of White Sands’ members. At the time, the contract prices were 123% of 2000 RBRVS and \$40 per ASA unit for anesthesia, respectively. In June 2001, following months of negotiations with Mr. Laurenza, Cimarron finally accepted his demand for a price increase for physician services on surgical procedures, to 140% of 2001 RBRVS. Months later, Cimarron accepted Mr. Laurenza’s demand for price increases for nurse anesthetist services, agreeing to pay nurse anesthetists a 16% increase to the conversion factor for anesthesia, and a 14% increase for pain management.

22. In September 2002, Mr. Laurenza demanded further price increases for physician services under Cimarron’s HMO product. He demanded prices ranging between 160% and 180% of 2001 RBRVS, as high as 28% to 30% over the previously increased prices. In November 2002, Mr. Laurenza modified his price demands for physician services, to prices ranging from 152% to 170% of 2001 RBRVS. In April 2003, Cimarron agreed to these prices. By April 2003, Cimarron also agreed to Mr. Laurenza’s demand for a 5% increase to the conversion factor for anesthesia, and a 6% increase to the price for pain management. During those most recent negotiations, Mr. Laurenza advised physician members on how to refuse Cimarron proposals for individual contracts without appearing to engage in joint conduct.

BLUE CROSS & BLUE SHIELD

23. Blue Cross & Blue Shield of New Mexico (“Blue Cross”) is a health plan doing business in the Alamogordo area. Blue Cross first entered into a non-risk contract with White Sands in November 2000.

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24. In a September 2002 letter to Blue Cross, Mr. Laurenza demanded price increases for White Sands' physicians, ranging from 11% to 24%. At that time, the contracted prices for physician services under White Sands' contract with Blue Cross ranged between 129% and 162% of 2001 RBRVS. After Blue Cross refused this demand, Mr. Laurenza sent Blue Cross a November 2002 letter of termination on behalf of White Sands' physician members, stating that White Sands' physician members would "reconsider" their joint termination if Blue Cross would meet their price demands.

25. Mr. Laurenza advised White Sands' members not to deal individually with Blue Cross, in order to secure greater bargaining leverage and higher prices through the collective power of the group. In a December 2002 letter to White Sands' physician members, Mr. Laurenza warned that individual contracting with Blue Cross would "cause a competitive reaction among providers that would lead to lower reimbursement for all involved." In February 2003, following repeated refusals by White Sands' physician members to deal with it outside of White Sands, Blue Cross agreed to increases in price for various procedures, to a range of 143% to 171% of 2003 RBRVS.

26. Mr. Laurenza also demanded substantial price increases from Blue Cross for White Sands' nurse anesthetist members. Under White Sands' November 2000 contract with Blue Cross, the price for nurse anesthetist services was \$47 per ASA unit for anesthesia, and 153% of 2001 RBRVS for pain management. In August 2001, Mr. Laurenza called for an 11% increase in the anesthesia conversion factor, and a 20% increase in the price for pain management. Blue Cross met Mr. Laurenza's price demand on pain management but counter-offered a conversion factor for anesthesia below Mr. Laurenza's demand. Mr. Laurenza rejected the counter-offer. Having no viable alternative for anesthesia specialists in the area, Blue Cross responded by increasing the conversion factor for anesthesia by 8%, and Mr. Laurenza accepted that term.

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PRESBYTERIAN HEALTH PLAN

27. Presbyterian Health Plan, Inc. (“Presbyterian”), is a health plan doing business in the Alamogordo area. White Sands first entered into a single-signature contract with Presbyterian in 1996 that included agreed upon prices for physicians and nurse anesthetists. In November 2001, Mr. Laurenza initiated renegotiation of the contracted prices with Presbyterian, threatening to terminate the contract on behalf of White Sands’ physician members if Presbyterian did not increase its prices. In January 2002, the Alamogordo Physicians Board voted to demand higher prices from Presbyterian, ranging between 155% and 195% of 2001 RBRVS.

28. In a February 2002 letter to Presbyterian, Mr. Laurenza demanded increases in payment for physician services to prices between 170% and 195% of 2001 RBRVS for various procedural codes. In June 2002, Presbyterian and White Sands agreed to prices for physician services ranging from 160% to 180% of 2001 RBRVS, depending on the code, a range that was pre-approved by the Alamogordo Physicians Board.

29. In May 2003, Mr. Laurenza, on behalf of White Sands’ nurse anesthetists, demanded a 18% price increase for anesthesia, to \$53 per ASA unit. At the time, the contracted price was \$45 per ASA unit. On the same day that he made his demand to Presbyterian, Mr. Laurenza sent the nurse anesthetists questionnaires to survey their support for his demand for a price increase. The questionnaires were designed to coordinate the nurse anesthetists’ joint support for Mr. Laurenza’s price increase demand. Presbyterian rejected Mr. Laurenza’s demand for price increases, and requested that they remain contracted under the same prices.

30. In June 2003, Mr. Laurenza increased his price demand for nurse anesthetists to \$60 per ASA unit. Presbyterian refused and counter-proposed \$48 per ASA unit. Mr. Laurenza warned Presbyterian that the nurse anesthetists would reject the counter-

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proposal, which a majority of them did. Presbyterian and White Sands did not reach an agreement on prices for nurse anesthetists, forcing Presbyterian to pay the White Sands nurse anesthetists unpredictable and high billed charges for anesthesia services in the Alamogordo area.

LOVELACE SANDIA HEALTH PLAN

31. Lovelace Sandia Health Plan (“Lovelace”) contracts with White Sands for health care services in the Alamogordo area. White Sands, through Mr. Laurenza, has successfully negotiated with Lovelace for high uniform prices on behalf of its competing members.

32. In August 2001, Mr. Laurenza sent Lovelace a letter demanding substantial price increases for White Sands’ physicians and nurse anesthetists. He requested prices ranging from 160% to 180% of current year RBRVS for physician services, and a \$50 conversion factor for anesthesia. At the time, White Sands was contracted with Lovelace under prices for physician services ranging between 150% and 165% of current year RBRVS. The conversion factor for anesthesia was \$47 per ASA unit, already 30% higher than the standard rate Lovelace paid for anesthesia elsewhere. One month later, Mr. Laurenza threatened to terminate the contract with Lovelace on behalf of White Sands if the parties did not come to an agreement on price and other terms. By November 2001, Lovelace agreed to meet White Sands’ initial demand for anesthesia, and to increase prices for physician services to prices ranging from 155% to 175%.

OTHER PAYORS

33. White Sands has orchestrated collective negotiations with other payors who do business, or attempted to do business, in the Alamogordo area, on behalf of its physician and nurse anesthetist members. Mr. Laurenza, with the assistance of both the White Sands and Alamogordo Physicians Boards, negotiated with these payors on price, making proposals and counter-proposals, as well

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as accepting or rejecting offers without transmitting them to members for their individual acceptance or rejection, and facilitating collective refusals to deal and threats of refusals to deal with payors. White Sands' members collectively accepted or rejected these payor contracts, and refused to deal with these payors individually. These coercive tactics, due to White Sands' dominant market position in the Alamogordo area, have been highly successful.

RESPONDENTS' PRICE-FIXING IS NOT JUSTIFIED

34. Respondents' joint negotiation of fees and other competitively significant contract terms has not been, and is not, reasonably related to any efficiency-enhancing integration.

RESPONDENTS' ACTIONS HAVE HAD SUBSTANTIAL ANTICOMPETITIVE EFFECTS

35. Respondents' actions described in Paragraphs 16 through 33 of this Complaint have had, or tend to have, the effect of restraining trade unreasonably and hindering competition in the provision of physician and nurse anesthetist services in the Alamogordo area in the following ways, among others:

1. price and other forms of competition among members of White Sands and Alamogordo Physicians were unreasonably restrained;
2. prices for physician and nurse anesthetist services were increased; and
3. health plans, employers, and individual consumers were deprived of the benefits of competition among physicians and among nurse anesthetists.

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**VIOLATION OF THE FEDERAL TRADE COMMISSION
ACT**

36. The combination, conspiracy, acts, and practices described above constitute unfair methods of competition in violation of Section 5 of the Federal Trade Commission Act, 15 U.S.C. § 45. Such combination, conspiracy, acts, and practices, or the effects thereof, are continuing and will continue or recur in the absence of the relief herein requested.

WHEREFORE, THE PREMISES CONSIDERED, the Federal Trade Commission on this eleventh day of January, 2005, issues its Complaint against Respondents White Sands, Alamogordo Physicians, Dacite, and James R. Laurenza.

DECISION AND ORDER

The Federal Trade Commission (“Commission”), having initiated an investigation of certain acts and practices of the White Sands Health Care System, L.L.C. (“White Sands”), Alamogordo Physicians’ Cooperative, Inc. (“Alamogordo Physicians”), Dacite, Inc. (“Dacite”), and James R. Laurenza, hereinafter sometimes referred to as “Respondents,” and Respondents having been furnished thereafter with a copy of the draft of Complaint that counsel for the Commission proposed to present to the Commission for its consideration and which, if issued, would charge Respondents with violations of Section 5 of the Federal Trade Commission Act, as amended, 15 U.S.C. § 45; and

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

The Commission having thereafter considered the matter and having determined that it had reason to believe that Respondents have violated the said Act, and that a Complaint should issue stating its charges in that respect, and having accepted the executed Consent Agreement and placed such Consent Agreement on the public record for a period of thirty (30) days for the receipt and consideration of public comments, now in further conformity with the procedure described in Commission Rule 2.34, 16 C.F.R. § 2.34, the Commission hereby issues its Complaint, makes the following jurisdictional findings and issues the following Order:

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1. Respondent White Sands is a for-profit limited liability company, organized, existing, and doing business under and by virtue of the laws of the State of New Mexico, with its principal address at 3310 N. White Sands Boulevard, Alamogordo, NM 88311.
2. Respondent Alamogordo Physicians is a cooperative association, organized, existing, and doing business under and by virtue of the laws of the State of New Mexico, with its principal address at P.O. Box 309, Alamogordo, NM 88310.
3. Respondent Dacite is a for-profit corporation, organized, existing, and doing business under and by virtue of the laws of the State of Wyoming, with its principal address at 106 Sweetbriar Lane, Louisville, KY 40207.
4. Respondent James R. Laurenza is the founder and president of Dacite. His principal address is 106 Sweetbriar Lane, Louisville, KY 40207.
5. The Federal Trade Commission has jurisdiction of the subject matter of this proceeding and of Respondents, and this proceeding is in the public interest.

ORDER

I.

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

- A. “Respondent White Sands” means White Sands Health Care System, L.L.C., its officers, directors, employees, agents, attorneys, representatives, successors, and assigns; and the subsidiaries, divisions, groups, and affiliates controlled by White Sands Health Care System, L.L.C., and the respective

officers, directors, employees, agents, attorneys, representatives, successors, and assigns of each.

- B. “Respondent Alamogordo Physicians” means Alamogordo Physicians’ Cooperative, Inc., its officers, directors, employees, agents, attorneys, representatives, successors, and assigns; and the subsidiaries, divisions, groups, and affiliates controlled by Alamogordo Physicians’ Cooperative, Inc., and the respective officers, directors, employees, agents, attorneys, representatives, successors, and assigns of each.
- C. “Respondent Dacite” means Dacite, Inc., its officers, directors, employees, agents, attorneys, representatives, successors, and assigns; and the subsidiaries, divisions, groups, and affiliates controlled by Dacite, Inc. and the respective officers, directors, employees, agents, attorneys, representatives, successors, and assigns of each.
- D. “Respondent Laurenza” means James R. Laurenza.
- E. “Respondents” means Respondent White Sands, Respondent Alamogordo Physicians, Respondent Dacite, and Respondent Laurenza.
- F. “Medical group practice” means a bona fide, integrated firm in which providers practice medicine together as partners, shareholders, owners, members, or employees, or in which only one provider practices medicine.
- G. “Participate” means (1) to be a partner, shareholder, owner, member, or employee of such entity, or (2) to provide services, agree to provide services, or offer to provide services, to a payor through such entity. This definition also applies to all tenses and forms of the word “participate,” including, but not limited to, “participating,” “participated,” and “participation.”
- H. “Payor” means any person that pays, or arranges for the payment, for all or any part of any provider services for itself

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or for any other person. “Payor” includes any person that develops, leases, or sells access to networks of providers.

- I. “Person” means both natural persons and artificial persons, including, but not limited to, corporations, unincorporated entities, and governments.
- J. “Physician” means a doctor of allopathic medicine (“M.D.”) or a doctor of osteopathic medicine (“D.O.”).
- K. “Preexisting contract” means a contract that was in effect on the date of the receipt by a payor that is a party to such contract of notice sent, pursuant to Paragraph V.B of this Order, of such payor’s right to terminate such contract.
- L. “Principal address” means either (1) primary business address, if there is a business address, or (2) primary residential address, if there is no business address.
- M.. “Provider” means any licensed health care professional, including, but not limited to, physicians and nurse anesthetists.
- N. “Qualified clinically-integrated joint arrangement” means an arrangement to provide provider services in which:
 - 1. all providers that participate in the arrangement participate in active and ongoing programs of the arrangement to evaluate and modify the practice patterns of, and create a high degree of interdependence and cooperation among, the providers who participate in the arrangement, in order to control costs and ensure the quality of services provided through the arrangement; and
 - 2. any agreement concerning price or other terms or conditions of dealing entered into by or within the arrangement is reasonably necessary to obtain significant efficiencies through the joint arrangement.

- O. “Qualified risk-sharing joint arrangement” means an arrangement to provide provider services in which:
1. all providers who participate in the arrangement share substantial financial risk through their participation in the arrangement and thereby create incentives for the providers who participate jointly to control costs and improve quality by managing the provision of provider services, such as risk-sharing involving:
 - a. the provision of provider services for a capitated rate from payors;
 - b. the provision of provider services for a predetermined percentage of premium or revenue from payors;
 - c. the use of significant financial incentives (*e.g.*, substantial withholds) for providers who participate to achieve, as a group, specified cost-containment goals; or
 - d. the provision of a complex or extended course of treatment that requires the substantial coordination of care by providers in different specialties offering a complementary mix of services, for a fixed, predetermined price, where the costs of that course of treatment for any individual patient can vary greatly due to the individual patient’s condition, the choice, complexity, or length of treatment, or other factors; and
 2. any agreement concerning price or other terms or conditions of dealing entered into by or within the arrangement is reasonably necessary to obtain significant efficiencies through the joint arrangement.

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II.

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

- A. Entering into, adhering to, participating in, maintaining, organizing, implementing, enforcing, or otherwise facilitating any combination, conspiracy, agreement, or understanding between or among any providers:
 - 1. to negotiate on behalf of any provider with any payor,
 - 2. to deal, refuse to deal, or threaten to refuse to deal with any payor,
 - 3. regarding any term, condition, or requirement upon which any provider deals, or is willing to deal, with any payor, including, but not limited to, price terms, or
 - 4. not to deal individually with any payor, or not to deal with any payor through any arrangement other than Respondent White Sands or Respondent Alamogordo Physicians;
- B. Exchanging or facilitating in any manner the exchange or transfer of information among providers concerning any provider’s willingness to deal with a payor, or the terms or conditions, including price terms, on which the provider is willing to deal;
- C. Attempting to engage in any action prohibited by Paragraph II.A or II.B, above; and
- D. Encouraging, suggesting, advising, pressuring, inducing, or attempting to induce any person to engage in any action that would be prohibited by Paragraphs II.A through II.C above.

PROVIDED, HOWEVER, that nothing in Paragraph II of this Order shall prohibit any agreement involving or conduct by:

- (i) Respondent Dacite or Respondent Laurenza, subject to the provisions of Paragraph IV below, that is reasonably necessary to form, participate in, or take any action in furtherance of a qualified risk-sharing joint arrangement or a qualified clinically-integrated joint arrangement, or that solely involves providers in the same medical group practice; or
- (ii) Respondent White Sands or Respondent Alamogordo Physicians that is reasonably necessary to form, participate in, or take any action in furtherance of a qualified risk-sharing joint arrangement or a qualified clinically-integrated joint arrangement, so long as the arrangement does not restrict the ability, or facilitate the refusal, of providers who participate in it to deal with payors on an individual basis or through any other arrangement.

III.

IT IS FURTHER ORDERED that Respondent Dacite and Respondent Laurenza, for three (3) years after the date that this Order becomes final, directly or indirectly, or through any corporate or other device, in connection with the provision of provider services in or affecting commerce, as “commerce” is defined in Section 4 of the Federal Trade Commission Act, 15 U.S.C. § 44, cease and desist from:

- A. Negotiating with any payor on behalf of Respondent White Sands, Respondent Alamogordo Physicians, or any provider who participates or has participated in Respondent White Sands or Respondent Alamogordo Physicians, notwithstanding whether such conduct also is prohibited by Paragraph II of this Order; and

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- B. Advising any provider who participates, or has participated, in Respondent White Sands or Respondent Alamogordo Physicians to accept or reject any term, condition, or requirement of dealing with any payor, notwithstanding whether such conduct also is prohibited by Paragraph II of this Order.

IV.

IT IS FURTHER ORDERED that, for three (3) years from the date this Order becomes final, each Respondent shall notify the Secretary of the Commission in writing (“Notification”) at least sixty (60) days prior to entering into any arrangement with any providers under which such Respondent would act as a messenger, or as an agent on behalf of those providers, with payors regarding contracts. The Notification shall include the identity of each proposed provider participant; the proposed geographic area in which the proposed arrangement will operate; a copy of any proposed provider participation agreement; a description of the proposed arrangement’s purpose and function; a description of any resulting efficiencies expected to be obtained through the arrangement; and a description of procedures to be implemented to limit possible anticompetitive effects, such as those prohibited by this Order. Notification is not required for such Respondent’s subsequent acts as a messenger pursuant to an arrangement for which this Notification has been given. Receipt by the Commission from such Respondent of any Notification, pursuant to Paragraph IV of the Order, is not to be construed as a determination by the Commission that any action described in such Notification does or does not violate this Order or any law enforced by the Commission.

PROVIDED, HOWEVER, that, if Respondent Dacite or Respondent Laurenza enter into an arrangement that solely involves providers in one medical group practice, Notification required by Paragraph IV of this Order shall include only the identity of that medical group practice and a copy of any proposed provider participation agreement.

V.

IT IS FURTHER ORDERED that Respondent White Sands shall:

- A. Within thirty (30) days from the date that this Order becomes final send by first-class mail, return receipt requested, a copy of this Order and the Complaint to:
1. each provider who participates, or has participated, in Respondent White Sands since January 1, 2003;
 2. each officer, director, manager, and employee of Respondent White Sands;
 3. the chief executive officer of each payor with which Respondent White Sands has a record of having been in contact since January 1, 2003, regarding contracting for the provision of provider services, and include in such mailing the notice specified in Appendix A to this Order;
- B. Terminate, without penalty or charge, and in compliance with any applicable laws, any preexisting contract with any payor for the provision of provider services, at the earlier of: (1) receipt by Respondent White Sands of a written request from a payor to terminate such contract, or (2) the earliest termination or renewal date (including any automatic renewal date) of such contract; *provided, however*, a preexisting contract may extend beyond any such termination or renewal date no later than one (1) year from the date that the Order becomes final if, prior to such termination or renewal date, (a) the payor submits to Respondent White Sands a written request to extend such contract to a specific date no later than one (1) year from the date that this Order becomes final, and (b) Respondent White Sands has determined not to exercise any right to terminate; *provided further*, that any payor making such request to extend a contract retains the right, pursuant to part (1) of Paragraph V.B of this Order, to terminate the contract at any time;

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- C. Within ten (10) days of receiving a written request from a payor, pursuant to Paragraph V.B(1) of this Order, distribute, by first-class mail, return receipt requested, a copy of that request to each provider participating in Respondent White Sands as of the date Respondent White Sands receives such request;
- D. For a period of three (3) years from the date that this Order becomes final:
 - 1. distribute by first-class mail, return receipt requested, a copy of this Order and the Complaint to:
 - a. each provider who begins participating in Respondent White Sands, and who did not previously receive a copy of this Order and the Complaint, within thirty (30) days of the time that such participation begins;
 - b. each payor that contracts with Respondent White Sands for the provision of provider services, and that did not previously receive a copy of this Order and the Complaint, within thirty (30) days of the time that such payor enters into such contract;
 - c. each person who becomes an officer, director, manager, or employee of Respondent White Sands, and who did not previously receive a copy of this Order and the Complaint, within thirty (30) days of the time that he or she assumes such responsibility with Respondent White Sands;
 - 2. annually publish a copy of this Order and the Complaint in an official annual report or newsletter sent to all providers who participate in Respondent White Sands, with such prominence as is given to regularly featured articles;
- E. File a verified written report within sixty (60) days from the date that this Order becomes final, annually thereafter for three

(3) years on the anniversary of the date this Order becomes final, and at such other times as the Commission may by written notice require. Each such report shall include:

1. a detailed description of the manner and form in which Respondent White Sands has complied and is complying with this Order;
 2. copies of the return receipts required by Paragraphs V.A, V.C, and V.D of this Order; and
- F. Notify the Commission at least thirty (30) days prior to any proposed (1) dissolution of Respondent White Sands, (2) acquisition, merger or consolidation of Respondent White Sands, or (3) any other change in Respondent White Sands that may affect compliance obligations arising out of the order, including but not limited to assignment, the creation or dissolution of subsidiaries, or any other change in Respondent White Sands.

PROVIDED, HOWEVER, that, if Respondent White Sands dissolves or otherwise ceases to do business, Respondent Alamogordo Physicians shall have the obligation to comply with those provisions of Paragraph V.A through V.E of this Order to the extent applicable to Respondent Alamogordo Physicians, its officers, and members of its board of directors.

VI.

IT IS FURTHER ORDERED that Respondent Alamogordo Physicians shall notify the Commission at least thirty (30) days prior to any proposed (1) dissolution of Respondent Alamogordo Physicians, (2) acquisition, merger or consolidation of Respondent Alamogordo Physicians, or (3) any other change in Respondent Alamogordo Physicians that may affect compliance obligations arising out of the order, including but not limited to assignment, the creation or dissolution of subsidiaries, or any other change in Respondent Alamogordo Physicians.

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VII.

IT IS FURTHER ORDERED that, if neither Respondent White Sands nor Respondent Alamogordo Physicians complies with all or any portion of Paragraphs V.A through V.F of this Order, or if Respondent Alamogordo Physicians fails to comply with Paragraph VI of this Order, within sixty (60) days of the times set forth in those paragraphs, then Respondent Laurenza shall, within thirty (30) days thereafter, comply with those portions of Paragraphs V.A through V.F and Paragraph VI of this Order with which Respondent White Sands or Respondent Alamogordo Physicians did not comply.

VIII.

IT IS FURTHER ORDERED that Respondent Dacite shall:

- A. Within thirty (30) days from the date that this Order becomes final, send a copy of this Order and the Complaint by first-class mail, return receipt requested:
1. to each provider who participates, or has participated, since January 1, 2003, in a provider group represented by Respondent Dacite;
 2. to each payor with which Respondent Dacite has dealt since January 1, 2003, for the purpose of contracting, or seeking to contract, while representing or advising any group of providers relating to contracting with such payor for the provision of provider services; and
 3. to (a) each present and past employee of Respondent Dacite, and (b) each individual who has acted as a contractor since January 1, 2003, for Respondent Dacite (i) relating to contracting, or seeking to contract, with payors for the provision of provider services, or (ii) relating to advising providers with regard to their dealings with payors in connection with the provision of provider services;

PROVIDED, HOWEVER, that Respondent Dacite is not required to send a copy of this Order and the Complaint to any provider or payor that received a copy of this Order and the Complaint from Respondent White Sands or Respondent Alamogordo Physicians, pursuant to Paragraphs V.A.1 and 3 or Paragraphs V.D.1.a and b of this Order;

B. For three (3) years after the date this Order becomes final, distribute a copy of this Order and the Complaint by first-class mail, return receipt requested:

1. to all providers that Respondent Dacite represents relating to contracting, or seeking to contract, with payors for the provision of provider services, or that Respondent Dacite advises relating to the provision of provider services, within (30) days of the time that Respondent Dacite begins providing such representation or advice; and
2. to each payor with which Respondent Dacite deals for the purpose of contracting, or seeking to contract, pursuant to any arrangement to represent or advise any provider, relating to contracting with such payor for the provision of provider services, within thirty (30) days of such dealing;

PROVIDED, HOWEVER, that Respondent Dacite is not required to send a copy of this Order and the Complaint to any provider who begins participating in Respondent White Sands or Respondent Alamogordo Physicians or any payor that contracts with Respondent White Sands or Respondent Alamogordo Physicians for the provision of provider services, and that received a copy of this Order and the Complaint from Respondent White Sands or Respondent Alamogordo Physicians, pursuant to Paragraphs V.A.1 and 3 or Paragraphs V.D.1.a and b of this Order;

C. File verified written reports within sixty (60) days from the date that this Order becomes final, annually thereafter for three (3) years on the anniversary of the date this Order becomes

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final, and at such other times as the Commission may by written notice require. Each report shall include:

1. a detailed description of the manner and form in which Respondent Dacite has complied and is complying with this Order; and
 2. copies of the return receipts required by Paragraphs VIII.A and VIII.B; and
- D. Notify the Commission at least thirty (30) days prior to any proposed (1) dissolution of Respondent Dacite, (2) acquisition, merger or consolidation of Respondent Dacite or (3) any other change in Respondent Dacite that may affect compliance obligations arising out of the order, including but not limited to assignment, the creation or dissolution of subsidiaries, or any other change in Respondent Dacite.

IX.

IT IS FURTHER ORDERED that, if Respondent Dacite fails to comply with all or any portion of Paragraph VIII of this Order within sixty (60) days of the time set forth in those portions of Paragraph VIII, then Respondent Laurenza shall, within thirty (30) days thereafter, comply with those portions of Paragraph VIII of this Order with which Respondent Dacite did not comply.

X.

IT IS FURTHER ORDERED that each Respondent shall notify the Commission of any change in his or its respective principal address within twenty (20) days of such change in address.

XI.

IT IS FURTHER ORDERED that, for the purpose of determining or securing compliance with this Order, each Respondent shall permit any duly authorized representative of the Commission:

- A. Access, during office hours and in the presence of counsel, to inspect and copy all books, ledgers, accounts, correspondence, memoranda, calendars, and other records and documents in his or its possession, or under his or its control, relating to any matter contained in this Order; and
- B. Upon five (5) days' notice to such Respondent, and in the presence of counsel, and without restraint or interference from him or it, to interview such Respondent or employees of such Respondent.

XII.

IT IS FURTHER ORDERED that this Order shall terminate on January 11, 2025.

Analysis

Analysis of Agreement Containing Consent Order to Aid Public Comment

The Federal Trade Commission has accepted, subject to final approval, an agreement containing a proposed Consent Order with the White Sands Health Care System, L.L.C., Alamogordo Physicians' Cooperative, Inc., Dacite, Inc., and James R. Laurenza. The agreement settles charges that these parties violated Section 5 of the Federal Trade Commission Act, 15 U.S.C. § 45, by orchestrating and implementing agreements among the physician and certified registered nurse anesthetist (nurse anesthetist) members of White Sands to fix prices and other terms on which they would deal with health plans, and to refuse to deal with such purchasers except on collectively-determined terms. The proposed Consent Order has been placed on the public record for 30 days to receive comments from interested persons. Comments received during this period will become part of the public record. After 30 days, the Commission will review the agreement and the comments received, and will decide whether it should withdraw from the agreement or make the proposed Order final.

The purpose of this analysis is to facilitate public comment on the proposed Order. The analysis is not intended to constitute an official interpretation of the agreement and proposed Order or to modify their terms in any way. Further, the proposed Consent Order has been entered into for settlement purposes only and does not constitute an admission by any respondent that said respondent violated the law or that the facts alleged in the Complaint (other than jurisdictional facts) are true.

The Complaint

The allegations of the Complaint are summarized below.

White Sands is a physician-hospital organization (PHO), consisting of Alamogordo Physicians, an independent practice association (IPA); Gerald Champion Regional Medical Center

(Gerald Champion), the sole hospital in the Alamogordo area, which is located in south-central New Mexico; and 31 non-physician health care providers, including all five nurse anesthetists in the Alamogordo area. White Sands was organized in 1996 to “develop pricing policies and . . . negotiate and enter into Managed Care Contracts” on behalf of its members.

Alamogordo Physicians is composed of 45 physicians, representing 84% percent of all physicians independently practicing (that is, those not employed by area hospitals) in and around the Alamogordo area. Dacite provides consulting and payor contracting services to White Sands. Mr. Laurenza is the founder and President of Dacite, and the General Manager and principal contract negotiator for White Sands.

White Sands’ members refuse to deal with health plans on an individual basis. Instead, Mr. Laurenza negotiates price and other contract terms with health plans that desire to contract with White Sands’ members. Contract terms for physician services that Mr. Laurenza negotiates for White Sands are presented to the White Sands’ Board of Managers for approval after acceptance by the Alamogordo Physicians’ Board of Directors. Mr. Laurenza also negotiates contract provisions, including fees, on behalf of independently practicing non-physician health care providers, namely nurse anesthetists. Respondents have orchestrated collective agreements on fees and other terms of dealing with health plans, carried out collective negotiations with health plans, and orchestrated refusals to deal and threats to refuse to deal with health plans that resisted respondents’ desired terms. Although White Sands purported to operate as a “messenger model,” – that is, an arrangement that does not facilitate horizontal agreements on price – it engaged in various actions that demonstrated or orchestrated such agreements.¹

¹ Some arrangements can facilitate contracting between health care providers and payors without fostering an illegal agreement among competing physicians on fees or fee-related terms. One

Analysis

Respondents have repeatedly succeeded in forcing numerous health plans to raise fees paid to White Sands' members, and thereby raised the cost of medical care in the Alamogordo area. They have been successful in "leverag[ing] the collective power of the members in obtaining more favorable reimbursement rates than could be negotiated . . . individually."

White Sands engaged in no efficiency-enhancing integration sufficient to justify respondents' joint negotiation of fees. By orchestrating agreements among White Sands members to deal only on collectively-determined terms, and actual or threatened refusals to deal with health plans that would not meet those terms, respondents have violated Section 5 of the FTC Act.

The Proposed Consent Order

The proposed Order is designed to remedy the illegal conduct charged in the Complaint and prevent its recurrence. It is similar to recent consent orders that the Commission has issued to settle charges that physician groups engaged in unlawful agreements to raise fees they receive from health plans. Unlike recent consent orders, however, this Order also settles charges that non-physician health care providers engaged in unlawful price agreements as well. The Order also includes temporary "fencing-in" relief to ensure that the alleged unlawful conduct by respondents does not continue.

The proposed Order's specific provisions are as follows:

Paragraph II.A prohibits respondents from entering into or facilitating any agreement between or among any health care

such approach, sometimes referred to as a "messenger model" arrangement, is described in the 1996 Statements of Antitrust Enforcement Policy in Health Care jointly issued by the Federal Trade Commission and U.S. Department of Justice, at 125. See <http://www.ftc.gov/reports/hlth3s.htm#8>.

providers: (1) to negotiate with payors on any health care provider's behalf; (2) to deal, not to deal, or threaten not to deal with payors; (3) on what terms to deal with any payor; or (4) not to deal individually with any payor, or to deal with any payor only through an arrangement involving the respondents.

Other parts of Paragraph II reinforce these general prohibitions. Paragraph II.B prohibits the respondents from facilitating exchanges of information between health care providers concerning whether, or on what terms, to contract with a payor. Paragraph II.C bars attempts to engage in any action prohibited by Paragraph II.A or II.B, and Paragraph II.D proscribes inducing anyone to engage in any action prohibited by Paragraphs II.A through II.C.

As in other Commission orders addressing health care providers' collective bargaining with health care purchasers, certain kinds of agreements are excluded from the general bar on joint negotiations. First, respondents would not be precluded from engaging in conduct that is reasonably necessary to form or participate in legitimate joint contracting arrangements among competing health care providers, whether a "qualified risk-sharing joint arrangement" or a "qualified clinically-integrated joint arrangement." The arrangement, however, must not facilitate the refusal of, or restrict, participants from contracting with payors outside of the arrangement.

As defined in the proposed Order, a "qualified risk-sharing joint arrangement" possesses two key characteristics. First, all participants must share substantial financial risk through the arrangement, such that the arrangement creates incentives for the participants jointly to control costs and improve quality by managing the provision of services. Second, any agreement concerning reimbursement or other terms or conditions of dealing must be reasonably necessary to obtain significant efficiencies through the joint arrangement.

Analysis

A “qualified clinically-integrated joint arrangement,” on the other hand, need not involve any sharing of financial risk. Instead, as defined in the proposed Order, participants must participate in active and ongoing programs to evaluate and modify their clinical practice patterns in order to control costs and ensure the quality of services provided, and the arrangement must create a high degree of interdependence and cooperation among participants. As with qualified risk-sharing arrangements, any agreement concerning price or other terms of dealing must be reasonably necessary to achieve the efficiency goals of the joint arrangement.

Also, because the Order is intended to reach agreements among horizontal competitors, Paragraph II would not bar agreements that only involve health care providers who are part of the same medical group practice (defined in Paragraph I.E).

Paragraph III, for a period of three years, bars Dacite and Mr. Laurenza from negotiating with any payor on behalf of White Sands, Alamogordo Physicians, or any White Sands or Alamogordo Physicians member; and from advising any White Sands or Alamogordo Physicians member to accept or reject any term, condition, or requirement of dealing with any payor. This temporary “fencing-in” relief is included to ensure that the alleged unlawful conduct by these respondents does not continue.

Paragraph IV, for a period of three years, requires respondents to notify the Commission before entering into any arrangement to act as a messenger, or as an agent on behalf of any health care providers, with payors regarding contracts. Paragraph IV sets out the information necessary to make the notification complete.

Paragraph V, which applies only to White Sands, requires White Sands to distribute the Complaint and Order to all health care providers who have participated in White Sands, and to payors that negotiated contracts with White Sands or indicated an interest in contracting with White Sands. Paragraph V.B requires White Sands, at any payor’s request and without penalty, or within

one year after the Order is made final, to terminate its current contracts. Paragraph V.C requires White Sands to distribute payor requests for contract termination to all health care providers who participate in White Sands, and, in the event that White Sands fails to comply with the requirements of Paragraph V due to dissolution or cessation of business, Alamogordo Physicians is required to do so.

Paragraph VI requires Alamogordo Physicians to notify the Commission of any change in Alamogordo Physicians that may affect its compliance with the Order, such as dissolution. In the event that White Sands or Alamogordo Physicians fails to comply with the requirements of Paragraph V, or Alamogordo Physicians fails to comply with Paragraph VI, Paragraph VII would require Mr. Laurenza to do so.

Paragraph VIII generally requires Dacite to distribute the Complaint and Order to health care providers who have participated in any group that has been represented by Dacite since January 1, 2003, and to each payor with which Dacite has dealt since January 1, 2003, for the purpose of contracting. In the event that Dacite fails to comply with the requirements of Paragraph VIII, Paragraph IX would require Mr. Laurenza to do so.

Paragraphs V.E, V.F, VIII.C, VIII.D, X, and XI of the proposed Order impose various obligations on respondents to report or provide access to information to the Commission to facilitate monitoring respondents' compliance with the Order.

The proposed Order will expire in 20 years.

Complaint

IN THE MATTER OF

GENZYME CORPORATION, ET AL.

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

Docket C-4128; File No. 0410083

Complaint, December 20, 2004--Decision, January 31, 2005

This consent order, among other things, requires Respondent Genzyme to divest to Schering AG all of its contractual and decision-making rights regarding Campath® -- a monoclonal antibody immunosuppressant drug that is used to suppress the immune system and reduce the likelihood of rejection of a transplanted organ -- for solid organ transplant, including its portion of the earnings from sales of Campath® in solid organ transplant. An accompanying Order to Hold Separate and Maintain Assets requires Respondent Genzyme to hold separate and maintain the viability of the Campath® solid organ transplant assets until their transfer to Schering, and prohibits the exchange of certain material confidential information between Respondent Genzyme and Schering.

Participants

For the Commission: *Norman A. Armstrong, Jr., Paul R. Frontczak, Stephanie C. Bovee, Tammy L. Imhoff, Sylvia M. Brooks, Eric D. Rohlck, Jennifer Lee, Jordan Coyle, Matthew J. Reilly, Michael R. Moiseyev, Daniel P. Ducore, and Mark Hertzendorf.*

For the Respondents: *Michael L. Weiner and Jill A. Ross, Skadden, Arps, Slate, Meagher & Flom, and David M. Foster, Fulbright & Jaworski L.L.P.*

COMPLAINT

Pursuant to the Clayton Act and the Federal Trade Commission Act, and its authority thereunder, the Federal Trade Commission (“Commission”), having reason to believe that Respondent Genzyme Corporation (“Genzyme”), a corporation subject to the jurisdiction of the Commission, has agreed to acquire Respondent ILEX Oncology, Inc. (“Ilex”), a corporation subject to the

Complaint

jurisdiction of the Commission, in violation of Section 7 of the Clayton Act, as amended, 15 U.S.C. § 18, and Section 5 of the Federal Trade Commission Act (“FTC Act”), as amended, 15 U.S.C. § 45, and it appearing to the Commission that a proceeding in respect thereof would be in the public interest, hereby issues its Complaint, stating its charges as follows:

I. DEFINITIONS

1. “Acute rejection” means a sudden injury to the transplanted organ that, if not treated, can cause loss of the organ.
2. “Bone Marrow Transplant” means blood and marrow transplantation including, but not limited to, the transplantation of stem cells, bone marrow, peripheral blood, and cord blood.
3. “Campath” means Ilex’s trademarked and patented drug Campath 1H, a humanized monoclonal antibody directed against CD-52 and any product containing such antibody as an active ingredient and any dose form or prescription thereof.
4. “Commission” means the Federal Trade Commission.
5. “FDA” means the United States Food and Drug Administration.
6. “Induction therapy” means the use of an acute therapy drug before, during, and/or immediately after a SOT procedure to suppress the immune system and decrease the likelihood of rejection of the transplanted organ.
7. “Off-label” means the use of a drug for a purpose other than the indication or indications for which the drug has received marketing approval from the FDA.
8. “Respondents” means Genzyme and Ilex individually and collectively.

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9. “Schering” means Schering AG, a corporation organized, existing, and doing business under and by virtue of the laws of Germany, with its office and principal place of business located at D-13345 Berlin, Germany. Schering includes, but is not limited to, its United States affiliates Berlex, Inc., and Berlex Laboratories, LLC, with headquarters in Montville, NJ.

10. “SOT” means solid organ transplant and refers to transplantation procedures related to solid organs including, but not limited to, heart, intestine, kidney, liver, lung, and pancreas. SOT does not include Bone Marrow Transplant.

11. “SOT acute therapy” means the use of an immunosuppressant drug in solid organ transplant either as an induction therapy or as an acute rejection treatment.

12. “T-cell depleting drugs” means a class of drugs that work by killing, or depleting, T-lymphocytes, a type of white blood cell that attacks foreign cells, such as a transplanted organ.

13. “Thymoglobulin” means Genzyme’s trademarked and patented drug Thymoglobulin, a humanized polyclonal antibody directed against antigens expressed on human T-lymphocytes and any dose form, prescription, or line extension thereof.

II. RESPONDENTS

14. Respondent Genzyme is a corporation organized, existing, and doing business under and by virtue of the laws of the state of Massachusetts, with its office and principal place of business located at 500 Kendall Street, Cambridge, Massachusetts 02142. Genzyme, among other things, is engaged in the research, development, marketing, and sale of human pharmaceutical products, including SOT acute therapy drugs.

15. Respondent Ilex 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

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4545 Horizon Hill Blvd., San Antonio, Texas 78229. Ilex, among other things, is engaged in the research, development, marketing, and sale of human pharmaceutical products, including SOT acute therapy drugs.

16. Respondents are, and at all times relevant herein have been, engaged in commerce, as “commerce” is defined in Section 1 of the Clayton Act as amended, 15 U.S.C. §12, and are corporations whose business is in or affects commerce, as “commerce” is defined in Section 4 of the Federal Trade Commission Act, as amended, 15 U.S.C. § 44.

III. THE PROPOSED ACQUISITION

17. On February 26, 2004, Genzyme and Ilex entered into a stock-for-stock merger agreement (the “Purchase Agreement”) whereby Genzyme agreed to acquire Ilex in a transaction valued at approximately \$1 billion (the “Acquisition”).

IV. THE RELEVANT MARKET

18. For the purposes of this Complaint, the relevant line of commerce in which to analyze the effects of the Acquisition is the research, development, manufacture, and sale of SOT acute therapy drugs.

19. For the purposes of this Complaint, the United States is the relevant geographic area in which to analyze the effects of the Acquisition in the relevant line of commerce.

V. THE STRUCTURE OF THE MARKET

20. The market for SOT acute therapy drugs is highly concentrated as measured by the Herfindahl-Hirschman Index (“HHI”). Genzyme, with its T-cell depleting drug Thymoglobulin, is the leading supplier in the market for the research, development, marketing, and sale of SOT acute therapy drugs in the United States, capturing approximately 45% of that

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market. Ilex is also a significant supplier in the market for SOT acute therapy drugs, with its T-cell depleting drug, Campath. Approved by the FDA for the treatment of Chronic Lymphocytic Leukemia (“CLL”), Campath is used off-label as a SOT acute therapy drug, and currently has an approximately 8% share of that market. Market participants anticipate that Campath’s share of the SOT acute therapy drug market will increase significantly in the near future. Ilex has a distribution and development agreement for Campath with Schering. As part of this agreement, Schering is solely responsible for the marketing and distribution of Campath in the United States.

VI. ENTRY CONDITIONS

21. Entry into the relevant line of commerce described in Paragraph 18 would not be timely, likely, or sufficient in its magnitude, character and scope to deter or counteract the anti-competitive effects of the Acquisition. Developing a drug, obtaining FDA approval, and convincing doctors to prescribe the drug, takes significantly longer than two years.

VII. EFFECTS OF THE ACQUISITION

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

- a. eliminating actual, direct and substantial competition between Genzyme and Ilex in the market for the research, development, marketing and sale of SOT acute therapy drugs;
- b. increasing the ability of the merged entity to unilaterally raise prices of SOT acute therapy drugs; and
- c. reducing innovation in the relevant market.

Complaint

VIII. VIOLATIONS CHARGED

23. The Purchase Agreement described in Paragraph 17 constitutes a violation of Section 5 of the FTC Act, as amended, 15 U.S.C. § 45.

24. The Acquisition described in Paragraph 17, if consummated, would constitute a violation of Section 7 of the Clayton Act, as amended, 15 U.S.C. § 18, and Section 5 of the FTC Act, as amended, 15 U.S.C. § 45.

WHEREFORE, THE PREMISES CONSIDERED, the Federal Trade Commission on this twentieth day of December, 2004, issues its Complaint against said Respondents.

Decision and Order

DECISION AND ORDER

The Federal Trade Commission (“Commission”) having initiated an investigation of the proposed acquisition by Respondent Genzyme Corporation (“Genzyme”) of Respondent ILEX Oncology, Inc. (“ILEX”), hereinafter referred to as “Respondents,” which has a distribution contract with Schering AG, through its wholly owned United States subsidiary, Berlex, Inc., and Respondents having been furnished thereafter with a copy of a draft of Complaint that the Bureau of Competition proposed to present to the Commission for its consideration and which, if issued by the Commission, would charge Respondent Genzyme and Respondent ILEX with violations of Section 7 of the Clayton Act, as amended, 15 U.S.C. § 18, and Section 5 of the Federal Trade Commission Act, as amended, 15 U.S.C. § 45; and

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

The Commission having thereafter considered the matter and having determined that it had reason to believe that Respondents have violated the said Acts, and that a Complaint should issue stating its charges in that respect, and having thereupon issued its Complaint and an Order to Hold Separate and Maintain Assets (“Hold Separate Order” attached to this Order as Appendix I), and having accepted the executed Consent Agreement and placed such Consent Agreement on the public record for a period of thirty (30) days for the receipt and consideration of public comments, and having duly considered the comments received from an interested person pursuant to section 2.34 of its Rules, now in further conformity with the procedure described in Commission Rule 2.34, 16 C.F.R. § 2.34, the Commission hereby makes the following jurisdictional findings and issues the following

Decision and Order (“Order”):

1. Respondent Genzyme Corporation is a corporation organized, existing and doing business under and by virtue of the laws of the Commonwealth of Massachusetts, with its office and principal place of business located at 500 Kendall Street, Cambridge, Massachusetts 02142.

2. Respondent ILEX Oncology, 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 4545 Horizon Hill Blvd., San Antonio, Texas 78229.

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

ORDER**I.**

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

- A. “Genzyme” means Genzyme Corporation, its directors, officers, employees, agents, attorneys, representatives, predecessors, successors, and assigns; its joint ventures, subsidiaries, divisions, groups and affiliates controlled by Genzyme Corporation, and the respective directors, officers, employees, agents, attorneys, representatives, predecessors, successors, and assigns of each. After the Acquisition, Genzyme shall include ILEX.
- B. “ILEX” means ILEX Oncology, Inc., its directors, officers, employees, agents, attorneys, representatives, predecessors, successors, and assigns; its joint ventures, subsidiaries, divisions, groups and affiliates controlled by ILEX Oncology, Inc., and the respective directors, officers, employees, agents, attorneys, representatives, predecessors, successors, and assigns of each. After the Acquisition Date, ILEX shall mean the assets and businesses of ILEX that have been acquired by Genzyme.
- C. “Schering” means Schering AG, a corporation organized,

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existing and doing business under and by virtue of the laws of Germany, with its office and principal place of business located at D-13342 Berlin, Germany. Schering includes, but is not limited to, its United States affiliates Berlex, Inc. and Berlex Laboratories, LLC, with headquarters in Montville, NJ.

- D. “Respondent Genzyme” shall mean Genzyme, and Genzyme and ILEX after the Acquisition.
- E. “Commission” means the Federal Trade Commission.
- F. “Acquirer” means Schering or any other entity that receives the prior approval of the Commission to acquire the Campath SOT Earnings pursuant to Paragraph III. of this Order.
- G. “Acquisition” means the proposed acquisition by Genzyme of ILEX pursuant to the Merger Agreement dated February 26, 2004, by and among Respondent Genzyme and Respondent ILEX.
- H. “Acquisition Date” means the date the Acquisition is consummated.
- I. “Bone Marrow Transplant” means blood and marrow transplantation including, but not limited to, the transplantation of stem cells, bone marrow, peripheral blood, and cord blood.
- J. “Campath” means ILEX’s trademarked and patented drug Campath 1H, a humanized monoclonal antibody directed against CD-52 and any product containing such antibody as an active ingredient, and any dose form or prescription thereof.
- K. “Campath Earnings” means the U.S. sales of Campath less certain costs and expenses as described in the Revised Distribution Agreement, including, among other things, the expenses Schering incurs in marketing and selling Campath.

- L. “Campath Intellectual Property” means all of the following related to Campath, to the extent owned, controlled, or licensed by Respondents:
 - 1. Patents;
 - 2. copyrights;

3. Campath Trademarks; and
4. trade secrets, know-how, techniques, data, inventions, practices, methods and other confidential or proprietary technical, business, research, development and other information, and all rights in any jurisdiction to limit the use or disclosure thereof.

M. "Campath Manufacturing Technology" means all technology, trade secrets, know-how, and proprietary information related to the manufacture, validation, packaging, release testing, stability, and shelf life of Campath including Campath's formulation, in existence and in the possession of Respondents as of the Effective Date, including, but not limited to, manufacturing records, sampling records, standard operating procedures, and batch records related to the manufacturing process, and supplier lists.

N. "Campath Non-SOT" means Campath that is sold for purposes of treating patients for any therapy, procedure, or protocol other than a SOT.

O. "Campath Non-SOT Earnings" means the Campath Earnings minus the Campath SOT Earnings.

P. "Campath Scientific and Regulatory Material" means all technological, scientific, chemical, biological, pharmacological, toxicological, regulatory, and clinical trial materials and information in existence and in the possession of Respondent(s) as of the Effective Date, to the extent related to Campath and all rights thereto, in any and all jurisdictions.

Q. "Campath SOT" means Campath that is used in treating patients before, during, or after a SOT.

R. "Campath SOT Assets" includes the following:

1. The Campath SOT License; and
2. The Campath SOT Earnings.

S. "Campath SOT Earnings" means the U.S. sales of Campath for SOT less certain costs and expenses as described in the Revised Distribution Agreement, including, among other things, the expenses Schering incurs in marketing and selling Campath SOT.

T. "Campath SOT Formula" means the formula that will be used as a basis for the Monitor and Schering to account for

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the U.S. sales of Campath SOT as described in the Revised Distribution Agreement.

U. “Campath SOT License” means all of ILEX’s rights, title, and interest in and to all assets related to ILEX’s worldwide business related to Campath SOT, to the extent legally transferable, including the research, development, manufacture, distribution, marketing, or sale of Campath SOT, including, without limitation, the following:

1. a fully paid, and royalty-free worldwide license with the rights to sublicense all Campath Intellectual Property and Campath Trade Dress to make, distribute, offer for sale, promote, advertise, sell, import, export, or have used, made, distributed, offered for sale, promoted, advertised, sold, imported, or exported Campath SOT anywhere in the world;

2. access to and copies of Campath Scientific and Regulatory Materials;

3. FDA rights of reference or use to Campath; access to and copies of all of ILEX’s books, records, and files related to Campath development, including, but not limited to, the following specified documents: the product registrations; pharmacology and toxicology data contained in all BLAs, ABLAs, SBLAs, and MAAs; all data submitted to and all correspondence with the FDA and other governmental agencies; all validation documents and data; all market studies; all sales histories, including, without limitation, clinical data, and sales force call activity, for Campath from January 1, 2001, through the Effective Date, and quality control histories pertaining to Campath owned by, or in the possession or control of, Respondents, or to which Respondents have a right of access, in each case such as is in existence as of the Effective Date;

4. Campath Manufacturing Technology (if and when Respondents receive such information).

V. “Campath Trade Dress” means the trade dress of Campath to the extent owned, controlled or licensed by Respondents, including, but not limited to, product packaging associated with the sale of Campath worldwide and the lettering of Campath’s trade name or brand name.

W. “Campath Trademarks” means, to the extent owned, controlled or licensed by Respondents, all proprietary

- names or designations, trademarks, tradenames, and brand names for Campath, including registrations and applications for registration therefor (and all renewals, modifications, and extensions thereof) and all common law rights, and the goodwill symbolized thereby and associated therewith.
- X. “Confidential Business Information” means all information owned by, or in the possession or control of Schering that is not in the public domain related to the research, development, manufacture, marketing, commercialization, distribution, importation, exportation, cost, pricing, supply, sales, sales support, after-sale servicing, or use of Campath SOT.
- Y. “Distribution Agreement” means the Distribution and Development Agreement entered into as of August 23, 1999 (as amended on December 19, 2000, and January 29, 2003) by and between ILEX Pharmaceuticals, L.P., as successor to L&I Partners, L.P., and Schering.
- Z. “Divestiture Agreement” means the Revised Distribution Agreement or any agreement between the Respondents or the Divestiture Trustee and an Acquirer, as well as all amendments, exhibits, attachments, agreements, and schedules thereto, that have been approved by the Commission, related to the divestiture of the Campath SOT Assets.
- AA. “Divestiture Trustee” means the trustee appointed by the Commission pursuant to Paragraph III. of this Order.
- BB. “Effective Date” means the date on which Respondent Genzyme divests to Schering or a Divestiture Trustee divests to an Acquirer the Campath SOT Assets completely and as required by Paragraph II. or III. of this Order.
- CC. “FDA” means the United States Food and Drug Administration or any successor agency with responsibilities comparable to those of the United States Food and Drug Administration.
- DD. “Held Separate Amount” means seven and one-half (7.5) percent of the U.S. sales of Campath from the Acquisition Date until the end of the Hold Separate Period.
- EE. “Hold Separate Period” means the time period during

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which the Hold Separate is in effect, which shall begin as of the date the Acquisition occurs and terminate pursuant to Paragraph VI of the Hold Separate Order.

- FF. “Monitor” means the person or entity appointed pursuant to the Order to Hold Separate and Maintain Assets in this matter.
- GG. “Pacific Rim” means the following countries: Bhutan, Cambodia, Indonesia, Japan, Laos, Malaysia, Maldives, Mongolia, Myanmar (Burma), Nepal, North Korea, Peoples Republic of China, the Philippines, Republic of China (Taiwan), South Korea, Thailand, and Vietnam.
- HH. “Patents” means all patents, patent applications, and statutory invention registrations, in each case existing as of the Effective Date (*except* where this Order specifies a different time), and includes all reissues, divisions, continuations, continuations-in-part, supplementary protection certificates, extensions and reexaminations thereof, all inventions disclosed therein, all rights therein provided by international treaties and conventions, and all rights to obtain and file for patents and registrations thereto in the world, related to Campath as of the Effective Date.
- II. “Revised Distribution Agreement” means the Distribution and Development Agreement by and between Respondents and Schering, as amended by Amendment No. 3 dated November 23, 2004, and attached as Confidential Appendix II. to this Order.
- JJ. “SOT” means solid organ transplant and refers to transplantation procedures related to solid organs including, but not limited to, heart, intestine, kidney, liver, lung, and pancreas. SOT does not include Bone Marrow Transplant.
- KK. “UNOS Data” means data compiled by the United Network for Organ Sharing or its successor or equivalent.

II.

IT IS FURTHER ORDERED that:

- A. No later than one (1) day after the Acquisition Date, Respondent Genzyme shall divest the Campath SOT Assets,

in good faith, to Schering pursuant to and in accordance with the Revised Distribution Agreement (which agreement shall not vary or contradict, or be construed to vary or contradict, the terms of this Order) which is incorporated by reference to this Order and made a part hereof. Pursuant to this divestiture, Respondent Genzyme shall, among other things:

1. not exercise any veto rights or otherwise interfere with or impede Schering's exclusive rights to control the development of, and conduct sales and marketing activities of Campath SOT;
2. relinquish its rights to Campath SOT Earnings;
3. divest, at Schering's option, all of Respondent Genzyme's interest in the net sales of Campath for SOT sold outside of the United States and the Pacific Rim (hereinafter "Such Areas"), as described in the Revised Distribution Agreement;

PROVIDED, HOWEVER, Genzyme shall (a) be reimbursed for all development expenses it has incurred in connection with the development of Campath SOT for Such Areas and shall not be required to incur any additional non-reimbursable expenses for Campath SOT for Such Areas, and (b) not be required to pay for the calculations and accounting to determine the income from Campath SOT in Such Areas.

4. establish the Campath SOT Formula and agree to pay for the UNOS Data, the Monitor, and the collection of inputs and any other things necessary to determine the Campath SOT Earnings in the United States as described in the Revised Distribution Agreement;

PROVIDED, HOWEVER, that nothing in this Order shall prohibit Respondents and Schering from agreeing that (a) Schering shall pay for or reimburse Respondents for up to one-half of the costs of the Monitor and all of the other costs described in this subparagraph II.A.4., and (b) Schering may be liable pursuant to the Distribution Agreement and Revised Distribution Agreement to reimburse Respondents for Schering's share of the costs described in this subparagraph II.A.4. if Schering fails to pay such costs.

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5. Respondents shall take no action to interfere with or impede the Monitor's ability to monitor Respondents' compliance with the Hold Separate Order and this Order or otherwise to perform his/her duties and responsibilities consistent with the terms of the Hold Separate Order and this Order.

6. not manufacture Campath without:

- a. having obtained the prior written consent of Schering, *PROVIDED, HOWEVER*, that such consent shall not be required to the extent that it has been unreasonably withheld or made contingent upon or tied to issues not related to Campath manufacturing; and
- b. giving the Commission:
 - (1) notice, within thirty (30) days, that Respondent Genzyme has given notice, pursuant to section 6.13 of the Distribution Agreement, that it intends to terminate the current contract manufacturing agreement for Campath;
 - (2) copies, within thirty (30) days, of any documents Schering provides Respondent Genzyme pursuant to section 6.13 of the Distribution Agreement; and
 - (3) sixty (60) days notice prior to the start of such manufacturing.

7. not receive or use any Confidential Business Information.

PROVIDED, HOWEVER, Respondent Genzyme may receive information and be involved in the decision-making related to Campath Non-SOT including, but not limited to, pricing information, except that which is precluded in this Paragraph II.;

PROVIDED FURTHER, HOWEVER, if Campath SOT worldwide sales account for twenty-five percent (25%) of Campath sales for all indications worldwide in any calendar quarter, Respondent Genzyme shall: (i) notify the Commission and the Monitor; and (ii) for the duration of the Order, be prohibited from receiving information and exercising any decision-making rights that may affect Campath SOT, including pricing information.

B. During the Hold Separate Period, Schering shall continue to retain the designated income Schering receives from sales of Campath as described in the Revised Distribution

Agreement.

- C. The Held Separate Amount shall continue to remain with Schering until the Monitor has collected the applicable data to input into the Campath SOT Formula whereby the amount of Campath SOT Earnings generated by Campath SOT sales since the Acquisition Date will have been accounted for, and future Campath SOT Earnings can be accounted for and collected by Schering. Within five (5) days after the Monitor, the Commission Staff, and Schering have approved these procedures, Respondent Genzyme shall have the right to receive from Schering, as described in the Revised Distribution Agreement, the appropriate percentage of the Held Separate Amount not attributed to SOT sales. *PROVIDED, HOWEVER*, Schering's approval shall not be required to the extent that it is unreasonably withheld or made contingent upon or tied to issues not related to such accounting procedures
- D. The Monitor Agreement, entered into pursuant to the Hold Separate Order in this matter, shall require continued accounting by the Monitor of the Campath SOT Earnings on a periodic basis, including any adjustments in the Campath SOT Formula and data inputs as are necessary. *PROVIDED, HOWEVER*, nothing in this Order or the Hold Separate Order shall prohibit Respondents from engaging an independent auditor at their own expense, which auditor shall be subject to appropriate covenants precluding the disclosure of any Confidential Business Information to Respondents, to verify the methods used to calculate the Campath SOT Earnings and that the amount of Campath SOT Earnings gathered by Schering is consistent with those calculations.
- E. Prior to the Effective Date, Respondent Genzyme shall secure all consents and waivers from all entities that are necessary for the divestiture of the Campath SOT Assets pursuant to this Order.
- F. Each of Respondents' employees having access to Confidential Business Information, whether directly or indirectly, must maintain such information on a confidential basis, and such employees shall be prohibited from

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providing, discussing, exchanging, circulating, or otherwise furnishing any such information to or with any other of Respondent Genzyme's employees involved in Respondent Genzyme's SOT business. Respondents shall cause each of Respondents' employees having access to Confidential Business Information to submit to the Commission a signed statement that the individual will maintain the confidentiality required by the terms and conditions of the Hold Separate Order and of this Order. These individuals shall not be involved in any way in the management, production, distribution, sale, marketing, or financial operations of Respondent Genzyme's competing SOT products.

G. If, at the time the Commission determines to make this Order final, the Commission notifies Respondent Genzyme that Schering is not an acceptable acquirer of the Campath SOT Assets or that the manner in which the divestiture was accomplished is not acceptable, then, after receipt of such written notification:

1. Respondent Genzyme shall immediately notify Schering of the notice received from the Commission and shall as soon as practicable effect the rescission of the Revised Distribution Agreement;
2. Respondent Genzyme shall have the Monitor hold separate the Held Separate Amount in an interest-bearing escrow account pending the divestiture of the Campath SOT Assets;
3. Respondent Genzyme shall, within six (6) months from the date this Order becomes final, divest the Campath SOT License, 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; and
4. Respondent Genzyme shall, within six (6) months from the date this Order becomes final, divest the Campath SOT Earnings, 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.

H. Any Divestiture Agreement shall be deemed incorporated into this Order. Any failure by Respondents to comply with any term of the Divestiture Agreement shall constitute a

failure to comply with this Order.

- I. Pending divestiture of all Campath SOT Assets, Respondents shall take such actions as are necessary to maintain the viability and marketability of the Campath SOT Assets and to prevent the destruction, removal, wasting, deterioration, or impairment of any of the Campath SOT Assets.
- J. The purpose of the divestiture of the Campath SOT Assets is to ensure the continued independent sales and development of Campath SOT in the same manner in which it was engaged before the Acquisition Date, to ensure the future development, promotion and marketing (as is legal) of Campath SOT by an entity independent of Respondents, and to remedy the lessening of competition resulting from the Acquisition as alleged in the Commission's Complaint.

III.

IT IS FURTHER ORDERED that:

If Respondent Genzyme has not fully complied with the obligations to divest the Campath SOT Assets as required by Paragraph II. or IV.D. of this Order, the Commission may appoint a Divestiture Trustee to divest the Campath SOT Assets in a manner that satisfies the requirements of Paragraph II. and IV. 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 Campath SOT Assets and enter into a Divestiture Agreement. Neither the appointment of a Divestiture Trustee nor a decision not to appoint a Divestiture Trustee under this Paragraph III. 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.

- A. The Commission shall select the Divestiture Trustee, subject to the consent of Respondent Genzyme, which

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

- B. Not later than ten (10) days after the appointment of a Divestiture Trustee, Respondent Genzyme shall execute a trust agreement that, subject to the prior approval of the Commission and, in the case of a court-appointed Divestiture Trustee, of the court, transfers to the Divestiture Trustee all rights and powers necessary to permit the Divestiture Trustee to effect the divestiture required by Paragraph II. of this Order.
- C. If a Divestiture Trustee is appointed by the Commission or a court pursuant to this Paragraph III., Respondent Genzyme shall consent to the following terms and conditions regarding the Divestiture Trustee's powers, duties, authority, and responsibilities:
1. Subject to the prior approval of the Commission, the Divestiture Trustee shall have the exclusive power and authority to divest the Campath SOT Assets and enter into a Divestiture Agreement.
 2. The Divestiture Trustee shall have one (1) year after the date the Commission, or a court, 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 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*, the Commission may extend the divestiture period only two (2) times.

3. Subject to any demonstrated legally recognized privilege, the Divestiture Trustee shall have full and complete access to the personnel, books, records and facilities related to the relevant assets that are required to be divested by this Order and to any other relevant information, as the Divestiture Trustee may request. Respondents shall develop such financial or other information as the Divestiture Trustee may request and shall cooperate with the Divestiture Trustee. Respondent Genzyme shall take no action to interfere with or impede the Divestiture Trustee's accomplishment of the divestiture. Any delays in divestiture caused by Respondent Genzyme shall extend the time for divestiture under this Paragraph III. in an amount equal to the delay, as determined by the Commission or, for a court-appointed Divestiture Trustee, by the court.
4. The Divestiture Trustee shall use commercially reasonable best efforts to negotiate the most favorable price and terms available in each contract that is submitted to the Commission, subject to Respondent Genzyme's absolute and unconditional obligation to divest expeditiously and at no minimum price. The divestiture shall be made in the manner and to an acquirer as required by this Order;
PROVIDED, HOWEVER, if the Divestiture Trustee receives bona fide offers from more than one acquiring entity, and if the Commission determines to approve more than one such acquiring entity, the Divestiture Trustee shall divest to the acquiring entity selected by Respondent Genzyme from among those approved by the Commission;
PROVIDED FURTHER, HOWEVER, that Respondent Genzyme shall select such entity within five (5) days after receiving notification of the Commission's approval.
5. The Divestiture Trustee shall serve, without bond or other security, at the cost and expense of Respondent Genzyme, on such reasonable and customary terms and conditions as the Commission or a court may set. The

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Divestiture Trustee shall have the authority to employ, at the cost and expense of Respondent Genzyme, such consultants, accountants, attorneys, investment bankers, business brokers, appraisers, and other representatives and assistants as are necessary to carry out the Divestiture Trustee's duties and responsibilities. The Divestiture Trustee shall account for all monies derived from the divestiture and all expenses incurred. After approval by the Commission and, in the case of a court-appointed Divestiture Trustee, by the court, of the account of the Divestiture Trustee, including fees for the Divestiture Trustee's services, all remaining monies shall be paid at the direction of the Respondent Genzyme, and the Divestiture Trustee's power shall be terminated. The compensation of the Divestiture Trustee shall be based at least in significant part on a commission arrangement contingent on the divestiture of all of the relevant assets that are required to be divested by this Order.

6. Respondent Genzyme shall indemnify the Divestiture Trustee and hold the Divestiture Trustee harmless against any losses, claims, damages, liabilities, or expenses arising out of, or in connection with, the performance of the Divestiture Trustee's duties, including all reasonable fees of counsel and other expenses incurred in connection with the preparation for, or defense of, any claim, whether or not resulting in any liability, except to the extent that such losses, claims, damages, liabilities, or expenses result from misfeasance, gross negligence, willful or wanton acts, or bad faith by the Divestiture Trustee.
7. The Divestiture Trustee shall have no obligation or authority to operate or maintain the relevant assets required to be divested by this Order.
8. The Divestiture Trustee shall act in a fiduciary capacity for the benefit of the Commission.
9. The Divestiture Trustee shall report in writing to Respondent Genzyme and to the Commission every sixty (60) days concerning the Divestiture Trustee's efforts to accomplish the divestiture.

10. Respondent Genzyme 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.
- D. 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 III.
- E. The Commission or, in the case of a court-appointed Divestiture Trustee, the court, may on its own initiative or at the request of the Divestiture Trustee issue such additional orders or directions as may be necessary or appropriate to accomplish the divestiture required by this Order.
- F. The Divestiture Trustee appointed pursuant to Paragraph III. of this Order may be the same Person appointed as Monitor pursuant to the relevant provisions of the Hold Separate Order in this matter.

IV.

IT IS FURTHER ORDERED that:

- A. Respondent Genzyme shall not terminate the Distribution Agreement, Revised Distribution Agreement, or the Divestiture Agreement, if applicable, or reacquire the assets divested pursuant to Paragraphs II. or III. of this Order without receiving prior Commission approval.
- B. Respondent Genzyme shall give the Commission notice within one day of receiving notice from Schering of Schering's intention to terminate the Distribution Agreement, Revised Distribution Agreement, or the Divestiture Agreement, if applicable.
- C. Upon receiving notice of Schering's intention to terminate the Distribution Agreement, Revised Distribution Agreement, or the Divestiture Agreement, if applicable, Respondent Genzyme shall establish, with Commission

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- approval, procedures to hold separate the Campath SOT Assets pending divestiture of the Campath SOT Assets as required by Paragraph IV. D.
- D. No later than the last to occur of (i) ninety (90) days after receiving notice of Schering's intention to terminate the Distribution Agreement, Revised Distribution Agreement, or the Divestiture Agreement, if applicable, or (ii) the effective date of any termination by Schering of the Distribution Agreement, Revised Distribution Agreement, or the Divestiture Agreement, if applicable, Respondent Genzyme shall divest the Campath SOT Assets and enter into a new distribution agreement at no minimum price, to an acquirer that receives the prior approval of the Commission and in a manner that receives the prior approval of the Commission;
PROVIDED, HOWEVER, if Respondent Genzyme has not divested the Campath SOT Assets pursuant to this Paragraph IV.D., a Divestiture Trustee may be appointed pursuant to Paragraph III. of this Order to divest the Campath SOT Assets.
- E. The purpose this Paragraph IV. is to ensure the continued independent sales and development of Campath SOT in the same manner in which it was engaged before the Acquisition Date, to ensure the future development, promotion and marketing (as is legal) of Campath SOT by an entity independent of Respondents, and to remedy the lessening of competition resulting from the Acquisition as alleged in the Commission's Complaint.

V.

IT IS FURTHER ORDERED that:

- A. Respondent Genzyme shall, within thirty (30) days after the date this Order becomes final, and every sixty (60) days thereafter until Respondent Genzyme has fully complied with Paragraphs II. and III. of this Order, submit to the Commission a verified written report setting forth in detail the manner and form in which it intends to comply, is complying, and has complied with this Order. Respondent

Genzyme shall submit at the same time a copy of its report concerning compliance with this Order to the Monitor, if any Monitor has been appointed pursuant to the Hold Separate Order in this matter. Respondent Genzyme shall include in its reports, among other things that are required from time to time, a full description of the efforts being made to comply with the relevant Paragraphs of the Order, including a description of all substantive contacts or negotiations related to the divestiture of the relevant assets and the identity of all parties contacted. Respondent Genzyme shall include in its reports copies of all written communications to and from such parties, all internal memoranda, and all reports and recommendations concerning completing the obligations.

- B. Respondents shall, one year from the date this Order becomes final and annually thereafter until the Order terminates, submit a verified written report to the Commission setting forth in detail the manner and form in which each Respondent has complied and is complying with this Order, and shall specifically include, among other things and to the extent known by each Respondent, in such reports:
1. The quantity of Campath and Campath Non-SOT sold in the United States, on a monthly and quarterly basis;
 2. The dollar amount of Campath Earnings and Campath Non-SOT Earnings, on a monthly and quarterly basis; and
 3. All planning documents, Board presentations, and senior management-level documents relating to Respondent Genzyme's plans for changing the manufacturing location of Campath.

VI.

IT IS FURTHER ORDERED that Respondents shall notify the Commission at least thirty (30) days prior to any proposed (1) dissolution of the Respondents, (2) acquisition, merger or consolidation of Respondents, or (3) any other change in the Respondents that may affect compliance obligations arising out of

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the Order, including but not limited to assignment and the creation or dissolution of subsidiaries.

VII.

IT IS FURTHER ORDERED that, for the purpose of determining or securing compliance with this Order, and subject to any legally recognized privilege, and upon written request with reasonable notice, Respondents shall permit any duly authorized representative of the Commission:

- A. access, during office hours of Respondents and in the presence of counsel, to all facilities and access to inspect and copy all books, ledgers, accounts, correspondence, memoranda and all other records and documents in the possession or under the control of Respondents related to compliance with this Order; and
- B. upon five (5) days' notice to Respondents and without restraint or interference from Respondents, to interview officers, directors, or employees of Respondents, who may have counsel present, regarding such matters.

VIII.

IT IS FURTHER ORDERED that this Order shall expire on January 31, 2015.

Appendix I

ORDER TO HOLD SEPARATE AND MAINTAIN ASSETS

Appendix II

REVISED DISTRIBUTION AGREEMENT

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

Order to Hold Separate

ORDER TO HOLD SEPARATE AND MAINTAIN ASSETS

The Federal Trade Commission (“Commission”), having initiated an investigation of the proposed acquisition by Respondent Genzyme Corporation (“Genzyme”) of Respondent ILEX Oncology, Inc. (“ILEX”), hereinafter referred to as “Respondents,” who has a distribution contract with Schering AG, through its wholly owned United States subsidiary, Berlex, Inc. (“Schering”), and Respondents having been furnished thereafter with a draft Complaint that the Bureau of Competition proposed to present to the Commission for its consideration and that, if issued by the Commission, would charge Respondent Genzyme and Respondent ILEX with violations of Section 7 of the Clayton Act, as amended, 15 U.S.C. § 18, and Section 5 of the Federal Trade Commission Act, as amended, 15 U.S.C. § 45; and

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

The Commission, having thereafter considered the matter and having determined that it had reason to believe that Respondent Genzyme and Respondent ILEX have violated the said Acts, and that a Complaint should issue stating its charges in that respect, and having 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 this Order to Hold Separate and Maintain Assets (“Hold Separate Order”).

1. Respondent Genzyme Corporation is a corporation organized, existing and doing business under and by virtue of the laws of

the Commonwealth of Massachusetts, with its office and principal place of business located at 500 Kendall Street, Cambridge, Massachusetts 02142.

2. Respondent ILEX Oncology, 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 4545 Horizon Hill Blvd., San Antonio, Texas 78229.
3. The Federal Trade Commission has jurisdiction of the subject matter of this proceeding and of Respondents, and the proceeding is in the public interest.

I.

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

- A. “Genzyme” means Genzyme Corporation, its directors, officers, employees, agents, attorneys, representatives, predecessors, successors, and assigns; its joint ventures, subsidiaries, divisions, groups and affiliates controlled by Genzyme Corporation, and the respective directors, officers, employees, agents, attorneys, representatives, predecessors, successors, and assigns of each. After the Acquisition, Genzyme shall include ILEX.
- B. “ILEX” means ILEX Oncology, Inc., its directors, officers, employees, agents, attorneys, representatives, predecessors, successors, and assigns; its joint ventures, subsidiaries, divisions, groups and affiliates controlled by ILEX Oncology, Inc., and the respective directors, officers, employees, agents, attorneys, representatives, predecessors, successors, and assigns of each. After the Acquisition Date, ILEX shall mean the assets and businesses of ILEX that have been acquired by Genzyme.
- C. “Schering” means Schering AG, a corporation organized, existing and doing business under and by virtue of the laws

Order to Hold Separate

of Germany, with its office and principal place of business located at D-13342 Berlin, Germany. Schering includes, but is not limited to, its United States affiliates Berlex, Inc. and Berlex Laboratories, LLC, with headquarters in Montville, NJ.

- D. “Respondent Genzyme” shall mean Genzyme, and Genzyme and ILEX after the Acquisition.
- E. “Commission” means the Federal Trade Commission.
- F. “Acquirer” means Schering or any other entity that receives the prior approval of the Commission to acquire the Campath SOT Earnings pursuant to Paragraph III. of the Decision and Order.
- G. “Acquisition” means the proposed acquisition by Genzyme of ILEX pursuant to the Merger Agreement dated February 26, 2004, by and among Respondent Genzyme and Respondent ILEX.
- H. “Acquisition Date” means the date the Acquisition is consummated.
- I. “Bone Marrow Transplant” means blood and marrow transplantation including, but not limited to, the transplantation of stem cells, bone marrow, peripheral blood, and cord blood.
- J. “Campath” means ILEX’s trademarked and patented drug Campath 1H, a humanized monoclonal antibody directed against CD-52 and any product containing such antibody as an active ingredient, and any dose form or prescription thereof.
- K. “Campath Earnings” means the U.S. sales of Campath less certain costs and expenses as described in the Revised Distribution Agreement, including, among other things,

the expenses Schering incurs in marketing and selling Campath.

- L. “Campath Intellectual Property” means all of the following related to Campath, to the extent owned, controlled, or licensed by Respondents:
1. Patents;
 2. copyrights;
 3. Campath Trademarks; and
 4. trade secrets, know-how, techniques, data, inventions, practices, methods and other confidential or proprietary technical, business, research, development and other information, and all rights in any jurisdiction to limit the use or disclosure thereof.
- M. “Campath Manufacturing Technology” means all technology, trade secrets, know-how, and proprietary information related to the manufacture, validation, packaging, release testing, stability, and shelf life of Campath including Campath’s formulation, in existence and in the possession of Respondents as of the Effective Date, including, but not limited to, manufacturing records, sampling records, standard operating procedures, and batch records related to the manufacturing process, and supplier lists.
- N. “Campath Non-SOT” means Campath that is sold for purposes of treating patients for any therapy, procedure, or protocol other than a SOT.
- O. “Campath Non-SOT Earnings” means the Campath Earnings minus the Campath SOT Earnings.

Order to Hold Separate

- P. “Campath Scientific and Regulatory Material” means all technological, scientific, chemical, biological, pharmacological, toxicological, regulatory, and clinical trial materials and information in existence and in the possession of Respondent(s) as of the Effective Date, to the extent related to Campath and all rights thereto, in any and all jurisdictions.
- Q. “Campath SOT” means Campath that is used in treating patients before, during, or after a SOT.
- R. “Campath SOT Assets” includes the following:
1. The Campath SOT License; and
 2. The Campath SOT Earnings.
- S. “Campath SOT Earnings” means the U.S. sales of Campath for SOT less certain costs and expenses as described in the Revised Distribution Agreement, including, among other things, the expenses Schering incurs in marketing and selling Campath SOT.
- T. “Campath SOT Formula” means the formula that will be used as a basis for the Monitor and Schering to account for the U.S. sales of Campath SOT as described in the Revised Distribution Agreement.
- U. “Campath SOT License” means all of ILEX’s rights, title, and interest in and to all assets related to ILEX’s worldwide business related to Campath SOT, to the extent legally transferable, including the research, development, manufacture, distribution, marketing, or sale of Campath SOT, including, without limitation, the following:
1. a fully paid, and royalty-free worldwide license with the rights to sublicense all Campath Intellectual Property and Campath Trade Dress to make, distribute, offer for sale,

- promote, advertise, sell, import, export, or have used, made, distributed, offered for sale, promoted, advertised, sold, imported, or exported Campath SOT anywhere in the world;
2. access to and copies of Campath Scientific and Regulatory Materials;
 3. FDA rights of reference or use to Campath;
 4. access to and copies of all of ILEX's books, records, and files related to Campath development, including, but not limited to, the following specified documents: the product registrations; pharmacology and toxicology data contained in all BLAs, ABLAs, SBLAs, and MAAs; all data submitted to and all correspondence with the FDA and other governmental agencies; all validation documents and data; all market studies; all sales histories, including, without limitation, clinical data, and sales force call activity, for Campath from January 1, 2001, through the Effective Date, and quality control histories pertaining to Campath owned by, or in the possession or control of, Respondents, or to which Respondents have a right of access, in each case such as is in existence as of the Effective Date;
 5. Campath Manufacturing Technology (if and when Respondents receive such information).
- V. "Campath Trade Dress" means the trade dress of Campath to the extent owned, controlled or licensed by Respondents, including, but not limited to, product packaging associated with the sale of Campath worldwide and the lettering of Campath's trade name or brand name.
- W. "Campath Trademarks" means, to the extent owned, controlled or licensed by Respondents, all proprietary names or designations, trademarks, tradenames, and brand

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names for Campath, including registrations and applications for registration therefor (and all renewals, modifications, and extensions thereof) and all common law rights, and the goodwill symbolized thereby and associated therewith.

- X. “Confidential Business Information” means all information owned by, or in the possession or control of Schering that is not in the public domain related to the research, development, manufacture, marketing, commercialization, distribution, importation, exportation, cost, pricing, supply, sales, sales support, after-sale servicing, or use of Campath SOT.
- Y. “Distribution Agreement” means the Distribution and Development Agreement entered into as of August 23, 1999 (as amended on December 19, 2000, and January 29, 2003) by and between ILEX Pharmaceuticals, L.P., as successor to L&I Partners, L.P., and Schering.
- Z. “Divestiture Agreement” means the Revised Distribution Agreement or any agreement between the Respondents or the Divestiture Trustee and an Acquirer, as well as all amendments, exhibits, attachments, agreements, and schedules thereto, that have been approved by the Commission, related to the divestiture of the Campath SOT Assets.
- AA. “Divestiture Trustee” means the trustee appointed by the Commission pursuant to Paragraph III. of the Decision and Order.
- BB. “Effective Date” means the date on which Respondent Genzyme divests to Schering or a Divestiture Trustee divests to an Acquirer the Campath SOT Assets completely and as required by Paragraph II. or III. of the Decision and Order.

- CC. “FDA” means the United States Food and Drug Administration or any successor agency with responsibilities comparable to those of the United States Food and Drug Administration.
- DD. “Held Separate Amount” means seven and one-half (7.5) percent of the U.S. sales of Campath from the Acquisition Date until the end of the Hold Separate Period.
- EE. “Hold Separate Period” means the time period during which the Hold Separate Order is in effect, which shall begin as of the date the Acquisition occurs and terminate pursuant to Paragraph VI. of this Hold Separate Order.
- FF. “Monitor” means the person or entity appointed pursuant to this Hold Separate Order.
- GG. “Pacific Rim” means the following countries: Bhutan, Cambodia, Indonesia, Japan, Laos, Malaysia, Maldives, Mongolia, Myanmar (Burma), Nepal, North Korea, Peoples Republic of China, the Philippines, Republic of China (Taiwan), South Korea, Thailand, and Vietnam.
- HH. “Patents” means all patents, patent applications, and statutory invention registrations, in each case existing as of the Effective Date (*except* where this Order specifies a different time), and includes all reissues, divisions, continuations, continuations-in-part, supplementary protection certificates, extensions and reexaminations thereof, all inventions disclosed therein, all rights therein provided by international treaties and conventions, and all rights to obtain and file for patents and registrations thereto in the world, related to Campath as of the Effective Date.
- II. “Revised Distribution Agreement” means the Distribution and Development Agreement by and between Respondents

Order to Hold Separate

and Schering, as amended by Amendment No. 3 dated November 23, 2004, and attached as Confidential Appendix II. to the Decision and Order.

- JJ. "SOT" means solid organ transplant and refers to transplantation procedures related to solid organs including, but not limited to, heart, intestine, kidney, liver, lung, and pancreas. SOT does not include Bone Marrow Transplant.
- KK. "UNOS Data" means data compiled by the United Network for Organ Sharing or its successor or equivalent.

II.

IT IS FURTHER ORDERED that:

- A. During the Hold Separate Period, Respondents shall take such actions as are necessary to maintain the viability, marketability, and competitiveness of the Campath SOT Assets, and shall prevent the destruction, removal, wasting, deterioration, sale, disposition, transfer, or impairment of the Campath SOT Assets, except for ordinary wear and tear.
- B. During the Hold Separate Period, Respondents shall:
1. Allow Schering to retain the Held Separate Amount for the duration of the Hold Separate Period; and
 2. not exercise direction or control over, or influence directly or indirectly, the Held Separate Amount, or the Monitor, appointed pursuant to this Hold Separate Order.

- C. During the Hold Separate Period, Schering shall continue to retain the designated income Schering receives from sales of Campath as described in the Revised Distribution Agreement.
- D. The Held Separate Amount shall continue to remain with Schering until the Monitor has collected the applicable data to input into the Campath SOT Formula whereby the amount of Campath SOT Earnings generated by Campath SOT sales since the Acquisition Date will have been accounted for, and future Campath SOT Earnings can be accounted for and collected by Schering. Within five (5) days after the Monitor, the Commission Staff, and Schering have approved these procedures, Respondent Genzyme shall have the right to receive from Schering, as described in the Revised Distribution Agreement, the appropriate percentage of the Held Separate Amount not attributed to SOT sales.

PROVIDED, HOWEVER, Schering's approval shall not be required to the extent that it is unreasonably withheld or made contingent upon or tied to issues not related to such accounting procedures.

- E. The Monitor Agreement, entered into pursuant to Paragraph II.G. of this Hold Separate Order, shall require continued accounting by the Monitor of the Campath SOT Earnings on a periodic basis, including any adjustments in the Campath SOT Formula and data inputs as are necessary. *PROVIDED, HOWEVER*, nothing in this Hold Separate Order shall prohibit Respondents from engaging an independent auditor at their own expense, which auditor shall be subject to appropriate covenants precluding the disclosure of any Confidential Business Information to Respondents, to verify the methods used to calculate the Campath SOT Earnings and that the amount of Campath SOT Earnings gathered by Schering is consistent with those calculations.

Order to Hold Separate

- F. Each of Respondents' employees having access to Confidential Business Information, whether directly or indirectly, must maintain such information on a confidential basis, and such employees shall be prohibited from providing, discussing, exchanging, circulating, or otherwise furnishing any such information to or with any other of Respondent Genzyme's employees involved in Respondent Genzyme's SOT business. Respondents shall cause each of Respondents' employees having access to Confidential Business Information to submit to the Commission a signed statement that the individual will maintain the confidentiality required by the terms and conditions of this Hold Separate Order and of the Decision and Order. These individuals shall not be involved in any way in the management, production, distribution, sale, marketing, or financial operations of Respondent Genzyme's competing SOT products.
- G. John Corcoran of Trinity Partners, Waltham, Massachusetts, shall serve as the Monitor, pursuant to the agreement executed by the Monitor and Respondents, approved by Schering, and attached as Confidential Appendix A to this Hold Separate Order ("Monitor Agreement").
1. The Monitor Agreement shall require that, no later than five (5) days after this Hold Separate Order becomes final, Respondents shall transfer to the Monitor all rights, powers, and authorities necessary to permit the Monitor to perform his/her duties and responsibilities, pursuant to this Hold Separate Order and consistent with the purposes of the Decision and Order.
 2. The Monitor shall have the responsibility, consistent with the terms of this Hold Separate Order and the Decision and Order, for:

- a. working with Schering to implement the Campath SOT Formula; and
 - b. monitoring Respondents' compliance with their obligations pursuant to this Hold Separate Order and the Decision and Order.
3. Subject to all applicable laws and regulations, the Monitor shall have full and complete access to all personnel, books, records, and documents relating to the Campath SOT Earnings and to any other relevant information as the Monitor may reasonably request, including, but not limited to, all documents and records kept by Respondents in the ordinary course of business that relate to the Campath SOT Assets. Respondents shall develop such financial or other information as the Monitor may reasonably request and shall cooperate with the Monitor. Respondents shall take no action to interfere with or impede the Monitor's ability to monitor Respondents' compliance with this Hold Separate Order and the Decision and Order or otherwise to perform his/her duties and responsibilities consistent with the terms of this Hold Separate Order.
4. The Monitor shall have the authority to employ, at Respondent Genzyme's cost and expense, such consultants, accountants, attorneys, and other representatives and assistants as are reasonably necessary to carry out the Monitor's duties and responsibilities.

PROVIDED, HOWEVER, that nothing in this Hold Separate Order shall prohibit Respondents and Schering from agreeing that (a) Schering shall pay for or reimburse Respondents for up to one-half of the costs described in this subparagraph II.G.4., and (b) Schering may be liable pursuant to the Distribution Agreement and Revised Distribution Agreement to reimburse Respondents for

Order to Hold Separate

Schering's share of the costs described in this subparagraph II.G.4. if Schering fails to pay such costs.

5. The Monitor shall serve, without bond or other security, at Respondent Genzyme's cost and expense, on reasonable and customary terms commensurate with the person's experience and responsibilities.

PROVIDED, HOWEVER, that nothing in this Hold Separate Order shall prohibit Respondents and Schering from agreeing that (a) Schering shall pay for or reimburse Respondents for up to one-half of the costs described in this subparagraph II.G.5., and (b) Schering may be liable pursuant to the Distribution Agreement and Revised Distribution Agreement to reimburse Respondents for Schering's share of the costs described in this subparagraph II.G.5. if Schering fails to pay such costs.

6. Respondent Genzyme shall indemnify the Monitor and hold him or her harmless against any losses, claims, damages, liabilities, or expenses arising out of, or in connection with, the performance of the Monitor's duties, including all reasonable fees of counsel and other expenses incurred in connection with the preparation for, or defense of any claim, whether or not resulting in any liability, except to the extent that such liabilities, losses, damages, claims, or expenses result from misfeasance, gross negligence, willful or wanton acts or omissions, or bad faith by the Monitor, or the respective agents.
7. The Commission may require the Monitor to sign an appropriate confidentiality agreement relating to materials and information received from the Commission in connection with performance of the Monitor's duties.
8. Respondents may require the Monitor to sign an appropriate confidentiality agreement prohibiting the disclosure of any Confidential Business Information

gained as a result of his/her role as Monitor to anyone other than the Commission.

9. The Monitor shall act in a fiduciary capacity for the benefit of the Commission.
10. Thirty (30) days after the Hold Separate Order becomes final, and every thirty (30) days thereafter until the Hold Separate Order terminates, the Monitor shall report in writing to the Commission concerning the efforts to accomplish the purposes of this Hold Separate Order.
11. If the Monitor ceases to act or fails to act diligently and consistently with the purposes of this Hold Separate Order, the Commission may appoint a substitute Monitor consistent with the terms of this paragraph, subject to the consent of Respondent Genzyme, which consent shall not be unreasonably withheld. If Respondent Genzyme has not opposed, in writing, including the reasons for opposing, the selection of the substitute Monitor within five (5) days after notice by the staff of the Commission to Respondent Genzyme of the identity of any substitute Monitor, Respondent Genzyme shall be deemed to have consented to the selection of the proposed substitute Monitor. Respondent Genzyme and the substitute Monitor shall execute a monitor agreement, subject to the approval of the Commission, consistent with this paragraph.
12. Respondent Genzyme's employees shall not receive, have access to, or use or continue to use any Confidential Business Information except:
 - a. as required by law; and
 - b. to the extent that necessary information is provided:

Order to Hold Separate

- (1) in the course of consummating the Acquisition;
 - (2) in negotiating agreements to divest assets pursuant to the Consent Agreement and engaging in related due diligence;
 - (3) in complying with this Hold Separate Order, the Consent Agreement, and the Decision and Order in this matter.
 - (4) in defending legal claims, investigations or enforcement actions threatened or brought against or related to the Campath SOT Assets; or
 - (5) in obtaining legal advice.
- H. The purpose of this Hold Separate Order is to: (1) preserve the Campath SOT Earnings independent of Respondent Genzyme until the divestiture required by the Decision and Order is achieved; (2) assure that no Confidential Business Information is exchanged between Respondent Genzyme and Schering, except in accordance with the provisions of this Hold Separate Order; and (3) prevent interim harm to competition pending the divestiture of the Campath SOT Assets.

III.

IT IS FURTHER ORDERED that, beginning thirty (30) days after the initial report is required to be filed pursuant to the Consent Agreement in this matter, and every sixty (60) days thereafter until Respondents have fully complied with these obligations pursuant to this Hold Separate Order, Respondents shall each submit to the Commission verified written reports setting forth in detail the manner and form in which it intends to comply, is complying, and has complied with Paragraph II. of this Hold Separate Order. Each Respondent shall include in its

reports, among other things that are required from time to time, a full description of the efforts being made to comply with this Hold Separate Order, including copies of all written and electronic communications to and from the parties, all internal memoranda, and all reports and recommendations concerning its obligations under this Order.

IV.

IT IS FURTHER ORDERED that each Respondent shall notify the Commission at least thirty (30) days prior to any proposed (1) dissolution of that Respondent, (2) acquisition, merger or consolidation of that Respondent, or (3) any other change in that Respondent that may affect compliance obligations arising out of this Hold Separate Order, including but not limited to assignment or the creation or dissolution of subsidiaries.

V.

IT IS FURTHER ORDERED that, for the purposes of determining or securing compliance with this Hold Separate Order, and subject to any legally recognized privilege, and upon written request with reasonable notice to either Respondent, Respondents shall permit any duly authorized representatives of the Commission:

- A. Access, during 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 relating to compliance with this Hold Separate Order; and
- B. Upon five (5) days' notice to that Respondent and without restraint or interference from that Respondent, to interview officers, directors, or employees of that Respondent, who may have counsel present, regarding such matters.

Order to Hold Separate

VI.

IT IS FURTHER ORDERED that this Hold Separate Order shall terminate on the earlier of:

- A. Three (3) business days after the Commission withdraws its acceptance of the Consent Agreement pursuant to the provisions of Commission Rule 2.34, 16 C.F.R. § 2.34; or
- B. The day after the appropriate percentage of the Held Separate Amount is distributed to Respondents pursuant to Paragraph II.D. of this Hold Separate Order.

By the Commission, Commissioner Harbour recused.

Appendix I

INTERIM MONITOR AGREEMENT

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

Analysis

Analysis of Agreement Containing Consent Orders to Aid Public Comment

The Federal Trade Commission (“Commission”) has accepted, subject to final approval, an Agreement Containing Consent Orders (“Consent Agreement”) from Genzyme Corporation (“Genzyme”) and ILEX Oncology, Inc. (“Ilex”). The purpose of the proposed Consent Agreement is to remedy the anticompetitive effects resulting from Genzyme’s acquisition of Ilex. Under the terms of the proposed Consent Agreement, Genzyme is required to divest all contractual rights to Ilex’s monoclonal antibody, Campath®, for use in solid organ transplant, to Schering AG (“Schering”).

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

Pursuant to an Agreement and Plan of Merger dated February 26, 2004, Genzyme proposes to acquire one hundred percent (100%) of the issued and outstanding shares of Ilex in a stock-for-stock transaction valued at approximately \$1 billion. The Commission’s complaint alleges that the proposed acquisition, if consummated, would violate Section 7 of the Clayton Act, as amended, 15 U.S.C. § 18, and Section 5 of the Federal Trade Commission Act, as amended, 15 U.S.C. § 45, by lessening competition in the U.S. market for acute therapy drugs used in solid organ transplant (“SOT”). The proposed Consent Agreement would remedy the alleged violations by replacing the competition that would be lost as a result of the acquisition.

SOT acute therapy drugs are immunosuppressant drugs that are used in solid organ transplants to suppress the transplant recipient’s immune system. SOT acute therapy drugs are

prescribed for induction therapy and to treat acute rejection. Induction therapy refers to the use of an immunosuppressant drug for a short time before, during, and/or after a solid organ transplant procedure in order to suppress the immune system and decrease the likelihood of rejection of the transplanted organ. An acute rejection is a sudden attack on the transplanted organ by the transplant recipient's immune system. If an acute rejection occurs, SOT acute therapy drugs are used to provide a high dose of immunosuppression in order to stop the rejection.

The U.S. market for SOT acute therapy drugs is highly concentrated. Genzyme is the leading supplier in the market for SOT acute therapy drugs with its drug, Thymoglobulin®. Ilex's Campath®, the newest entrant into the market for SOT acute therapy drugs, currently accounts for a relatively small share of the SOT acute therapy drug market, but is quickly gaining market share and is expected to continue growing. Campath® is FDA-approved for the treatment of chronic lymphocytic leukemia, but is used off-label as an SOT acute therapy drug.

In addition to Thymoglobulin® and Campath®, there are four other SOT acute therapy drugs used in the United States. However, due to similar mechanisms of action, Campath® and Thymoglobulin® are especially close competitors. Both drugs accomplish immunosuppression by depleting T-cells, which are a type of white blood cell that attack transplanted organs and can result in rejection. Atgam® from Pfizer and OKT-3® from Ortho Biotech/Johnson & Johnson are also T-cell depleting SOT acute therapy drugs, but are diminished and aged competitors and account for a small share of the SOT acute therapy drug market. Novartis' Simulect® and Roche's Zenepax® operate by a different mechanism of action – one that prevents the body's immune system from responding to and rejecting a foreign antigen by blocking the receptor for Interleukin – and are known as Interleukin-2 receptor inhibitors. Although Simulect® and Zenepax® are significant competitors and properly included in the relevant market, they exert more competitive pressure on each other than on Thymoglobulin® or Campath®.

Analysis

Other immunosuppressant drugs used in connection with SOT, such as maintenance therapy drugs, are not substitutes for SOT acute therapy drugs. Maintenance therapy drugs refer to low doses of immunosuppressant drugs that are typically used for the duration of a patient's life to prevent rejection. Maintenance therapy drugs are designed to provide a low dose of immunosuppression over a long period of time. Transplant patients typically start on maintenance therapy drugs a short time after the transplant and continue taking maintenance drugs for the rest of their lives. In contrast, SOT acute therapy drugs are designed to deliver a potent dose of immunosuppression over a short period of time, ranging from one day to two weeks. Using maintenance therapy drugs in higher doses to administer the same level of immunosuppression over a short period of time may be toxic to the patient. Thus, doctors would not likely prescribe maintenance therapy drugs in place of SOT acute therapy drugs. Likewise, SOT acute therapy drugs likely would not be used for maintenance therapy because SOT acute therapy drugs may be too powerful to use on a long-term basis.

As with many pharmaceutical products, entry into the manufacture and sale of SOT acute therapy drugs is difficult, expensive, and time-consuming. Developing a drug for SOT acute therapy and conducting clinical trials necessary to gain FDA approval is expensive and takes a significant amount of time. After developing a drug and receiving FDA approval, a company must then convince doctors to prescribe the drug. In order to convince doctors to prescribe a new SOT acute therapy drug, the new drug would need to be more efficacious, safer, and/or significantly less expensive than currently available SOT acute therapy drugs. Off-label entry by a drug already approved for another indication is also expensive and time-consuming, because a drug company would still need to develop and implement costly clinical trials to demonstrate benefits over other SOT acute therapy drugs. A company may not actively market a drug for off-label use. There are no drugs that are being evaluated currently for off-label use in SOT acute therapy. Additionally, entry is unlikely because the market for SOT acute therapy drugs is

relatively small, lessening the incentive to invest the time and money necessary to develop these drugs. It is therefore unlikely that entry into the market for SOT acute therapy drugs, either by a new drug approved by the FDA, or by off-label entry, will occur in a manner that is timely or sufficient to resolve the anticompetitive effects of the proposed acquisition.

The proposed acquisition would cause significant competitive harm in the U.S. market for SOT acute therapy drugs by eliminating the actual, direct, and substantial competition between Genzyme and Ilex. This loss of competition would likely result in higher prices and decreased development in the market for SOT acute therapy drugs.

The proposed Consent Agreement effectively remedies the acquisition's anticompetitive effects in the market for SOT acute therapy drugs by requiring Genzyme to divest to Schering all of its contractual and decision-making rights regarding Campath® for solid organ transplant, including its portion of the earnings from sales of Campath® in solid organ transplant. Through an existing distribution and development agreement with Ilex, Schering already distributes and markets Campath® in the United States, sharing costs and profits. Thus, Schering is already responsible for distributing and marketing Campath® in the United States, and already participates in development activities for the drug. Therefore, the company is well-positioned to acquire the divested assets, and to compete vigorously in the market for SOT acute therapy drugs. In addition, because Campath® is manufactured by a third-party, there is no need for an interim supply agreement as is required in many pharmaceutical merger settlements.

The parties, with the assistance of a Monitor and the approval of the Commission, will implement a formula to determine the portion of Campath® earnings attributable to solid organ transplant sales. The formula uses drug utilization data maintained by the United Network for Organ Sharing ("UNOS") and its federally-mandated database to determine the portion of Campath® sales that are attributable to SOT. This unique

Analysis

database provides a reliable, independent source for information regarding the use of Campath® in SOT, because all hospitals performing SOT operations in the United States are required to submit data to UNOS on many aspects of SOT operations. Hospital compliance is high, due in part to the fact that hospitals not submitting the required data face losing Medicare reimbursement. The proposed Consent Agreement also allows for this formula to be reevaluated based on changes in the market or in the use of Campath®.

The Commission has appointed Trinity Partners, LLC (“Trinity”) as Monitor to oversee the divestiture of the Campath® earnings from solid organ transplant. The Monitor will work with the parties to develop and implement the formula to compute Campath® earnings attributable to use in solid organ transplant. John E. Corcoran, Trinity’s Managing Partner, will oversee the monitoring team. Mr. Corcoran founded Trinity in 1996, and has over twenty years of experience servicing clients in the pharmaceutical, biotechnology, diagnostic, and medical device industries.

Genzyme and Schering will continue to have a relationship regarding uses of Campath® outside solid organ transplant. Virtually all Campath® sales are for oncology use and only a very small portion of sales are attributable to SOT use. The price of Campath®, therefore, is driven by the competitive dynamics in the oncology market. To provide further protection, the proposed Consent Agreement contains firewall provisions to ensure that Genzyme does not receive competitively sensitive information regarding Campath®’s use and development in solid organ transplant. Additional firewalls prohibit Genzyme from participating in pricing decisions should Campath® SOT sales surpass a set percentage of overall Campath® sales.

The purpose of this analysis is to facilitate public comment on the proposed Consent Agreement, and it is not intended to

constitute an official interpretation of the proposed Decision and Order or the Agreement to Hold Separate, or to modify their terms in any way.

Statement

**CONCURRING STATEMENT OF COMMISSIONER JON
LEIBOWITZ**

I support the conclusion reached by my fellow Commissioners to approve the consent order regarding Genzyme's acquisition of ILEX. Through this transaction, Genzyme intends to acquire ILEX's key oncology product Campath. However, because a small percentage of Campath sales are used off-label for acute therapy in solid organ transplants ("SOT"), a significant competitive problem arises concerning the overlap between ILEX's SOT use and Genzyme's Thymoglobulin acute therapy SOT product. The relief provides a solution designed to protect consumers against the likely harm otherwise caused by this transaction, while allowing the parties to move forward, even though it creates entanglements that could raise serious concerns under a different set of facts. Thus, I write separately to clarify my support for the relief here, and to express some general observations on merger policy, which I am sure will continue to develop during my tenure here at the Commission.

Merger enforcement is a vital component of the Commission's mission. We are charged under the Clayton Act with ensuring that competition and consumers do not suffer from transactions whose effects may be to "substantially lessen competition." Of course, the Clayton Act provides no inalienable right to merge. It is important, then, for the Commission to rigorously scrutinize each transaction we review in fulfilling our mission. Where a transaction may substantially lessen competition, a high burden should be placed on the parties to show that harm is demonstrably outweighed by efficiencies or that potential relief restores competition. My fellow Commissioners and our attorneys, economists and staff take our responsibility very seriously.

At the same time, where transactions present potential economic benefit – through efficiencies or enhanced research and innovation – we should weigh those benefits relative to the likely harm, and not seek to impose unnecessary obstacles to the parties achieving those benefits. In particular, each merger should be

reviewed carefully on its merits and its own facts, and we should remain flexible in considering remedies that restore competition.

My support of the remedy regarding Genzyme's acquisition of ILEX is consistent with these principles. *Absent the relief*, this transaction would have resulted in significant harm to consumers through increased prices and a possible reduction in research and innovation. And since the original transaction's purported efficiencies (assuming they were cognizable under the Merger Guidelines) were not sufficient to reverse the likely anticompetitive harm, it was incumbent that the parties demonstrate that the relief effectively restores competition.

Here, the remedy likely accomplishes that purpose. It is a creative solution – severing Genzyme from its rights and revenues relating to use of ILEX's Campath product in the SOT market (while allowing Genzyme to maintain its rights and revenues to the product in the oncology market) in a manner that substantially diminishes the likelihood of anticompetitive harm.

As a general matter, creative and flexible remedies should be encouraged where we are confident they will succeed in restoring competition. However, no matter how creative the parties are in devising relief, and no matter how flexible the Commission is willing to be, such an approach will not work in many situations. The specific facts concerning each transaction will drive the analysis.

The unique facts of this case add assurance that the relief will work. For example, virtually all of Campath sales are derived from the competitive oncology market, and only a very small portion of its sales are attributable to SOT use. Thus, the price of Campath is constrained by the oncology market (not the SOT market), substantially diminishing the ability or incentive of Genzyme to attempt a price increase on Campath. Another key fact that allows the remedy to work here is the divestiture to Schering AG of the Campath SOT rights and revenues. Schering AG was already responsible (through a pre-merger relationship with ILEX) for distributing and marketing Campath in the United States, and thus is well-positioned to acquire the ILEX SOT rights and vigorously compete post-merger. These facts, along with

Statement

other particulars of this transaction, allow for this well-tailored order to fit the facts, and remedy the likely competitive harm.

One concern raised by this transaction is that the remedy creates entanglements between the merged firm and Schering AG: Genzyme will continue to receive revenues post-merger from oncology sales for Campath, while Schering will receive revenues for Campath's SOT sales. It is possible that this relationship could lead to collusion (via side payments or some other mechanism) between the companies that make it mutually profitable for them to increase price or reduce research and development to the detriment of consumers.

We should be concerned ordinarily about such entanglements. However, the possibility of collusion *in this case* is not a sufficient concern for us to challenge this transaction. First, the entanglements are minimized because Campath SOT earnings can easily be determined without requiring communication between the parties since a federally-mandated independent database on organ transplants will identify the number of SOT patients using Campath. Second, the order makes use of several of the Commission's key tools to prevent this from happening (*e.g.*, employing a monitor, erecting firewalls, and the threat of civil penalties for violating the proposed order), and a violation of the proposed order through collusion could result in criminal sanctions for violating Section 1 of the Sherman Act. In the past, the Commission has demonstrated its willingness to sue companies for illegal side payments in the pharmaceutical industry (*e.g.*, *In the Matter of Schering-Plough Corp.*), and the Commission, no doubt, will remain vigilant in ensuring that we continue to do so in the future.

For these reasons, I concur in the decision of the Commission, but will remain cautious about considering future consent orders that create entanglements which could foster collusion and potentially harm consumers.

Complaint

IN THE MATTER OF

PETCO ANIMAL SUPPLIES, INC.CONSENT ORDER, ETC., IN REGARD TO ALLEGED VIOLATIONS OF
SEC. 5 OF THE FEDERAL TRADE COMMISSION ACT*Docket C-4133; File No. 0323221*
Complaint, March 4, 2005--Decision, March 4, 2005

This consent order, among other things, prohibits the respondent -- in connection with the online advertising, marketing, promotion, offering for sale, or sale of any product or service -- from misrepresenting the extent to which it maintains and protects the security of any personal information collected from or about consumers. The order also requires the respondent to create a written security policy reasonably designed to protect the security, confidentiality, and integrity of personal information collected from or about consumers. In addition, the order requires the respondent, for twenty years, to secure biennial assessments and reports from a qualified, objective, and independent third-party professional certifying that the respondent has a security program in place that operates with sufficient effectiveness to provide reasonable assurance that the security, confidentiality, and integrity of consumers' personal information has been protected.

Participants

For the Commission: *Alain Sheer, Joel Winston, Jessica L. Rich, and Louis Silversin.*

For the Respondent: *Peter H. Benzian, Latham & Watkins.*

COMPLAINT

The Federal Trade Commission, having reason to believe that Petco Animal Supplies, Inc. ("respondent") has violated the provisions of the Federal Trade Commission Act, and it appearing to the Commission that this proceeding is in the public interest, alleges:

1. Respondent Petco Animal Supplies, Inc. is a Delaware corporation with its principal office or place of business at 9125 Rehco Road, San Diego, California 29121.

Complaint

2. Respondent sells pet food, supplies, and services through more than 636 stores in 43 states and the District of Columbia. It also sells pet food and supplies through its website at www.PETCO.com.
3. The acts and practices of respondent as alleged in this complaint have been in or affecting commerce, as “commerce” is defined in Section 4 of the Federal Trade Commission Act.
4. Respondent has marketed and sold pet food and supplies to consumers online at www.PETCO.com since February 5, 2001. Most consumers who make purchases through www.PETCO.com pay using a credit card. To complete these purchases, consumers must provide personal information, including, but not limited to, name, address, and credit card number and expiration date. Respondent stores this information in particular locations (called “tables”) in a database that supports or connects to its website. Respondent also stores product information about pet food and supplies in a database that supports or connects to its website.
5. Visitors to www.PETCO.com communicate with the website using a software program called a “web application.” Respondent’s application was designed so that visitors could use it to: (1) obtain product information from certain database tables, and (2) supply respondent with transaction information, such as credit card numbers and expiration dates, that respondent then stored in other tables in a database. To facilitate communication between the website and a visitor, respondent’s application was designed to automatically present any information retrieved from or supplied to a database in clear readable text on the visitor’s web browser.
6. Since at least February 5, 2001, respondent has disseminated or caused to be disseminated privacy policies and representations on www.PETCO.com, including, but not necessarily limited to, the attached Exhibit A containing the following statements

Complaint

regarding the privacy and confidentiality of personal information collected through respondent's website:

Privacy Concerns and Issues**Your information is secure**

At PETCO.com our customers' data is strictly protected against any unauthorized access. PETCO.com also provides a "100% Safeguard Your Shopping Experience Guarantee" so you never have to worry about the safety of your credit card information.

Payment Options

PETCO.com accepts the following credit cards: Visa, MasterCard, American Express, and Discover. PETCO.com also redeems PETCO.com online gift certificates and PETCO gift cards as payment for purchases made at PETCO.com. We are unable to accept checks or money orders at this time.

Entering your credit card number via our secure server is completely safe. The server encrypts all of your information; no one except you can access it.

Is my personal information secure?

At PETCO.com, protecting your information is our number one priority, and your personal data is strictly shielded from unauthorized access. Our "100% Safeguard Your Shopping Experience Guarantee" means you never have to worry about the safety of your credit card information.

Exhibit A (Petco webpages dated June 21, 2003)(emphasis in original)

7. Since at least February 5, 2001, respondent's website and application have been vulnerable to commonly known or

Complaint

reasonably foreseeable attacks from third parties attempting to obtain access to personal information about consumers stored in respondent's database. These attacks include, but are not limited to, web application attacks such as "Structured Query Language" (or "SQL") injection attacks. Such an attack occurs when an attacker enters certain characters in the address (or URL) bar of a standard web browser to direct an application to obtain information from a database that supports or connects to a website. By such an attack, respondent's application can be manipulated to gain access, in clear readable text, to tables in databases that support or connect to www.PETCO.com, including tables containing credit card information supplied by consumers.

8. Respondent created these vulnerabilities by failing to implement reasonable and appropriate measures to secure and protect databases that support or connect to the website. Among other things, respondent failed to: adopt policies and procedures adequate to protect sensitive consumer information collected through the website; or implement simple, readily available defenses to prevent website visitors from gaining access to database tables containing sensitive personal information about other consumers.
9. The risk of such web application attacks is well known in the information technology industry, as are simple, easy to implement, and publicly available measures to prevent such attacks. Security experts have been warning the industry about these vulnerabilities since at least 1997; in 1998, at least one security organization developed, and made publicly available at no charge, a security measure that could prevent such attacks, and in 2000 the industry began receiving reports of successful attacks on web applications.
10. In June 2003, a visitor to www.PETCO.com conducted an SQL injection attack and was able to read in clear text credit card numbers stored in respondent's database.

Complaint

11. Through the means described in Paragraph 6, respondent represented, expressly or by implication, that the personal information it obtained from consumers through www.PETCO.com was maintained in an encrypted format and therefore was inaccessible to anyone other than the consumer providing the information.
12. In truth and in fact, the personal information respondent obtained from consumers through www.PETCO.com was not maintained in an encrypted format and was accessible to persons other than the consumer providing the information. Instead, Petco encrypted credit card information only while it was being transmitted between a visitor's web browser and the website's server; once the information reached the server, it was decrypted and maintained in clear readable text. Using a standard web browser, a visitor could (and did) use a commonly known attack to manipulate respondent's web application and obtain access, in clear readable text, to sensitive personal information about other consumers, including, but not limited to, consumer names and credit card numbers and expiration dates. Therefore, the representation set forth in Paragraph 11 was false or misleading.
13. Through the means described in Paragraph 6, respondent represented, expressly or by implication, that it implemented reasonable and appropriate measures to protect personal information it obtained from consumers through www.PETCO.com against unauthorized access.
14. In truth and in fact, respondent did not implement reasonable and appropriate measures to protect personal information it obtained from consumers through www.PETCO.com against unauthorized access. In particular, respondent failed to implement procedures that were reasonable and appropriate to: (1) detect reasonably foreseeable application vulnerabilities, and (2) prevent visitors from exploiting such vulnerabilities and obtaining

Complaint

unauthorized access to sensitive consumer information.
Therefore, the representation set forth in Paragraph 13 was false or misleading.

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

THEREFORE, the Federal Trade Commission this fourth day of March, 2005, has issued this complaint against respondent.

EXHIBIT A

HELP

- HELP**
- [PETCO.com Help](#)
 - [Your Account Help](#)
 - [Shopping Help](#)
 - [Bottomless Bowl & More Help](#)
 - [Shipping Help](#)
 - [Promotion Codes Help](#)
 - [Community Help](#)
 - [Affiliates Frequently Asked Questions](#)
 - [Privacy Help](#)
 - [Copyright, Disclaimer](#)
 - [Technology](#)
 - [Repair Shopping Cart Problems](#)

Privacy Concerns and Issues

- [Security](#)
- [Privacy Policy](#)
- [Surveys, Contests, and Other Special Programs](#)
- [Cookies and How We Use Them](#)
- [Choice/Opt-Out](#)

Effective as of 07/25/02

Your information is secure

At PETCO.com our customers' data is strictly protected against any unauthorized access. PETCO.com also provides a "100% Safeguard Your Shopping Experience Guarantee" so you never have to worry about the safety of your credit card information.



Protecting your order information is a priority. PETCO.com makes every effort to protect your online order information by using Secure Sockets Layer (SSL) technology.

SSL encrypts your order information to avoid the decoding of that information by anyone other than PETCO.com. To check the security of your connection, look at the bottom of your browser window after accessing the server. If you see an unbroken key or a closed lock (depending upon your browser), then SSL is active. You can also double-check by looking at the URL line of your browser. When accessing a secure server, the first characters of the site address will change from "http" to "https." Some versions of browsers and some firewalls don't permit communication through secure servers. In these cases, you'll be unable to connect to the server, so you won't have to worry about mistakenly placing an order through an unsecured connection.

PETCO also supports the Verified by Visa Security Service. Learn more about this feature...



[»back to top](#)

Privacy Policy

At PETCO.com we are concerned with protecting your privacy. We use the information we collect about you to provide a personalized shopping experience. We may also use it to tell you about special offers that we think you'd appreciate. You'll never have to worry about receiving a barrage of unexpected e-mail from us if you have not subscribed with us. We will not sell, rent or trade your information.

We occasionally have third party agents, subsidiaries, affiliates and joint ventures that perform functions on our behalf. They have access to personal information needed to perform their functions, and are contractually obligated to maintain the confidentiality and security of the data. They are restricted from using this data for other purposes, and in any way other than to provide the requested services to PETCO.com, and may not alter or re-sell the data. You may elect to opt-out of personally identifiable site tracking activity by following the Opt-out link below. Keep in mind that PETCO.com may continue to collect anonymous aggregate site behavior from our customers. [Opt-out.](#)

We may occasionally have third party agents, subsidiaries, affiliates or joint ventures offer promotions on PETCO.com. You have the option to specifically opt-in to participate in the promotion and share your personal data with these parties and PETCO.com. These promotions may be in the form of a survey or a separate area offering you the opportunity to enter your data for the specific purpose of participating in that program or promotion. Data collected by these third-parties will be covered under the third-party's Privacy Policy

To complete your order, fax your order form to us, toll-free, at 1-888-409-4567. Please remember not to fax your order after placing it online, or your order will be duplicated.

Payment Options

PETCO.com accepts the following credit cards: Visa, MasterCard, American Express, and Discover. PETCO.com also redeems PETCO.com online gift certificates and PETCO gift cards as payment for purchases made at PETCO.com. We are unable to accept checks or money orders at this time.

Entering your credit card number via our secure server is completely safe. The server encrypts all of your information; no one except you can access it. (If you'd prefer, you are also welcome to place your order entirely by fax.)

Sales Tax

Please Note: taxes apply for recipients in all states EXCEPT HI, NC, OK, WV, WY, AK, DE, MT, NH, OR.

Pricing Errors and Omissions

Please be aware that prices and availability are subject to change without prior notice. We make every effort to insure the accuracy of the information on our site and when errors are discovered, we will correct them. Be advised that PETCO reserves the right to revoke any stated offer and to correct any errors, inaccuracies, or omissions including after an order has been submitted, after it has been confirmed, or after your credit card has been charged. If we discover a pricing error after your credit card has been charged and your order is canceled as a result of the error, your credit card will be refunded back the full amount of your order. You will be notified via email if your order has been canceled and be given the opportunity to place the order at the correct price. Please note that individual bank policies vary when the amount is credited back to your account.

Return Policy

Our return policy is simple:

1. Contact PETCO at cs@orders.petco.com or call 877-738-6742, indicating your name, order number, and reason for return.
2. All returns should be complete and placed in their original packaging.
3. Attach the "Return Mailing Label" located on the front of the packing slip to your carton, and send the item(s) along with your packing slip back to PETCO.com for your refund.

If your Return Mailing Label is missing, send the package to:

**Petco.com Returns
(Your Order #)
3801 Rock Creek Road
Joliet, IL 60431**

If you choose to return an item because you or your pet decide it is not what you want, we'll refund the price of the item plus the applicable sales tax, but we will not refund the shipping charges to and from PETCO.com.

If your purchase is defective or in error, we'll refund all charges, including shipping. Your return will be processed at PETCO.com, and a refund will be issued at that time.

For your protection, return your item using a carrier who offers package tracking such as UPS or Federal Express.

We will issue a refund to your credit card and notify you via email 24 hours after our warehouse has received your item.

If you return product purchased from PETCO.com that was bought using a Gift Card, the refund amount will be first credited back to the credit card used for the transaction, and any additional refund amount will be credited via a PETCO.com email gift certificate (we are currently unable to refund back to PETCO Gift Cards online).

At this time, we are unable to process online order returns in PETCO stores.

Requesting Products

If you'd like to suggest that we carry a particular product at PETCO.com, please email your suggestion to cs@orders.petco.com or phone us at 1-877-738-6742.

address is a house or an apartment and whether deliveries can be left outdoors. FedEx, UPS or USPS policies for your area may dictate that your package be held at a local office until you pick it up in person. Call your local FedEx, UPS or post office directly to learn the delivery policy for your area.

Do you offer Gift Certificates?

Yes. You can send a pet (and pet lover) in your life an email gift certificate valid on PETCO.com. This allows you to customize a message and choose an amount of \$5, \$10, \$15, \$20, \$25, \$50, \$75, or \$100. These email gift certificates are sent on the day you specify too! Please note that these are valid only on PETCO.COM but we also sell PETCO Gift Cards which can be redeemed either online or in our stores.

More information or to purchase either a PETCO.com or a PETCO Store Gift Certificate.

Do you offer Gift Cards?

Yes. You can purchase or redeem gift cards on PETCO.com or in our stores. You can also easily check your gift card balance. At checkout you will be able to enter up to four PETCO gift cards and they will be applied to your balance due.

More information on Gift Cards.

Is my personal information secure?

At PETCO.com, protecting your information is our number one priority, and your personal data is strictly shielded from unauthorized access. Our "100% Safeguard Your Shopping Experience Guarantee" means you never have to worry about the safety of your credit card information. We protect your online order information using the latest in Secure Sockets Layer (SSL) technology.

SSL encrypts your order information to prevent the decoding of that information by anyone other than PETCO.com. To check the security of your connection, look at the bottom of your browser window after accessing the server. If you see an unbroken key or a closed lock (depending upon your browser), then SSL is active. You can also double-check by looking at the URL line of your browser. When accessing a secure server, the first characters of the site address will change from "http" to "https."

Some versions of browsers and some firewalls don't permit communication through secure servers. In these cases, you'll be unable to connect to the server, so you won't have to worry about mistakenly placing an order through an unsecured connection.

What's your privacy policy?

At PETCO.com, protecting your privacy is a priority. We use the information we collect about you to process orders and to provide a personalized shopping experience. We may also use it to tell you about special offers we think you'd appreciate. When you register with PETCO.com, we ask for some contact information, such as your name and email address. We will use the contact information from the registration form to send you information about our company and promotional material from some of our partners.

1. Click on "Your Account" at the top right corner of any page.
2. Log in, using your email address and password.
3. Under "In This Section", click on the "Update Your Newsletter Subscriptions" link.
4. Follow the instructions you see when you arrive at the "Newsletters" page. You can easily subscribe to or unsubscribe from multiple newsletters.

Once you've completed these steps, you will no longer receive special offers or promotions from PETCO.com.

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|------------------------------|-------------------------------------|--|----------------------------------|---|
| » Home | » Locate a PETCO | » Privacy & Security | » Shopping Cart | » Specialty Stores |
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DECISION AND ORDER

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

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

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

1. Respondent Petco Animal Supplies, Inc. is a Delaware corporation with its principal office or place of business at 9125 Rehco Road, San Diego, California 92121.

Decision and Order

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

ORDER

DEFINITIONS

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

1. “Personal information” shall mean individually identifiable information from or about an individual consumer including, but not limited to: (a) a first and last name; (b) a home or other physical address, including street name and name of city or town; (c) an email address or other online contact information, such as an instant messaging user identifier or a screen name that reveals an individual’s email address; (d) a telephone number; (e) a Social Security number; (f) credit and/or debit card information, including credit and/or debit card number and expiration date; (g) a persistent identifier, such as a customer number held in a “cookie” or processor serial number, that is combined with other available data that identifies an individual consumer; or (h) any other information from or about an individual consumer that is combined with (a) through (g) above.

2. Unless otherwise specified, “respondent” shall mean Petco Animal Supplies, Inc. and its successors and assigns, officers, agents, representatives, and employees.

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

I.

IT IS ORDERED that respondent, directly or through any corporation, subsidiary, division, or other device, in connection with the online advertising, marketing, promotion, offering for sale, or sale of any product or service, in or affecting commerce,

shall not misrepresent in any manner, expressly or by implication, the extent to which respondent maintains and protects the privacy, confidentiality, security, or integrity of any personal information collected from or about consumers.

II.

IT IS FURTHER ORDERED that respondent, directly or through any corporation, subsidiary, division, or other device, in connection with the online advertising, marketing, promotion, offering for sale, or sale of any product or service, in or affecting commerce, shall, no later than the date of service of this order, establish and implement, and thereafter maintain, a comprehensive information security program that is reasonably designed to protect the security, confidentiality, and integrity of personal information collected from or about consumers. Such program, the content and implementation of which must be fully documented in writing, shall contain administrative, technical, and physical safeguards appropriate to respondent's size and complexity, the nature and scope of respondent's activities, and the sensitivity of the personal information collected from or about consumers, including:

A. the designation of an employee or employees to coordinate and be accountable for the information security program.

B. the identification of material internal and external risks to the security, confidentiality, and integrity of personal information that could result in the unauthorized disclosure, misuse, loss, alteration, destruction, or other compromise of such information, and assessment of the sufficiency of any safeguards in place to control these risks. At a minimum, this risk assessment should include consideration of risks in each area of relevant operation, including, but not limited to: (1) employee training and management; (2) information systems, including network and software design, information processing, storage, transmission, and disposal;

Decision and Order

and (3) prevention, detection, and response to attacks, intrusions, or other systems failures.

C. the design and implementation of reasonable safeguards to control the risks identified through risk assessment, and regular testing or monitoring of the effectiveness of the safeguards' key controls, systems, and procedures.

D. the evaluation and adjustment of respondent's information security program in light of the results of the testing and monitoring required by subparagraph C, any material changes to respondent's operations or business arrangements, or any other circumstances that respondent knows or has reason to know may have a material impact on the effectiveness of its information security program.

III.

IT IS FURTHER ORDERED that respondent obtain an assessment and report (an "Assessment") from a qualified, objective, independent third-party professional, using procedures and standards generally accepted in the profession, within one hundred and eighty (180) days after service of the order, and biennially thereafter for twenty (20) years after service of the order that:

A. sets forth the specific administrative, technical, and physical safeguards that respondent has implemented and maintained during the reporting period;

B. explains how such safeguards are appropriate to respondent's size and complexity, the nature and scope of respondent's activities, and the sensitivity of the personal information collected from or about consumers;

C. explains how the safeguards that have been implemented meet or exceed the protections required by Paragraph II of this order; and

D. certifies that respondent's security program is operating with sufficient effectiveness to provide reasonable assurance that the security, confidentiality, and integrity of personal information is protected and, for biennial reports, has so operated throughout the reporting period.

Each Assessment shall be prepared by a person qualified as a Certified Information System Security Professional (CISSP) or as a Certified Information Systems Auditor (CISA); a person holding Global Information Assurance Certification (GIAC) from the SysAdmin, Audit, Network, Security (SANS) Institute; or a qualified person or organization approved by the Associate Director for Enforcement, Bureau of Consumer Protection, Federal Trade Commission.

Respondent shall provide the first Assessment, as well as all: plans, reports, studies, reviews, audits, audit trails, policies, training materials, and assessments, whether prepared by or on behalf of respondent, relied upon to prepare such Assessment to the Associate Director for Enforcement, Bureau of Consumer Protection, Federal Trade Commission, Washington, D.C. 20580, within ten (10) days after the Assessment has been prepared. All subsequent biennial Assessments shall be retained by respondent until the order is terminated and provided to the Associate Director of Enforcement within ten (10) days of request.

IV.

IT IS FURTHER ORDERED that respondent shall maintain, and upon request make available to the Federal Trade Commission for inspection and copying, a print or electronic copy of each document relating to compliance, including but not limited to:

- A. for a period of five (5) years:
 - 1. a sample copy of each different print, broadcast, cable, or Internet advertisement, promotion, information collection

Decision and Order

form, Web page, screen, email message, or other document containing any representation regarding respondent's online collection, use, and security of personal information from or about consumers. Each Web page copy shall be dated and contain the full URL of the Web page where the material was posted online. Electronic copies shall include all text and graphics files, audio scripts, and other computer files used in presenting the information on the Web. *Provided, however,* that after creation of any Web page or screen in compliance with this order, respondent shall not be required to retain a print or electronic copy of: (1) any amended Web page or screen to the extent that the amendment does not affect respondent's compliance obligations under this order; or (2) any Web page or screen that contains a hypertext link to respondent's privacy policy, but otherwise does not relate to respondent's compliance obligations under this order.

2. any documents, whether prepared by or on behalf of respondent, that contradict, qualify, or call into question respondent's compliance with this order; and

B. for a period of three (3) years after the date of preparation of each biennial Assessment required under Paragraph III of this order: all plans, reports, studies, reviews, audits, audit trails, policies, training materials, and assessments, whether prepared by or on behalf of respondent, relating to respondent's compliance with Paragraphs II and III of this order for the compliance period covered by such biennial Assessment.

V.

IT IS FURTHER ORDERED that respondent shall deliver a copy of this order to all current and future principals, officers, directors, and managers, and to all current and future employees, agents, and representatives having managerial responsibilities relating to the subject matter of this order. Respondent shall deliver this order to such current personnel within thirty (30) days

after service of this order, and to such future personnel within thirty (30) days after the person assumes such position or responsibilities.

VI.

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

VII.

IT IS FURTHER ORDERED that respondent shall, within one hundred and eighty (180) days after service of this order, and at such other times as the Commission may require, file with the Commission an initial report, in writing, setting forth in detail the manner and form in which it has complied with this order.

VIII.

This order will terminate on March 4, 2025, or twenty (20) years from the most recent date that the United States or the Federal Trade Commission files a complaint (with or without an accompanying consent decree) in federal court alleging any

Decision and Order

violation of the order, whichever comes later; *provided, however*, that the filing of such a complaint will not affect the duration of:

A. any Paragraph in this order that terminates in less than twenty (20) years;

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

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

Provided, further, that if such complaint is dismissed or a federal court rules that 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 Paragraph 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.

Analysis of Proposed Consent Order to Aid Public Comment

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

The consent agreement has been placed on the public record for thirty (30) days for receipt of comments by interested persons. Comments received during this period will become part of the public record. After thirty (30) days, the Commission will again review the 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.

Petco is a national retailer that sells pet food, pet supplies, and pet services from over 600 stores throughout the United States. It also sells pet food and supplies through its online store at www.PETCO.com. This matter concerns alleged false or misleading representations Petco made to consumers about the security of personal information collected through its online store.

The Commission’s proposed complaint alleges that Petco represented that personal information it obtained from consumers through www.PETCO.com was stored in an encrypted format and therefore was not accessible to anyone except the consumer that provided the information. The complaint alleges this representation was false because a commonly known attack on its website could and was used to gain access in clear readable text to personal information, including credit card numbers and expiration dates, that Petco obtained from consumers.

The proposed complaint also alleges that Petco represented that it implemented reasonable and appropriate measures to protect the personal information it obtained through the website against unauthorized access. The complaint alleges this representation was false because Petco did not implement reasonable and appropriate measures to detect common vulnerabilities and prevent them from being exploited.

Analysis

The proposed order applies to Petco's collection and storage of personal information from or about consumers in connection with its online business. It contains provisions designed to prevent Petco from engaging in the future in practices similar to those alleged in the complaint.

Specifically, Part I of the proposed order prohibits Petco, in connection with online advertising, marketing, promotion, offering for sale, or sale of any product or service, from misrepresenting the extent to which it maintains and protects the security, confidentiality, or integrity of any personal information collected from or about consumers.

Part II of the proposed order requires Petco to establish and maintain a comprehensive information security program in writing that is reasonably designed to protect the security, confidentiality, and integrity of personal information collected from or about consumers. The security program must contain administrative, technical, and physical safeguards appropriate to Petco's size and complexity, the nature and scope of its activities, and the sensitivity of the personal information collected from or about consumers. Specifically, the order requires Petco to:

- Designate an employee or employees to coordinate and be accountable for the information security program.
- Identify material internal and external risks to the security, confidentiality, and integrity of consumer information that could result in unauthorized disclosure, misuse, loss, alteration, destruction, or other compromise of such information, and assess the sufficiency of any safeguards in place to control these risks. At a minimum, this risk assessment should include consideration of the risks in each area of relevant operation.
- Design and implement reasonable safeguards to control the risks identified through risk assessment, and regularly test or monitor the effectiveness of the safeguards' key controls, systems, and procedures.

- Evaluate and adjust its information security program in light of the results of testing and monitoring, any material changes to its operations or business arrangements, or any other circumstances that Petco knows or has to reason to know may have a material impact on the effectiveness of its information security program.

Part III of the proposed order requires that Petco obtain within 180 days after being served with the final order approved by the Commission, and on a biennial basis thereafter, an assessment and report from a qualified, objective, independent third-party professional, certifying, among other things, that: (1) Petco has in place a security program that provides protections that meet or exceed the protections required by Part II of the proposed order, and (2) Petco's security program is operating with sufficient effectiveness to provide reasonable assurance that the security, confidentiality, and integrity of consumers' personal information has been protected.

Parts IV through VII of the proposed order are reporting and compliance provisions. Part IV requires Petco to retain documents relating to compliance. It requires Petco to retain most documents for a five-year period; assessments and supporting documents, however, must be retained for three years after the date when each assessment is prepared. Part V requires dissemination of the order now and in the future to persons with responsibilities relating to the subject matter of the proposed order. Part VI requires Petco to notify the Commission of changes in Petco's corporate status. Part VII mandates that Petco submit compliance reports to the FTC. Part VIII is a provision "sunsetting" the order after twenty (20) years, with certain exceptions.

The purpose of this analysis is to facilitate public comment on the proposed order. It is not intended to constitute an official interpretation of the proposed order to modify its terms in any way.

Complaint

IN THE MATTER OF

CEMEX S.A. de C.V.

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

Docket C-4131; File No. 0510007

Complaint, February 11, 2005--Decision, March 25, 2005

This consent order, among other things, requires the respondent to divest the ready-mix concrete business of RMC in Tucson, Arizona to a buyer approved by the Commission and at no minimum price. An accompanying Order to Hold Separate and Maintain Assets requires the respondent to hold separate and maintain the viability of the RMC Tucson business as a competitive operation until its transfer to the Commission-approved acquirer, and prohibits the exchange of certain material confidential information between the respondent and the RMC Tucson business.

Participants

For the Commission: *Randall A. Long, Andrew J. Forman, John D. Carroll, Richard A. Levy, Mary Thuell Sledd, Matthew J. Reilly, Michael R. Moiseyev, and Roger A. Boner.*

For the Respondent: *Clifford H. Aronson, Skadden, Arps, Slate, Meagher & Flom.*

COMPLAINT

Pursuant to the Clayton Act and the Federal Trade Commission Act, and its authority thereunder, the Federal Trade Commission (“Commission”), having reason to believe that Respondent Cemex S.A. de C.V. (“Cemex”), a corporation subject to the jurisdiction of the Commission, has agreed to acquire RMC Group PLC (“RMC”), a corporation subject to the jurisdiction of the Commission, in violation of Section 7 of the Clayton Act, as amended, 15 U.S.C. § 18, and Section 5 of the Federal Trade Commission Act, as amended, 15 U.S.C. § 45, and it appearing to the Commission that a proceeding in respect thereof would be in

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

I. RESPONDENT

1. Respondent Cemex is incorporated as a stock corporation with variable capital organized under the laws of the United Mexican States with its office and principal place of business located at Av. Ricardo Margáin Zozaya #325, Colonia del Valle Campestre, Garza García, Nuevo León, Mexico 66265. Respondent Cemex operates all of its business in the United States through its wholly owned subsidiary, Cemex Corp., which operates all of its business through its wholly owned subsidiary, Cemex Inc. Cemex Inc. has its principal place of business on 840 Gessner Road, Suite 1400, Houston, Texas 77024.

2. Respondent, among other things, is engaged in the manufacture and sale of ready-mix concrete and aggregates in Tucson, Arizona.

3. Respondent is, and at all times relevant herein has been, engaged in commerce, as “commerce” is defined in Section 1 of the Clayton Act, as amended, 15 U.S.C. §12, and is a corporation whose business is in or affects commerce, as “commerce” is defined in Section 4 of the Federal Trade Commission Act, as amended, 15 U.S.C. § 44.

II. THE ACQUIRED COMPANY

4. RMC is a public limited company organized under the laws of England and Wales with registered number 249776 whose registered principal office is located at RMC House, Coldharbour Lane, Thorpe, Egham, Surrey TW20 8TD, United Kingdom. RMC operates all of its business in the United States through its wholly owned subsidiary, RMC USA, Inc., which has its headquarters at One Glenlake Parkway, Suite 600, Atlanta, GA 30328.

Complaint

5. RMC, among other things, is engaged in the manufacture and sale of ready-mix concrete and aggregates in Tucson, Arizona.

6. RMC is, and at all times herein has been, engaged in commerce, as “commerce” is defined in Section 1 of the Clayton Act, as amended, 15 U.S.C. § 12, and is a corporation whose business is in or affects commerce, as “commerce” is defined in Section 4 of the Federal Trade Commission Act, as amended, 15 U.S.C. § 44.

III. THE PROPOSED ACQUISITION

7. Pursuant to an Implementation Agreement dated September 27, 2004, Cemex proposed to acquire 100 percent of the existing shares of RMC for approximately \$5.8 billion (the “Acquisition”).

IV. THE RELEVANT MARKET

8. For the purposes of this Complaint, the relevant line of commerce in which to analyze the effects of the Acquisition is the manufacture and sale of ready-mix concrete.

9. Ready-mix concrete is a construction material used to build various structures, including buildings, highways, bridges, tunnels, and numerous other projects. Ready-mix concrete is produced at local plants by mixing a cementitious material, typically Portland cement, and aggregates (crushed rocks) with water to form a slurry. In certain construction projects, silica sand is combined with aggregate to produce different types of ready-mix concrete. A chemical reaction induced by the combination of cement and water causes the mixture to harden and gain strength.

10. For the purposes of this Complaint, metropolitan Tucson, Arizona is the relevant geographic area in which to analyze the effects of the Acquisition in the relevant line of commerce. Ready-mix concrete is a perishable product. If ready-mix concrete is not delivered to customers in a timely manner, typically less than one hour, it begins to harden and lose utility. Hence, ready-

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mix concrete is generally sold within 10 to 20 miles of the plant where it is mixed, although the precise distance may vary depending on traffic patterns and infrastructure. Transportation costs also can limit the distance ready-mix concrete can be shipped. In Tucson, Arizona each competitor has spaced plants within 20 miles of its other plants, creating a network capable of serving the entire Tucson metropolitan area.

V. THE STRUCTURE OF THE MARKET

11. The Tucson, Arizona market for ready-mix concrete is highly concentrated, whether measured by Herfindahl-Hirschman Index or two or four firm concentration ratios. Aside from Cemex and RMC, only one other company in Tucson, Arizona supplies ready-mix concrete. Accordingly, the Acquisition would significantly increase concentration in the Tucson, Arizona market for ready-mix concrete, leaving Cemex as the dominant supplier.

12. Cemex and RMC are actual competitors in the relevant market.

VI. ENTRY CONDITIONS

13. New entry into the relevant market is difficult due to a limited availability in the relevant area of the vital raw materials, aggregates and cement, necessary for ready-mix concrete production. In Tucson, Arizona, aggregates sufficient to supply a new ready-mix concrete operation are not available for purchase. A new entrant, therefore, would have to acquire its own local source of aggregates. In Tucson, Arizona, however, viable concrete aggregate reserves are scarce. Even if such reserves can be acquired, it would take in excess of two years to develop aggregate facilities of the scale necessary to serve the relevant market. Additionally, the supply of cement in Tucson, Arizona is constrained by a very limited number of cement suppliers.

14. New entry into the relevant market has not occurred in more than 10 years.

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15. New entry into the relevant market sufficient to deter or counteract the anticompetitive effects described in Paragraph 16 would not occur in a timely manner because it would take over two years to enter and achieve significant market impact.

VII. EFFECTS OF THE ACQUISITION

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

- a. by eliminating actual, direct, and substantial competition between Cemex and RMC in the Tucson, Arizona market for ready-mix concrete;
- b. by increasing the likelihood that the remaining ready-mix suppliers in Tucson, Arizona would engage in coordinated interaction that harms consumers;
- c. by reducing incentives to improve service or product quality in the Tucson, Arizona market for ready-mix concrete; and
- d. by increasing the likelihood that customers would be forced to pay higher prices for ready-mix concrete in Tucson, Arizona.

VII. VIOLATIONS CHARGED

17. The Acquisition described in Paragraph 7 constitutes a violation of Section 5 of the FTC Act, as amended, 15 U.S.C. § 45.

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

Complaint

FTC Act, as amended, 15 U.S.C. § 45.

WHEREFORE, THE PREMISES CONSIDERED, the Federal Trade Commission on this eleventh day of February, 2005, issues its Complaint against said Respondent.

Decision and Order

DECISION AND ORDER

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

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

The Commission, having thereafter considered the matter and having determined that it had reason to believe that Respondent has violated the said Acts, and that a Complaint should issue stating its charges in that respect, and having thereupon issued its Complaint and an Order to Hold Separate and Maintain Assets (“Hold Separate”), attached at Appendix C, and having accepted the executed Consent Agreement and placed such Consent Agreement on the public record for a period of thirty (30) days for the receipt and consideration of public comments, and having duly considered the comment received from an interested person pursuant to section 2.34 of its Rules, now in further conformity with the procedure described in Commission Rule 2.34, 16 C.F.R.

§ 2.34, the Commission hereby makes the following jurisdictional findings and issues the following Decision and Order (“Order”):

1. Respondent Cemex is incorporated as a stock corporation with variable capital organized under the laws of the United Mexican States with its office and principal place of business located at Av. Ricardo Margáin Zozaya #325, Colonia del Valle Campestre, Garza García, Nuevo León, Mexico 66265. Respondent Cemex operates all of its business in the United States through its wholly owned subsidiary, Cemex Corp., which operates all of its business through its wholly owned subsidiary, Cemex Inc. Cemex Inc. has its principal place of business on 840 Gessner Road, Suite 1400, Houston, Texas 77024.

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

ORDER

I.

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

- A. “Cemex” or “Respondent” means Cemex, S.A. de C.V., its directors, officers, employees, agents, representatives, successors, and assigns; its joint ventures, subsidiaries, divisions, groups, and affiliates controlled by Cemex (including, but not limited to, Cemex Corp. and Cemex Inc.), and the respective directors, officers, employees, agents, representatives, successors, and assigns of each.
- B. “RMC” means RMC Group PLC, a public limited company organized under the laws of England and Wales with registered number 249776 whose registered principal office is located at RMC House, Coldharbour Lane, Thorpe, Egham, Surrey TW20 8TD, United Kingdom.

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- C. "Commission" means the Federal Trade Commission.
- D. "Acquirer" means any Person that receives the prior approval of the Commission to acquire the Ready Mix Concrete Divestiture Assets pursuant to Paragraph II. or Paragraph III. of this Order.
- E. "Acquisition" means the proposed acquisition of RMC by Cemex pursuant to the September 27, 2004 Implementation Agreement between Cemex and RMC.
- F. "Acquisition Date" means the date the Acquisition is consummated.
- G. "Aggregate(s)" means crushed stone and gravel produced at quarries, mines, or gravel pits used to manufacture Ready Mix Concrete and Asphalt Concrete.
- H. "Asphalt Concrete" means a paving material produced by combining and heating asphalt cement (also referred to in the industry as "liquid asphalt" or "asphalt oil") with Aggregate.
- I. "Divestiture Agreement" means any agreement that receives the prior approval of the Commission between Respondent and an Acquirer (or between a Divestiture Trustee appointed pursuant to Paragraph III. of this Order and an Acquirer) related to the Ready Mix Concrete Divestiture Assets required to be divested pursuant to Paragraph II. (or Paragraph III.) of this Order.
- J. "Divestiture Trustee" means the Divestiture Trustee appointed pursuant to Paragraph III. of this Order.
- K. "Effective Date of Divestiture" means the date on which Respondent (or a Divestiture Trustee) divests to an Acquirer the Ready Mix Concrete Divestiture Assets completely and

as required by Paragraph II. (or by Paragraph III.) of this Order.

- L. "Hold Separate" means the Order to Hold Separate and Maintain Assets incorporated into and made a part of the Agreement Containing Consent Orders.
- M. "Hold Separate Monitor" means the Person appointed pursuant to Paragraph II. of the Hold Separate.
- N. "Material Confidential Information" means competitively sensitive, proprietary and all other information that is not in the public domain owned by or pertaining to a Person or a Person's business, and includes, but is not limited to, all customer lists, price lists, cost information, marketing methods, patents, technologies, processes, or other trade secrets. The Ready Mix Concrete Divestiture Assets shall be considered a Person separate from Respondent (as defined in this Order and the Hold Separate) and RMC for this purpose.
- O. "Person" means any individual, partnership, association, firm, company, corporation, or other business entity.
- P. "Ready Mix Concrete" means a building material used in the construction of buildings, highways, bridges, tunnels, and other projects that is produced by mixing a cementing material (commonly, but not limited to, Portland cement) and Aggregate with sufficient water to cause the cement to set and bind.
- Q. "Ready Mix Concrete Divestiture Assets" means all of RMC's rights, titles, and interests in and to all assets, properties, business and goodwill, tangible or intangible, and any improvements or additions thereto, used to operate the RMC Ready Mix Concrete Businesses in the ordinary course and in accordance with past practice, including, but not limited to:

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(i) the Ready Mix Concrete facilities, Aggregate facilities, Asphalt Concrete facilities, quarries, mines, gravel pits, aggregate reserves, plants, and other buildings located at the sites identified on Appendix A hereto;

(ii) all real property (together with appurtenances, licenses, and permits), including all leasehold and renewal rights, owned, leased, or otherwise held by RMC and used to operate the RMC Ready Mix Concrete Businesses located at the sites identified on Appendix A hereto;

(iii) all capital equipment, stone crushing equipment, power supply equipment, scales, machinery, fixtures, tools, trucks and other vehicles, transportation and storage facilities, furniture, and supplies held by RMC and used to operate the RMC Ready Mix Concrete Businesses;

(iv) all personal property owned, leased or otherwise held by RMC and used to operate the RMC Ready Mix Concrete Businesses;

(v) all intangible assets and all intellectual property owned by or licensed to RMC used in the RMC Ready Mix Concrete Businesses, including, but not limited to, aggregate reserve testing information, technical information, leases, know-how, safety procedures, quality assurance and control procedures, dispatch software, systems and equipment, trademarks, patents, mask works, copyrights, trade secrets, research materials, technical information, management information systems, software, inventions, test data, licenses, registrations, submissions, approvals, technology, specifications, designs, drawings, processes, recipes, mix designs, protocols, and formulas;

(vi) all rights of RMC relating to the RMC Ready Mix Concrete Businesses under any contract entered into with customers (together with associated bid and performance

bonds), suppliers, sales representatives, distributors, agents, personal property lessors, personal property lessees, licensors, licensees, consignors and consignees, and joint venture partners;

(vii) all governmental approvals, consents, licenses, permits, waivers, or other authorizations held by RMC and used to operate the RMC Ready Mix Concrete Businesses;

(viii) all rights of RMC relating to the RMC Ready Mix Concrete Businesses under any warranty and guarantee, express or implied;

(ix) all books, records, and files held by RMC relating to the RMC Ready Mix Concrete Businesses;

(x) all rights in and to inventories of products, raw materials, supplies, and parts, including work-in-process and finished goods held by RMC and used in the RMC Ready Mix Concrete Businesses;

(xi) all customer and vendor lists, catalogs, sales promotion literature, and advertising materials held by RMC and used in the RMC Ready Mix Concrete Businesses; and

(xii) all items of prepaid expense held by RMC and used in the RMC Ready Mix Concrete Businesses;

provided, however, that the Ready Mix Concrete Divestiture Assets do not include the Excluded Assets identified in Appendix B to this Order.

R. “RMC Ready Mix Concrete Businesses” means the research, development, manufacture, distribution, or sale of Ready Mix Concrete, and the related research, development, production, manufacture, distribution, or sale of Aggregates and/or Asphalt Concrete, at or by the facilities, quarries,

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mines, gravel pits, aggregate reserves, plants, and other buildings listed in Appendix A to this Order.

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

- A. Respondent shall divest the Ready Mix Concrete Divestiture Assets absolutely and in good faith, at no minimum price, to a single Acquirer, within six (6) months of the Acquisition Date.
- B. Respondent shall divest the Ready Mix Concrete Divestiture Assets only to an Acquirer that receives the prior approval of the Commission and only in a manner that receives the prior approval of the Commission.
- C. Until the Effective Date of Divestiture, Respondent shall take such actions as are necessary to maintain the viability and marketability of the Ready Mix Concrete Divestiture Assets and to prevent the destruction, removal, wasting, deterioration, or impairment of the Ready Mix Concrete Divestiture Assets, except for ordinary wear and tear.
- D. Prior to the Effective Date of Divestiture, Respondent shall secure all consents and waivers from all government and private entities that are necessary for the divestiture of the Ready Mix Concrete Divestiture Assets to the Acquirer, and for the continued research, development, manufacture, sale or distribution of Ready Mix Concrete, Aggregate and Asphalt Concrete at or by the facilities listed in Appendix A to this Order by the Acquirer.
- E. The purpose of the divestiture of the Ready Mix Concrete Divestiture Assets is to ensure their continued operation in the same manner and engaged in the same businesses in which the RMC Ready Mix Concrete Businesses were engaged as of 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.

III.

IT IS FURTHER ORDERED that:

- A. If Respondent has not fully complied with the obligations to divest the Ready Mix Concrete Divestiture Assets as required by Paragraph II. of this Order, the Commission may appoint a Divestiture Trustee to divest the Ready Mix Concrete Divestiture Assets in a manner that satisfies the requirements of Paragraph II. In the event that the Commission or the Attorney General brings an action pursuant to § 5(l) of the Federal Trade Commission Act, 15 U.S.C. § 45(l), or any other statute enforced by the Commission, Respondent shall consent to the appointment of a Divestiture Trustee in such action to divest the Ready Mix Concrete Divestiture Assets. Neither the appointment of a Divestiture Trustee nor a decision not to appoint a Divestiture Trustee under this Paragraph III. shall preclude the Commission or the Attorney General from seeking civil penalties or any other relief available to it, including a court appointed Divestiture Trustee, pursuant to § 5(l) of the Federal Trade Commission Act, or any other statute enforced by the Commission, for any failure by Respondent to comply with this Order.
- B. The Commission shall select the Divestiture Trustee, subject to the consent of Respondent, which consent shall not be unreasonably withheld. The Divestiture Trustee shall be a person with experience and expertise in acquisitions and divestitures. If Respondent has not opposed, in writing, including the reasons for opposing, the selection of any proposed Divestiture Trustee within ten (10) days after notice by the staff of the Commission to Respondent of the identity of any proposed Divestiture Trustee, Respondent

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shall be deemed to have consented to the selection of the proposed Divestiture Trustee.

- C. No later than ten (10) days after appointment of a Divestiture Trustee, Respondent shall execute a trust agreement that, subject to the prior approval of the Commission, transfers to the Divestiture Trustee all rights and powers necessary to permit the Divestiture Trustee to effect the divestiture required by this Order.
- D. If a Divestiture Trustee is appointed by the Commission or a court pursuant to this Order, Respondent shall consent to the following terms and conditions regarding the Divestiture Trustee's powers, duties, authority, and responsibilities:
1. Subject to the prior approval of the Commission, the Divestiture Trustee shall have the exclusive power and authority to divest the Ready Mix Concrete Divestiture Assets as required by this Order.
 2. The Divestiture Trustee shall have twelve (12) months from the date the Commission approves the trust agreement described herein to accomplish the divestiture, which shall be subject to the prior approval of the Commission. If, however, at the end of the twelve (12) month period, the Divestiture Trustee has submitted a divestiture plan or believes that the divestiture can be achieved within a reasonable time, the divestiture period may be extended by the Commission; *provided, however*, the Commission may extend the divestiture period for no more than two (2) additional periods of twelve (12) months each.
 3. The Divestiture Trustee shall have full and complete access to the personnel, books, records, and facilities related to the Ready Mix Concrete Divestiture Assets and to any other relevant information, as the Divestiture Trustee may request. Respondent shall develop such

financial or other information as the Divestiture Trustee may request and shall cooperate with the Divestiture Trustee. Respondent shall take no action to interfere with or impede the Divestiture Trustee's accomplishment of the divestiture. Respondent shall cooperate with the efforts of the Divestiture Trustee to divest the Ready Mix Concrete Divestiture Assets. Any delays in divestiture caused by Respondent shall extend the time for divestiture under this Paragraph III. in an amount equal to the delay, as determined by the Commission.

4. The Divestiture Trustee shall use commercially reasonable best efforts to negotiate the most favorable price and terms available in each contract that is submitted to the Commission, subject to Respondent's absolute and unconditional obligation to divest expeditiously and at no minimum price. The divestiture shall be made only in a manner that receives the prior approval of the Commission and only to an Acquirer that receives the prior approval of the Commission; *provided, however,* if the Divestiture Trustee receives bona fide offers from more than one acquiring entity, and if the Commission determines to approve more than one such acquiring entity, the Divestiture Trustee shall divest to the acquiring entity selected by Respondent from among those approved by the Commission; *provided further, however,* that Respondent shall select such entity within five (5) days of receiving notification of the Commission's approval.
5. In the event that the Divestiture Trustee determines that he or she is unable to divest the Ready Mix Concrete Divestiture Assets in a manner consistent with the Commission's purpose as described in Paragraph II. of this Order, the Divestiture Trustee may divest such additional assets of Respondent and effect such arrangements as are necessary to satisfy the requirements of this Order.

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6. The Divestiture Trustee shall serve, without bond or other security, at the cost and expense of Respondent, on such reasonable and customary terms and conditions as the Commission may set. The Divestiture Trustee shall have the authority to employ, at the cost and expense of Respondent, such consultants, accountants, attorneys, investment bankers, business brokers, appraisers, and other representatives and assistants as are necessary to carry out the Divestiture Trustee's duties and responsibilities. The Divestiture Trustee shall account for all monies derived from the divestiture and all expenses incurred. After approval by the Commission, of the account of the Divestiture Trustee, including fees for the Divestiture Trustee's services, all remaining monies shall be paid at the direction of Respondent, and the Divestiture Trustee's power shall be terminated. The compensation of the Divestiture Trustee shall be based at least in significant part on a commission arrangement contingent on the divestiture of the Ready Mix Concrete Divestiture Assets as required by this Order.
7. Respondent shall indemnify the Divestiture Trustee and hold the Divestiture Trustee harmless against any losses, claims, damages, liabilities, or expenses arising out of, or in connection with, the performance of the Divestiture Trustee's duties, including all reasonable fees of counsel and other expenses incurred in connection with the preparation for, or defense of, any claim, whether or not resulting in any liability, except to the extent that such losses, claims, damages, liabilities, or expenses result from misfeasance, 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 Ready Mix Concrete Divestiture Assets.

9. The Divestiture Trustee shall act in a fiduciary capacity for the benefit of the Commission.
 10. The Divestiture Trustee shall report in writing to the Commission every sixty (60) days concerning the Divestiture Trustee's efforts to accomplish the divestiture.
 11. Respondent may require the Divestiture Trustee and each of the Divestiture Trustee's consultants, accountants, attorneys, and other representatives and assistants to sign a customary confidentiality agreement; *provided, however*, such agreement shall not restrict the Divestiture Trustee from providing any information to the Commission.
- E. The Commission may on its own initiative or at the request of the Divestiture Trustee issue such additional orders or directions as may be necessary or appropriate to accomplish the divestiture required by this Order.
- F. The Divestiture Trustee appointed pursuant to Paragraph III. of this Order may be the same Person appointed as Hold Separate Monitor pursuant to the relevant provisions of the Hold Separate in this matter.
- 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 III.

IV.

IT IS FURTHER ORDERED that for a period of one (1) year following the Effective Date of Divestiture, Respondent shall not, directly or indirectly, solicit, induce, or attempt to solicit or induce any former employees of the RMC Ready Mix Concrete Businesses who are employed by the Acquirer to terminate their

Decision and Order

employment relationship with the Acquirer if such employees have had access to Material Confidential Information of the Acquirer or of the Ready Mix Concrete Divestiture Assets; *provided, however*, a violation of this provision will not occur if: (1) the individual's employment has been terminated by the Acquirer; (2) Respondent advertises for employees in newspapers, trade publications, or other media not targeted specifically at the employees; or (3) Respondent hires employees who apply for employment with Respondent, so long as such employees were not solicited by Respondent in violation of this paragraph.

V.

IT IS FURTHER ORDERED that within thirty (30) days after the date this Order becomes final, and every sixty (60) days thereafter until Respondent has fully complied with Paragraph II. and III. of this Order, Respondent shall submit to the Commission a verified written report setting forth in detail the manner and form in which it intends to comply, is complying, and has complied with this Order. Respondent shall include in its reports, among other things that are required from time to time, a full description of the efforts being made to comply with the relevant Paragraphs of the Order, including a description of all substantive contacts or negotiations related to the divestiture of the relevant assets and the identity of all parties contacted. Respondent shall include in its reports copies of all written communications to and from such parties, all internal memoranda, and all reports and recommendations concerning its obligations under this Order.

VI.

IT IS FURTHER ORDERED that Respondent shall notify the Commission at least thirty (30) days prior to any proposed (1) dissolution of Respondent, (2) acquisition, merger, or consolidation of Respondent, or (3) any other change in Respondent that may affect compliance obligations arising out of this Order, including but not limited to assignment, the creation or dissolution of subsidiaries, or any other change in Respondent.

VII.

IT IS FURTHER ORDERED that, for the purpose of determining or securing compliance with this Order, and subject to any legally recognized privilege, and upon written request with reasonable notice to Respondent, Respondent shall permit any duly authorized representative of the Commission:

- A. Access, during office hours of Respondent and in the presence of counsel, to all facilities and access to inspect and copy all books, ledgers, accounts, correspondence, memoranda, and all other records and documents in the possession or under the control of Respondent related to compliance with this Order; and
- B. Upon five (5) days' notice to Respondent and without restraint or interference from Respondent, to interview officers, directors, or employees of Respondent, who may have counsel present, regarding such matters.

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Appendix A

RMC Ready Mix Concrete facilities to be divested pursuant to this Order:

- 10200 W. Tangerine Road, Marena, Arizona 85653
- 6601 N. Casa Grande Highway, Tucson, Arizona 85743
- 9301 S. Swan Road, Tucson, Arizona 85706
- 11800 E. Valencia Road, Tucson, Arizona 85747
- 409 Camino Ramanote, Rio Rico, Arizona 85648

RMC Aggregate facilities to be divested pursuant to this Order:

- 6601 N. Casa Grande Highway, Tucson, Arizona 85743
- 11800 E. Valencia Road, Tucson, Arizona 85747
- 409 Camino Ramanote, Rio Rico, Arizona 85648

RMC Asphalt Concrete facility to be divested pursuant to this Order:

- 6601 N. Casa Grande Highway, Tucson, Arizona 85743

Appendix B

The following are the Excluded Assets:

1. cash and cash equivalents;
2. any U.S. insurance policies that do not apply exclusively to the Ready Mix Concrete Divestiture Assets and prepaid expenses for any such U.S. insurance policies;
3. the following pension plans: The Savings and Retirement Plan for Employees of RMC USA, Inc. and Affiliated Companies; RMC USA, Inc. Amended and Restated Nonqualified Executive Savings Plan; and Savings & Retirement Plan for Employees of Tucson Ready-Mix, Inc.;
4. subject to item 5 below, intellectual property that is not used exclusively in the Ready Mix Concrete Divestiture Assets, provided, however, that, to the extent such intellectual property is used in the Ready Mix Concrete Divestiture Assets, Respondents shall grant the Acquirer a perpetual, nonexclusive, paid-up (royalty-free) license to use such intellectual property in the operation of the Ready Mix Concrete Divestiture Assets;
5. all rights, including the right to use, in or to any trade name and trademark whether or not registered in any country in the world which includes the term "RMC" or the "RMC" design; *provided, however*, that the Acquirer shall have rights to use the "RMC" trade name and trademark for a transition period of three months following the Effective Date of Divestiture;
6. any books and records that Respondent are required by law to retain, so long as RMC delivers at least one copy thereof to the Acquirer; and
7. all refunds, rebates, or similar payments of taxes to the extent such taxes were paid by or on behalf of RMC prior to the Effective Date of Divestiture.

Decision and Order

Appendix C

ORDER TO HOLD SEPARATE AND MAINTAIN ASSETS

ORDER TO HOLD SEPARATE AND MAINTAIN ASSETS

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

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

The Commission, having thereafter considered the matter and having determined that it had reason to believe that Respondent has violated the said Acts, and that a Complaint should issue stating its charges in that respect, and having determined to accept the executed Consent Agreement and to place such Consent Agreement containing the Decision and Order on the public record for a period of thirty (30) days for the receipt and consideration of public comments, now in further conformity with the procedure described in Commission Rule 2.34, 16 C.F.R. § 2.34, the Commission hereby issues its Complaint, makes the following jurisdictional findings, and issues this Order to Hold Separate and Maintain Assets (“Hold Separate”):

Order to Hold Separate

1. Respondent Cemex is incorporated as a stock corporation with variable capital organized under the laws of the United Mexican States with its office and principal place of business located at Av. Ricardo Margáin Zozaya #325, Colonia del Valle Campestre, Garza García, Nuevo León, Mexico 66265. Respondent Cemex operates all of its business in the United States through its wholly owned subsidiary, Cemex Corp., which operates all of its business through its wholly owned subsidiary, Cemex Inc. Cemex Inc. has its principal place of business on 840 Gessner Road, Suite 1400, Houston, Texas 77024.
2. The Federal Trade Commission has jurisdiction of the subject matter of this proceeding and of the Respondent, and the proceeding is in the public interest.

ORDER**I.**

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

- A. “Cemex” or “Respondent” means Cemex, S.A. de C.V., its directors, officers, employees, agents, representatives, successors, and assigns; its joint ventures, subsidiaries, divisions, groups, and affiliates controlled by Cemex (including, but not limited to, Cemex Corp. and Cemex Inc.), and the respective directors, officers, employees, agents, representatives, successors, and assigns of each.
- B. “RMC” means RMC Group PLC, a public limited company organized under the laws of England and Wales with registered number 249776 whose registered principal office is located at RMC House, Coldharbour Lane, Thorpe, Egham, Surrey TW20 8TD, United Kingdom.
- C. “Commission” means the Federal Trade Commission.

- D. “Acquirer” means any Person that receives the prior approval of the Commission to acquire the Ready Mix Concrete Divestiture Assets pursuant to Paragraph II. or Paragraph III. of the Decision and Order.
- E. “Acquisition” means the proposed acquisition of RMC by Cemex pursuant to the September 27, 2004 Implementation Agreement between Cemex and RMC.
- F. “Acquisition Date” means the date the Acquisition is consummated.
- G. “Aggregate(s)” means crushed stone and gravel produced at quarries, mines, or gravel pits used to manufacture Ready Mix Concrete and Asphalt Concrete.
- H. “Asphalt Concrete” means a paving material produced by combining and heating asphalt cement (also referred to in the industry as “liquid asphalt” or “asphalt oil”) with Aggregate.
- I. “Decision and Order” means:
 - 1. until the issuance and service of a final Decision and Order by the Commission, the proposed Decision and Order contained in the Consent Agreement in this matter; and
 - 2. following the issuance and service of a final Decision and Order by the Commission, the final Decision and Order issued by the Commission.
- J. “Divestiture Agreement” means any agreement that receives the prior approval of the Commission between Respondent and an Acquirer (or between a Divestiture Trustee appointed pursuant to Paragraph III. of the Decision and Order and an Acquirer) related to the Ready Mix Concrete Divestiture Assets required to be divested pursuant to Paragraph II. (or Paragraph III.) of the Decision and Order.

Order to Hold Separate

- K. “Divestiture Trustee” means the Divestiture Trustee appointed pursuant to Paragraph III. of the Decision and Order.
- L. “Effective Date of Divestiture” means the date on which Respondent (or a Divestiture Trustee) divests to an Acquirer the Ready Mix Concrete Divestiture Assets completely and as required by Paragraph II. (or by Paragraph III.) of the Decision and Order.
- M. “Held Separate Business” means the Ready Mix Concrete Divestiture Assets and all full-time, part-time, or contract employees of the RMC Ready Mix Concrete Businesses (“Held Separate Business employees”).
- N. “Hold Separate Monitor” means the Person appointed pursuant to Paragraph II. of this Hold Separate.
- O. “Hold Separate Period” means the time period during which the Hold Separate is in effect, which shall begin on the Acquisition Date and terminate pursuant to Paragraph V. hereof.
- P. “Material Confidential Information” means competitively sensitive, proprietary, and all other information that is not in the public domain owned by or pertaining to a Person or a Person’s business, and includes, but is not limited to, all customer lists, price lists, cost information, marketing methods, patents, technologies, processes, or other trade secrets. The Ready Mix Concrete Divestiture Assets shall be considered a Person separate from Respondent (as defined in the Decision and Order and the Hold Separate) and RMC for this purpose.
- Q. “Person” means any individual, partnership, association, firm, company, corporation, or other business entity.

- R. "Ready Mix Concrete" means a building material used in the construction of buildings, highways, bridges, tunnels, and other projects that is produced by mixing a cementing material (commonly, but not limited to, Portland cement) and Aggregate with sufficient water to cause the cement to set and bind.
- S. "Ready Mix Concrete Divestiture Assets" means all of RMC's rights, titles, and interests in and to all assets, properties, business and goodwill, tangible or intangible, and any improvements or additions thereto, used to operate the RMC Ready Mix Concrete Divestiture Businesses in the ordinary course and in accordance with past practice, including, but not limited to:
1. the Ready Mix Concrete facilities, Aggregate facilities, Asphalt Concrete facilities, quarries, mines, gravel pits, aggregate reserves, plants, and other buildings located at the sites identified on Appendix A to the Decision and Order (attached hereto);
 2. all real property (together with appurtenances, licenses, and permits), including all leasehold and renewal rights, owned, leased, or otherwise held by RMC and used to operate the RMC Ready Mix Concrete Businesses located at the sites identified on Appendix A to the Decision and Order (attached hereto);
 3. all capital equipment, stone crushing equipment, power supply equipment, scales, machinery, fixtures, tools, trucks and other vehicles, transportation and storage facilities, furniture and supplies held by RMC and used to operate the RMC Ready Mix Concrete Businesses;
 4. all personal property owned, leased, or otherwise held by RMC and used to operate the RMC Ready Mix Concrete Businesses;

Order to Hold Separate

5. all intangible assets and all intellectual property owned by or licensed to RMC used in the RMC Ready Mix Concrete Businesses, including, but not limited to, aggregate reserve testing information, technical information, leases, know-how, safety procedures, quality assurance and control procedures, dispatch software, systems and equipment, trademarks, patents, mask works, copyrights, trade secrets, research materials, technical information, management information systems, software, inventions, test data, licenses, registrations, submissions, approvals, technology, specifications, designs, drawings, processes, recipes, mix designs, protocols, and formulas;
6. all rights of RMC relating to the RMC Ready Mix Concrete Businesses under any contract entered into with customers (together with associated bid and performance bonds), suppliers, sales representatives, distributors, agents, personal property lessors, personal property lessees, licensors, licensees, consignors and consignees, and joint venture partners;
7. all governmental approvals, consents, licenses, permits, waivers, or other authorizations held by RMC and used to operate the RMC Ready Mix Concrete Businesses;
8. all rights of RMC relating to the RMC Ready Mix Concrete Businesses under any warranty and guarantee, express or implied;
9. all books, records, and files held by RMC relating to the RMC Ready Mix Concrete Businesses;
10. all rights in and to inventories of products, raw materials, supplies and parts, including work-in-process and finished goods held by RMC and used in the RMC Ready Mix Concrete Businesses;

11. all customer and vendor lists, catalogs, sales promotion literature, and advertising materials held by RMC and used in the RMC Ready Mix Concrete Businesses; and
12. all items of prepaid expense held by RMC and used in the RMC Ready Mix Concrete Businesses;

provided, however, that the Ready Mix Concrete Divestiture Assets do not include the Excluded Assets identified in Appendix B to the Decision and Order.

- T. “RMC Ready Mix Concrete Businesses” means the research, development, manufacture, distribution, or sale of Ready Mix Concrete, and the related research, development, production, manufacture, distribution, or sale of Aggregates and/or Asphalt Concrete, at or by the facilities, quarries, mines, gravel pits, aggregate reserves, plants, and other buildings listed in Appendix A to the Decision and Order.

IT IS FURTHER ORDERED that:

- U. During the Hold Separate Period, Respondent shall hold the Held Separate Business separate, apart, and independent as required by this Hold Separate and shall vest the Held Separate Business with all rights, powers, and authority necessary to conduct its business; Respondent shall not exercise direction or control over, or influence directly or indirectly, the Held Separate Business or any of its operations, or the Hold Separate Monitor, except to the extent that Respondent must exercise direction and control over the Held Separate Business as is necessary to assure compliance with this Hold Separate, the Consent Agreement, the Decision and Order, and all applicable laws.
- V. Until the Effective Date of Divestiture, Respondent shall take such actions as are necessary to maintain the viability and marketability of the Held Separate Business and to prevent the destruction, removal, wasting, deterioration, or

Order to Hold Separate

impairment of any of the assets, except for ordinary wear and tear.

- W. The purpose of this Hold Separate is to: (1) preserve the Held Separate Business as a viable, competitive, and ongoing business independent of Respondent until the divestiture required by the Decision and Order is achieved; (2) assure that no Material Confidential Information is exchanged between Respondent and the Held Separate Business, except in accordance with the provisions of this Hold Separate; and (3) prevent interim harm to competition pending the relevant divestiture and other relief.
- X. Respondent shall hold the Held Separate Business separate, apart, and independent on the following terms and conditions:
1. Mr. Stephen J. Roebuck shall serve as Hold Separate Monitor, pursuant to the agreement executed by the Hold Separate Monitor and Respondent and attached as Confidential Appendix B (“Monitor Agreement”).
 - a. Respondent shall, no later than one (1) day after the Acquisition Date, transfer to the Hold Separate Monitor all rights, powers, and authorities necessary to permit the Hold Separate Monitor to perform his duties and responsibilities, pursuant to this Hold Separate and consistent with the purposes of the Decision and Order, and shall include in the Monitor Agreement all provisions necessary to effectuate this requirement.
 - b. The Hold Separate Monitor shall have the responsibility, consistent with the terms of this Hold Separate and the Decision and Order, for monitoring the organization of the Held Separate Business; for managing the Held Separate Business through the Manager; for maintaining the independence of the

Held Separate Business; and for monitoring Respondent's compliance with its obligations pursuant to this Hold Separate and the Decision and Order.

- c. Subject to all applicable laws and regulations, the Hold Separate Monitor shall have full and complete access to all personnel, books, records, documents, and facilities of the Held Separate Business or to any other relevant information as the Hold Separate Monitor may reasonably request including, but not limited to, all documents and records kept by Respondent in the ordinary course of business that relate to the Held Separate Business. Respondent shall develop such financial or other information as the Hold Separate Monitor may reasonably request and shall cooperate with the Hold Separate Monitor. Respondent shall take no action to interfere with or impede the Hold Separate Monitor's ability to monitor Respondent's compliance with this Hold Separate, the Consent Agreement, the Decision and Order, or otherwise to perform his duties and responsibilities consistent with the terms of this Hold Separate.
- d. The Hold Separate Monitor shall have the authority to employ, at the cost and expense of Respondent, such consultants, accountants, attorneys, and other representatives and assistants as are reasonably necessary to carry out the Hold Separate Monitor's duties and responsibilities.
- e. The Commission may require the Hold Separate Monitor to sign an appropriate confidentiality agreement relating to materials and information received from the Commission in connection with performance of the Hold Separate Monitor's duties.

Order to Hold Separate

- f. Respondent may require the Hold Separate Monitor to sign an appropriate confidentiality agreement prohibiting the disclosure of any Material Confidential Information gained as a result of his role as Hold Separate Monitor to anyone other than the Commission.
- g. Thirty (30) days after the Hold Separate becomes final, and every thirty (30) days thereafter until the Hold Separate terminates, the Hold Separate Monitor shall report in writing to the Commission concerning the efforts to accomplish the purposes of this Hold Separate. Included within that report shall be the Hold Separate Monitor's assessment of the extent to which the businesses comprising the Held Separate Business are meeting (or exceeding) their projected goals as are reflected in operating plans, budgets, projections or any other regularly prepared financial statements.
- h. If the Hold Separate Monitor ceases to act or fails to act diligently and consistent with the purposes of this Hold Separate, the Commission may appoint a substitute Hold Separate Monitor consistent with the terms of this paragraph, subject to the consent of Respondent, which consent shall not be unreasonably withheld. If Respondent has not opposed, in writing, including the reasons for opposing, the selection of the substitute Hold Separate Monitor within five (5) days after notice by the staff of the Commission to Respondent of the identity of any substitute Hold Separate Monitor, Respondent shall be deemed to have consented to the selection of the proposed substitute Hold Separate Monitor. Respondent and the substitute Hold Separate Monitor shall execute a Monitor Agreement, subject to the approval of the Commission, consistent with this paragraph.

2. No later than one (1) day after the Acquisition Date, Respondent shall enter into a management agreement with, and transfer all rights, powers, and authorities necessary to manage and maintain the Held Separate Business to, Mr. Michael Smith, the current Vice President of Operations and General Manager of Tucson Ready-Mix, Inc. (“Manager”).
 - a. In the event that Mr. Smith declines an offer to act as the Manager, or if Mr. Smith accepts the position of Manager and, subsequently, ceases to act as Manager, then Respondent shall select a substitute Manager, subject to the approval of the Commission, and transfer to the substitute Manager all rights, powers and authorities necessary to permit the substitute Manager to perform his/her duties and responsibilities, pursuant to this Hold Separate.
 - b. The Manager shall report directly and exclusively to the Hold Separate Monitor and shall manage the Held Separate Business independently of the management of Respondent. The Manager shall not be involved, in any way, in the operations of the other businesses of Respondent during the term of this Hold Separate.
 - c. The Manager shall have no financial interests affected by Respondent’s revenues, profits or profit margins, except that the Manager’s compensation for managing the Held Separate Business may include economic incentives dependent on the financial performance of the Held Separate Business if there are also sufficient incentives for the Manager to operate the Held Separate Business at no less than current rates of operation (including, but not limited to, current rates of production and sales) and to achieve the objectives of this Hold Separate.

Order to Hold Separate

- d. The Manager shall make no material changes in the present operation of the Held Separate Business except with the approval of the Hold Separate Monitor, in consultation with the Commission staff.
 - e. The Manager shall have the authority, with the approval of the Hold Separate Monitor, to remove Held Separate Business employees and replace them with others of similar experience or skills. If any person ceases to act or fails to act diligently and consistent with the purposes of this Hold Separate, the Manager, in consultation with the Hold Separate Monitor, may request Respondent to, and Respondent shall, appoint a substitute person, which person the Manager shall have the right to approve.
 - f. In addition to employees within the Held Separate Business, the Manager may employ such Persons as are reasonably necessary to assist the Manager in managing the Held Separate Business.
 - g. The Hold Separate Monitor shall be permitted, in consultation with the Commission staff, to remove the Manager for cause. Within fifteen (15) days after such removal of the Manager, Respondent shall appoint a replacement Manager, subject to the approval of the Commission, on the same terms and conditions as provided in Paragraph II.D.2 of this Hold Separate.
3. The Held Separate Business shall be staffed with sufficient employees to maintain the viability and competitiveness of the Held Separate Business. To the extent that such employees leave or have left the Held Separate Business prior to the Effective Date of Divestiture, the Manager, with the approval of the Hold Separate Monitor, may replace departing or departed employees with persons who have similar experience and

expertise or determine not to replace such departing or departed employees.

4. In connection with support services or products not included within the Held Separate Business, Respondent and RMC shall continue to provide, or offer to provide, the same support services to the Held Separate Business as are being provided to such business interests by Respondent and RMC as of the date the Consent Agreement is signed by Respondent. For any services or products that Respondent and RMC may provide to the Held Separate Business, Respondent may charge no more than the same price they charge others for the same services or products. Respondent's or RMC's personnel providing such services or products must retain and maintain all Material Confidential Information of the Held Separate Business on a confidential basis, and, except as is permitted by this Hold Separate, such persons shall be prohibited from providing, discussing, exchanging, circulating, or otherwise furnishing any such information to or with any person whose employment involves any of Respondent's or RMC's businesses, other than the Held Separate Business. Such personnel shall also execute confidentiality agreements prohibiting the disclosure of any Material Confidential Information of the Held Separate Business.
 - a. Respondent and RMC shall offer to the Held Separate Business any services and products that Respondent or RMC provided to their other businesses directly or through third party contracts, or that they have provided directly or through third party contracts to the businesses constituting the Held Separate Business at any time since January 1, 2004. The Held Separate Business may, at the option of the Manager with the approval of the Hold Separate Monitor, obtain such services and products from Respondent or RMC. The services and products that

Order to Hold Separate

Respondent or RMC shall offer the Held Separate Business shall include, but shall not be limited to, the following:

- (1) human resources and administrative services, including but not limited to payroll processing, labor relations support, pension administration, and procurement and administration of employee benefits, including health benefits;
 - (2) environmental health and safety services, which are used to develop corporate policies and insure compliance with federal and state regulations and corporate policies;
 - (3) financial accounting services;
 - (4) preparation of tax returns;
 - (5) audit services;
 - (6) information technology support services;
 - (7) processing of accounts payable and accounts receivable;
 - (8) technical support;
 - (9) procurement of supplies;
 - (10) procurement of goods and services utilized in the ordinary course of business by the Held Separate Business; and
 - (11) legal services.
- b. the Held Separate Business shall have, at the option of the Manager with the approval of the Hold

Separate Monitor, the ability to acquire services and products from third parties unaffiliated with Respondent or RMC.

5. Respondent shall cause the Hold Separate Monitor, the Manager, and each employee having access to Material Confidential Information to submit to the Commission a signed statement that the individual will maintain the confidentiality required by the terms and conditions of this Hold Separate. These individuals must retain and maintain all Material Confidential Information relating to the Held Separate Business on a confidential basis and, except as is permitted by this Hold Separate, such persons shall be prohibited from providing, discussing, exchanging, circulating, or otherwise furnishing any such information to or with any other person whose employment involves any of Respondent's businesses other than the Held Separate Business. These persons shall not be involved in any way in the management, production, distribution, sale, marketing, or financial operations of the competing businesses of Respondent.
6. No later than five (5) days after the Acquisition Date, Respondent shall establish written procedures, subject to the approval of the Hold Separate Monitor, covering the management, maintenance, and independence of the Held Separate Business consistent with the provisions of this Hold Separate.
7. No later than five (5) days after the date this Hold Separate becomes final, Respondent shall circulate to employees of the Held Separate Business, and to persons who are employed in Respondent's businesses that compete with the Held Separate Business, a notice of this Hold Separate and the Consent Agreement, in the form attached hereto as Appendix C.

Order to Hold Separate

8. The Hold Separate Monitor and the Manager shall serve, without bond or other security, at the cost and expense of Respondent, on reasonable and customary terms commensurate with each person's experience and responsibilities.
9. Respondent shall indemnify the Hold Separate Monitor and Manager and hold each harmless against any losses, claims, damages, liabilities, or expenses arising out of, or in connection with, the performance of the Hold Separate Monitor's or the Manager's duties, including all reasonable fees of counsel and other expenses incurred in connection with the preparation for, or defense of any claim, whether or not resulting in any liability, except to the extent that such liabilities, losses, damages, claims, or expenses result from misfeasance, gross negligence, willful or wanton acts, or bad faith by the Hold Separate Monitor or the Manager.
10. Respondent shall provide the Held Separate Business with sufficient financial resources:
 - a. as are appropriate in the judgment of the Hold Separate Monitor to operate the Held Separate Business as it is currently operated;
 - b. to perform all maintenance to, and replacements of, the assets of the Held Separate Business;
 - c. to carry on existing and planned capital projects and business plans; and
 - d. to maintain the viability, competitive vigor, and marketability of the Held Separate Business.

Such financial resources to be provided to the Held Separate Business shall include, but shall not be limited to, (i) general funds, (ii) capital, (iii) working capital, and (iv) reimbursement

for any operating losses, capital losses, or other losses; *provided, however*, that, consistent with the purposes of the Decision and Order, the Manager may reduce in scale or pace any capital or research and development project, or substitute any capital or research and development project for another of the same cost.

11. Respondent shall not, during the Hold Separate Period, directly or indirectly, solicit, induce, or attempt to solicit or induce any employee of the Held Separate Business for positions with Respondent. The Acquirer shall have the option of offering employment to any Held Separate Business employee. Respondent shall not interfere with the employment by the Acquirer of such employees; shall not offer any incentive to such employees to decline employment with the Acquirer or to accept other employment with the Respondent; and shall remove any impediments that may deter such employees from accepting employment with the Acquirer including, but not limited to, any non-compete or confidentiality provisions of employment or other contracts that would affect the ability of such employees to be employed by the Acquirer, and the payment, or the transfer for the account of the employee, of all current and accrued bonuses, pensions and other current and accrued benefits to which such employees would otherwise have been entitled had they remained in the employment of the Respondent.
12. For a period of one (1) year commencing on the Effective Date of Divestiture, Respondent shall not, directly or indirectly, solicit, induce or attempt to solicit or induce any Held Separate Business employees who are employed by the Acquirer to terminate their employment relationship with the Acquirer if such employees have had access to Material Confidential Information of the Acquirer or of the Held Separate Business; *provided, however*, a violation of this provision will not occur if:
 - (1) the individual's employment has been terminated by

Order to Hold Separate

the Acquirer; (2) Respondent advertises for employees in newspapers, trade publications, or other media not targeted specifically at the employees; or (3) Respondent hires employees who apply for employment with Respondent, so long as such employees were not solicited by Respondent in violation of this paragraph.

13. Except for the Manager, Held Separate Business employees, and support services employees involved in providing services to the Held Separate Business pursuant to Paragraph II.D.4., and except to the extent provided in Paragraph II.A., Respondent shall not permit any other of its employees, officers, or directors to be involved in the operations of the Held Separate Business.
14. Respondent shall assure that Held Separate Business employees receive, during the Hold Separate Period, their salaries, all current and accrued bonuses, pensions and other current and accrued benefits to which those employees otherwise would have been entitled.
15. Respondent's employees (excluding the Manager, Held Separate Business employees and employees involved in providing support services to the Held Separate Business pursuant to Paragraph II.D.4.) shall not receive, or have access to, or use or continue to use any Material Confidential Information of the Held Separate Business not in the public domain except:
 - a. as required by law; and
 - b. to the extent that necessary information is exchanged:
 - (1) in the course of consummating the Acquisition;
 - (2) in negotiating agreements to divest assets pursuant to the Consent Agreement and engaging in related due diligence;
 - (3) in complying with this Hold Separate or the Consent Agreement;

- (4) in overseeing compliance with policies and standards concerning the safety, health, and environmental aspects of the operations of the Held Separate Business and the integrity of the financial controls of the Held Separate Business;
- (5) in defending legal claims, investigations or enforcement actions threatened or brought against or related to the Held Separate Business; or
- (6) in obtaining legal advice.

Nor shall the Manager or Held Separate Business employees receive or have access to, or use or continue to use, any Material Confidential Information not in the public domain about Respondent and relating to Respondent's businesses, except such information as is necessary to maintain and operate the Held Separate Business. Respondent may receive aggregate financial and operational information relating to the Held Separate Business only to the extent necessary to allow Respondent to comply with the requirements and obligations of the laws of the United States and other countries, and to prepare consolidated financial reports, tax returns, reports required by securities laws, and personnel reports. Any such information that is obtained pursuant to this subparagraph shall be used only for the purposes set forth in this subparagraph.

16. Respondent and the Held Separate Business shall jointly implement, and at all times during the Hold Separate Period maintain in operation, a system, as approved by the Hold Separate Monitor, of access and data controls to prevent unauthorized access to or dissemination of Material Confidential Information of the Held Separate Business, including, but not limited to, the opportunity by the Hold Separate Monitor, on terms and conditions agreed to with Respondent, to audit Respondent's networks and systems to verify compliance with this Hold Separate.

Order to Hold Separate

III.

IT IS FURTHER ORDERED that Respondent shall notify the Commission at least thirty (30) days prior to any proposed (1) dissolution of Respondent, (2) acquisition, merger or consolidation of Respondent, or (3) any other change in Respondent that may affect compliance obligations arising out of this Hold Separate, including but not limited to assignment, the creation or dissolution of subsidiaries, or any other change in Respondent.

IV.

IT IS FURTHER ORDERED that, for the purpose of determining or securing compliance with this Hold Separate, and subject to any legally recognized privilege, and upon written request with reasonable notice to Respondent made to their principal United States offices, Respondent shall permit any duly authorized representative of the Commission:

- A. Access, during office hours of Respondent and in the presence of counsel, to all facilities, and access to inspect and copy all books, ledgers, accounts, correspondence, memoranda, and all other records and documents in the possession or under the control of Respondent relating to any matters contained in this Hold Separate; and
- B. Upon five (5) days' notice to Respondent and without restraint or interference from Respondent, to interview officers, directors, or employees of Respondent, who may have counsel present, regarding any such matters.

V.

IT IS FURTHER ORDERED that this Hold Separate shall terminate at the earlier of:

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

B. The day after the Effective Date of Divestiture (the date the divestiture required by the Decision and Order is completed).

By the Commission, Chairman Majoras recused.

Appendix A

RMC Ready Mix Concrete facilities to be divested pursuant to this Order:

- 10200 W. Tangerine Road, Marena, Arizona 85653
- 6601 N. Casa Grande Highway, Tucson, Arizona 85743
- 9301 S. Swan Road, Tucson, Arizona 85706
- 11800 E. Valencia Road, Tucson, Arizona 85747
- 409 Camino Ramanote, Rio Rico, Arizona 85648

RMC Aggregate facilities to be divested pursuant to this Order:

- 6601 N. Casa Grande Highway, Tucson, Arizona 85743
- 11800 E. Valencia Road, Tucson, Arizona 85747
- 409 Camino Ramanote, Rio Rico, Arizona 85648

RMC Asphalt Concrete facility to be divested pursuant to this Order:

- 6601 N. Casa Grande Highway, Tucson, Arizona 85743

Confidential Appendix B

HOLD SEPARATE MONITOR AGREEMENT

Order to Hold Separate

Appendix C

NOTICE OF DIVESTITURE AND REQUIREMENT FOR CONFIDENTIALITY

Cemex, S.A. de C.V. (“Cemex”), hereinafter referred to as “Respondent,” has entered into an Agreement Containing Consent Orders (“Consent Agreement”) with the Federal Trade Commission relating to the divestiture of certain assets and other relief.

As used herein, the term “Held Separate Business” means RMC’s ready mix concrete, aggregate and asphalt facilities located in Tucson, Arizona and Rio Rico, Arizona, and all full-time, part-time or contract employees whose duties relate primarily to the Held Separate Business. Under the terms of the Decision and Order contained in the Consent Agreement, Cemex must divest the Held Separate Business within six months after the Acquisition Date.

During the Hold Separate Period (which begins on the date that Cemex acquires RMC and ends after Cemex has completed the required divestiture of the Held Separate Business), the Held Separate Business shall be held separate, apart, and independent from Cemex’s other businesses. The Held Separate Business must be maintained as a separate, ongoing business, independent of all other businesses of Cemex, until Cemex has completed the required divestiture. All competitive information relating to the Held Separate Business must be retained and maintained by the persons involved in the operation of the Held Separate Business on a confidential basis, and such persons are prohibited from providing, discussing, exchanging, circulating, or otherwise furnishing any such information to or with any other person employed by Cemex or whose employment relates to any of Cemex’s businesses other than the Held Separate Business. These individuals shall not be involved in any way in the management, production, distribution, sales, marketing, or financial operations of the competing products or services of Cemex. Similarly, persons involved in similar activities in Respondent Cemex’s businesses are prohibited from providing, discussing, exchanging, circulating, or otherwise furnishing any similar information to or

with any other person whose employment involves the Held Separate Business, except as otherwise provided in the Hold Separate Order.

Until the Held Separate Business is divested, Respondent must take such actions as are necessary to maintain the viability, marketability, and competitiveness of the Held Separate Business, and to prevent the destruction, removal, wasting, deterioration, sale, disposition, transfer, or impairment of the Held Separate Business or any assets related thereto, except for ordinary wear and tear.

Any violation of the Consent Agreement may subject Respondent to civil penalties and other relief as provided by law.

Analysis

**Analysis of Agreement Containing Consent Orders to Aid
Public Comment****I. Introduction**

The Federal Trade Commission (“Commission”) has accepted, subject to final approval, an Agreement Containing Consent Order (“Consent Agreement”) from Cemex, S.A. de C.V. (“Cemex”). The purpose of the Consent Agreement is to remedy the anticompetitive effects resulting from Cemex’s proposed acquisition of RMC, PLC (“RMC”). The Consent Agreement requires Cemex to divest RMC’s Tucson, Arizona ready-mix concrete business within six months of the date Cemex signed the Consent Agreement. The Consent Agreement also includes an Order to Hold Separate and Maintain Assets that requires Cemex to preserve the RMC Tucson, Arizona ready-mix concrete business as a viable, competitive, and ongoing operation until the divestiture is achieved.

The Consent Agreement 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 Consent Agreement and the comments received, and will decide whether it should withdraw from the proposed Consent Agreement or make it final.

Pursuant to an Implementation Agreement dated September 27, 2004, Cemex agreed to acquire 100 percent of the existing shares of RMC for approximately \$5.8 billion (“Proposed Acquisition”). The Commission’s complaint alleges that the Proposed Acquisition, if consummated, would violate Section 7 of the Clayton Act, as amended, 15 U.S.C. § 18, and Section 5 of the Federal Trade Commission Act, as amended, 15 U.S.C. § 45, by substantially lessening competition in the Tucson, Arizona market for the manufacture and sale of ready-mix concrete.

II. The Parties

Headquartered in Monterrey, Mexico, Cemex is the third largest cement company in the world, with significant downstream businesses in ready-mix concrete and related products. Cemex's operations in Tucson, Arizona consist of four ready-mix concrete plants, all of which are supplied internally with concrete aggregates.

RMC is a United Kingdom Holding Company headquartered in London, with nine subsidiaries doing business in the United States. RMC is the world's largest supplier of ready-mix concrete and a leading producer of cement and aggregates in Europe. RMC has five ready-mix concrete plants in the Tucson, Arizona area, all of which are supplied internally with locally-produced aggregates.

III. The Tucson, Arizona Ready-Mix Concrete Market

The relevant product market in which to assess the competitive effects of the Proposed Acquisition is ready-mix concrete. Ready-mix concrete is produced at local plants by combining cement, aggregates, and water in accordance with precise specifications. Once blended, ready-mix concrete is delivered to construction sites as a slurry in trucks with revolving drums. At construction sites, ready-mix concrete is poured and formed into its final shape. Among building products, ready-mix concrete is unique because it is pliable when freshly mixed and strong and permanent when hardened. Due to ready-mix concrete's exceptional characteristics as a building material, ready-mix concrete customers would not switch to other materials, such as steel, wood, or asphalt, in the event of a five to ten percent increase in the price of ready-mix concrete. Indeed, for some applications, such as certain building foundations, concrete's unique structural characteristics make it the only viable construction material.

The relevant geographic market in which to analyze the effects of the Proposed Acquisition is the Tucson, Arizona metropolitan area. The geographic scope of competition in ready-mix concrete

Analysis

is circumscribed by the perishable nature of the product. Once ready-mix concrete is blended at a plant and loaded into a truck, it will solidify if it is not poured in a timely manner (typically less than one hour), rendering it useless. Hence, ready-mix concrete generally is sold within a 10 to 20 mile radius of the plant where it is mixed, although the precise mileage may differ depending on traffic patterns and infrastructure. For instance, traffic congestion within a metropolitan area can significantly lengthen delivery times, whereas a plant located on the periphery of the market may be able to serve a larger area. Due to a low value-to-weight ratio, transportation costs also can effectively limit the distance that ready-mix concrete can be shipped. There are three ready-mix competitors in Tucson, each operating at least four ready-mix concrete plants: Cemex, RMC, and Rinker. Each competitor has spaced plants within 20 miles of its other plants, creating a network capable of supplying the entire area.

The three-firm Tucson, Arizona ready-mix concrete market is highly concentrated. If the Proposed Acquisition is consummated, the Tucson, Arizona ready-mix concrete market will become even more concentrated with only two independent suppliers. As a result, the Proposed Acquisition likely would facilitate coordinated behavior between Cemex and its lone remaining competitor. Coordination is particularly likely where the relevant product is homogenous, as is ready-mix concrete. In a two-firm market, each competitor would have an enhanced ability to monitor the other's conduct, and would know with certainty the source of any discounting. Likewise, the accuracy and effectiveness of any retaliation for deviations from the terms of collusion would greatly improve with only one remaining competitor. As a result, the Proposed Acquisition would increase the likelihood that ready-mix concrete purchasers in Tucson, Arizona would be forced to pay higher prices and would receive diminished service. Absent Commission action, Cemex's acquisition of RMC raises significant antitrust concerns in Tucson, Arizona.

Entry into the Tucson, Arizona ready-mix concrete market on a level sufficient to deter or counteract the likely anticompetitive effects of the Proposed Transaction is not likely to occur in a timely manner. Entry into this market is difficult due to a limited availability of the vital raw materials, *i.e.* aggregates and cement, necessary to sustain a new ready-mix concrete operation. In Tucson, Arizona, ready-mix concrete operations are closely intertwined with concrete aggregate operations. As a result, concrete aggregates are not currently available on the open market in Tucson on the scale necessary to sustain a new ready-mix concrete competitor. Thus, a new concrete entrant would need to enter the aggregate business itself, or enter the market contemporaneously with a new aggregate entrant. Neither alternative is likely to occur in a timely manner. Viable locations for concrete aggregates in Tucson are scarce, and even if a suitable site were found, an aggregates entrant would then need to undergo an extensive permitting process with federal, state, and local authorities. Entry into the Tucson, Arizona ready-mix concrete market also is made difficult by the scale required to compete. Entry with a single ready-mix plant would be insufficient, as customers typically require that a supplier have a network of plants. Presently, all three ready-mix companies have a network of at least four plants supplying the entire Tucson metropolitan area. Due to these entry barriers, new entry by a ready-mix concrete company has not occurred in Tucson in over ten years.

IV. The Consent Agreement

The Consent Agreement effectively remedies the Proposed Acquisition's anticompetitive effects in the Tucson, Arizona ready-mix concrete market by requiring Cemex to divest RMC's Tucson, Arizona ready-mix concrete business. Pursuant to the Consent Agreement, Cemex is required to divest the RMC Tucson, Arizona ready-mix concrete business to a buyer, at no minimum price, within six months of the date Cemex signed the Consent Agreement. The acquirer of the RMC Tucson business must receive the prior approval of the Commission. The

Analysis

Commission's goal in evaluating possible purchasers of divested assets is to ensure that the competitive environment that existed prior to the acquisition is maintained. A proposed acquirer of divested assets must not itself present competitive problems.

Should Cemex fail to accomplish the divestiture within the time and in the manner required by the Consent Agreement, the Commission may appoint a trustee to divest these assets. If approved, the trustee would have the exclusive power and authority to accomplish the divestiture within six months of being appointed, subject to any necessary extensions by the Commission. The Consent Agreement requires Cemex to provide the trustee with access to information related to the RMC Tucson business as necessary to fulfill his or her obligations.

The Order to Hold Separate and Maintain Assets that is included in the Consent Agreement requires that Cemex hold separate and maintain the viability of the RMC Tucson business as a competitive operation until the business is transferred to the Commission-approved acquirer. Furthermore, it contains measures designed to ensure that no material confidential information is exchanged between Cemex and the RMC Tucson business (except as otherwise provided in the Consent Agreement). The Order to Hold Separate and Maintain Assets is also designed to prevent interim harm to competition in the Tucson, Arizona ready-mix concrete market pending divestiture. Under the Order to Hold Separate and Maintain Assets, the Commission may appoint a Hold Separate Monitor to monitor Cemex's compliance with the Consent Agreement. Pursuant to that Order, the Commission has appointed Stephen J. Roebuck, President, Roebuck Consulting Group, as a Hold Separate Monitor to oversee the RMC Tucson business prior to its divestiture and to ensure that Cemex complies with its obligations under the Consent Agreement. Mr. Roebuck has more than 25 years of construction materials industry experience at all levels of management. Most recently, Mr. Roebuck served as Vice President of Sales and Marketing with Southdown, Inc.'s Concrete Products Division. He is also a former member of the

Analysis

Board and Executive Committee of the National Concrete Masonry Association; has authored over 20 industry-specific continuing education programs; and has served as a contributing author and editor for the National Ready Mixed Concrete Association's Certified Concrete Sales Professional program.

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

Complaint

IN THE MATTER OF

CYTEC INDUSTRIES INC.

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

Docket C-4132; File No. 0410203

Complaint, February 28, 2005--Decision, April 7, 2005

This consent order, among other things, requires the respondent to divest the UCB Amino Resins Business and the Fechenheim Additives Business, including facilities that produce amino resins -- which are used to promote the adhesion of rubber to materials such as steel or fiber, in products such as automotive coatings, coil coatings, can coatings, appliance coatings, and tires -- associated patents and other intellectual property, and other assets, to a buyer approved by the Commission and at no minimum price. An accompanying Order to Hold Separate and Maintain Assets requires the respondent to hold separate and maintain the viability of the UCB Amino Resins Business as a competitive operation until its transfer to the Commission-approved acquirer, and prohibits the exchange of certain material confidential information between the respondent and the UCB Amino Resins Business.

Participants

For the Commission: *Robert S. Tovsky, Sebastian Lorigo, Marc I. Alvarez, Michael H. Knight, Geary A. Gessler, Nicholas Kreisle, and Jeffrey H. Fischer.*

For the Respondent: *Stuart Meiklejohn, Sullivan & Cromwell.*

COMPLAINT

Pursuant to the Federal Trade Commission Act and the Clayton Act, and by virtue of the authority vested in it by said Acts, the Federal Trade Commission ("Commission"), having reason to believe that Cytec Industries Inc. ("Cytec"), a corporation subject to the jurisdiction of the Commission, has entered into an agreement to acquire the Surface Specialties division of UCB S.A. ("UCB"), a corporation subject to the jurisdiction of the Commission, and that the acquisition, if consummated, would

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result in a violation of Section 5 of the Federal Trade Commission Act, 15 U.S.C. § 45, and Section 7 of the Clayton Act, 15 U.S.C. § 18, 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:

A. THE RESPONDENT

1. Respondent Cytec is a corporation organized, existing, and doing business under and by virtue of the laws of the United States, with its principal office and principal place of business located at 5 Garret Mountain Plaza, West Paterson, New Jersey 07424.

2. Cytec, among other things, engages in the worldwide development, manufacture, and sale of amino resins.

3. Respondent Cytec is, and at all times relevant herein has been and is now engaged in commerce, as “commerce” is defined in Section 1 of the Clayton Act, 15 U.S.C. § 12, and is a corporation whose business is in or affecting commerce as “commerce” is defined in Section 4 of the Federal Trade Commission Act, 15 U.S.C. § 44.

B. THE ACQUIRED COMPANY

4. “UCB” means UCB S.A., a corporation organized, existing, and doing business under and by virtue of the laws of Belgium, with its registered office located at 60 Allee de la Recherche, B-1070, Brussels, Belgium.

5. Surface Specialties, one of two divisions of UCB, operates through wholly-owned subsidiaries of UCB in North and South America, Europe and Asia. Surface Specialties, which operates more than ten plants in these areas, researches, develops, manufactures, and sells a wide range of products that includes those used in the coating, bonding, and printing of surfaces.

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C. THE PROPOSED ACQUISITION

6. On October 1, 2004, Cytec and UCB announced that they had entered into a combined cash-share purchase agreement whereby Cytec would purchase UCB's Surface Specialties division for approximately \$1.8 billion.

D. THE RELEVANT MARKETS

7. For the purposes of this Complaint, the relevant product markets in which to analyze the effects of Cytec's proposed acquisition of UCB's Surface Specialties division is the research, development, manufacture, and sale of amino resins for: (1) industrial liquid coatings; and (2) adhesion promotion in rubber (primarily tire applications). The types of amino resins that Cytec and UCB manufacture are used as cross-linking agents in thermoset surface coatings for a variety of applications, including automotive coatings, coil coatings, appliance coatings, can coatings, and general maintenance coatings. In addition, these types of resins are used in tires to promote the adhesion of rubber to other materials in the tire and thereby enhance the performance and durability of the tire.

8. There are many different grades of amino resins, each of which will impart specific performance properties. Customers, such as coatings manufacturers or tire manufacturers, typically will qualify a resin for use in a particular formulation. That is, the customers will take resin samples and perform various types of laboratory and product testing to demonstrate that the resin will provide the performance they require in the application.

9. Amino resins provide a critical function for the specialized applications in which they are used, and there are no economic substitutes for amino resins in these applications. In other words, a small but significant and non-transitory price increase would not significantly affect the current level of consumption of amino resins in either of the significant end-use applications of industrial liquid coatings and rubber adhesion promotion.

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10. The relevant geographic market in which to assess the impact of the proposed acquisition is no broader than North America and potentially limited to the United States. Imports and exports of the relevant products are very limited, and the potential for interregional shipping is limited by transportation costs and duties, by the requirements for an effective distribution and service infrastructure, and due to the often time-consuming customer qualification requirements.

E. MARKET STRUCTURE

11. The markets for amino resins for industrial liquid coatings and rubber adhesion promotion are highly concentrated. Cytec and UCB are the two major competitors in the United States, accounting for over 90% of domestic sales for at least the last ten years.

12. Cytec manufactures amino resins at multiple plants in the United States, and at multiple overseas plants. UCB manufactures amino resins at one plant in the United States, one in Canada, and at multiple plants overseas.

13. Other firms also market amino resins for coatings and rubber adhesion applications, but only on a very limited basis with less advanced products.

14. Cytec and UCB, by virtue of their history of participation in the marketplace over a period of many years, have the broadest ranges of commercially available amino resin grades, and the broadest ranges of qualifications in customer applications.

15. As measured by sales, the proposed acquisition would increase concentration significantly for amino resins for industrial liquid coating and adhesion promotion in rubber, as measured by the Herfindahl-Hirschman Index ("HHI"), by almost 4000 points, to over 8000.

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F. DIRECT COMPETITION BETWEEN CYTEC AND UCB

16. Cytec and UCB compete directly with each other across an extensive array of amino resin grades used in different applications. Customers often qualify both Cytec and UCB as suppliers in order to ensure competition in pricing and other key aspects of the supply of amino resins.

G. CONDITIONS OF ENTRY AND EXPANSION

17. In order to constrain Cytec's ability to exercise market power, new entry or expansion must be able to compete on the basis on which UCB is able to compete today so as to restore the competition that exists between Cytec and UCB across the wide range of amino resin grades. Because of the time that would be required to develop the necessary capabilities, and the hurdles a potential entrant would face in trying to develop a business of the scale and scope of UCB, neither new entry nor expansion are likely to be sufficient to provide substantial constraint on Cytec's ability to exercise market power after the acquisition.

18. Other firms would lack key assets that they would require to compete effectively against Cytec. At a minimum, other firms would need to invest resources over an extended period of time in developing the formulation expertise to produce the wide range of grades Cytec and UCB have developed, and currently manufacture and market. They would also need to obtain the research and development capability to continue to improve existing product lines to meet the evolving requirements of amino resins in the applications in which they are used. Finally, in order to fully respond to the requirements of major customers at the locations where they use amino resins, firms would need to have plants as close as possible to their major customers in order to be able to supply those grades to the worldwide locations of these customers on a timely basis and at competitive prices.

19. Even if manufacturers were able to develop some grades of amino resins, the rigorous process of qualifying resins in the

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coating and tire applications in which they are used would likely make it several additional years before new competition could emerge to compete effectively against Cytec in the full range of applications in which Cytec and UCB today compete.

20. In the end, therefore, there would be no assurance that the emerging competition would be sufficient to replace the established competition that has existed between Cytec and UCB over a period of many years in the wide range of applications in which amino resins are used.

H. EFFECTS OF THE PROPOSED ACQUISITION

21. The effect of the acquisition may be to substantially lessen competition and to tend to create a monopoly in the relevant market in violation of Section 7 of the Clayton Act, as amended, 15 U.S.C. § 18, and Section 5 of the Federal Trade Commission Act, as amended, 15 U.S.C. § 45, in the following ways, among others:

a. It will substantially increase concentration in the markets for amino resins for industrial liquid coatings and promotion of adhesion in rubber, primarily tire applications;

b. It will eliminate UCB as the only other significant competitor in the markets for amino resins for industrial liquid coatings and promotion of adhesion in rubber, primarily tire applications;

c. It will lead to higher prices and a reduced level of innovation in the markets for amino resins for industrial liquid coatings and promotion of adhesion in rubber, primarily tire applications.

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I. VIOLATIONS CHARGED

22. The acquisition agreement between Cytec and UCB, as described in paragraph 6, violates Section 5 of the Federal Trade Commission Act, as amended, 15 U.S.C. § 45.

23. The acquisition of UCB's Surface Specialties division by Cytec, if consummated, would violate Section 5 of the Federal Trade Commission Act, as amended, 15 U.S.C. § 45, and Section 7 of the Clayton Act, as amended, 15 U.S.C. § 18.

WHEREFORE, THE PREMISES CONSIDERED, the Federal Trade Commission on this twenty-eighth day of February, 2005, issues its complaint against said Respondent.

DECISION AND ORDER

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

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

The Commission having thereafter considered the matter and having determined that it had reason to believe that Respondent has violated the said Acts and that a Complaint should issue stating its charges in that respect, and having thereupon issued its Complaint and its Order to Hold Separate and Maintain Assets and having accepted the executed Agreement Containing Consent Orders and placed such Agreement Containing Consent Orders 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”):

Decision and Order

1. Respondent Cytec Industries Inc. is a corporation organized, existing and doing business under and by virtue of the laws of Delaware, with its office and principal place of business located at Five Garret Mountain Plaza, West Paterson, New Jersey 07424.
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.**

- A. “Cytec” means Cytec Industries Inc., its directors, officers, employees, agents, representatives, predecessors, successors, and assigns; and its parents, joint ventures, subsidiaries, divisions, groups, and affiliates controlled by Cytec, and the respective directors, officers, employees, agents, representatives, predecessors, successors, and assigns of each.
- B. “UCB” means UCB S.A., a corporation organized, existing, and doing business under and by virtue of the laws of Belgium, with its registered office located at 60 Allée de la Recherche, B-1070, Brussels, Belgium; and all joint ventures, subsidiaries, divisions, groups, and affiliates controlled by UCB, including without limitation UCB Chemicals Corp. and UCB, Inc.
- C. “Surface Specialties” means the Surface Specialties business of UCB which Cytec agreed to acquire as described in the October 1, 2004, Stock and Asset Purchase Agreement between UCB S.A. and Cytec Industries Inc.
- D. “Commission” means the Federal Trade Commission.
- E. “Respondent” means Cytec Industries Inc.

- F. “Acquirer” means each Person approved by the Commission to acquire the UCB Amino Resins Business pursuant to Paragraphs II or V of this Order.
- G. “Actual Cost” means actual direct material plus actual direct labor plus allocated actual manufacturing overhead at the Suzano Amino Resins Facility, the Werndorf Amino Resins Facility and the La Llagosta Amino Resins Facility.
- H. “Acquisition” means the proposed acquisition of Surface Specialties by Cytec, as described in the October 1, 2004, Stock and Asset Purchase Agreement between UCB S.A. and Cytec Industries Inc.
- I. “Amino Resins” means products obtained through the addition of formaldehyde to urea, melamine or benzoguanamine and such products etherified with linear or branched aliphatic alcohols (C1-C18 atoms). This definition excludes the products obtained through the addition of formaldehyde to phenols (the phenolics), the products obtained through the addition of formaldehyde to carbamates (such as HF480 and Alvnovol VPN 1759) and the products obtained through the reaction of butylated urea formaldehyde with alkyds (plasticized urea formaldehyde resins).
- J. “Amino Resin Products” means all of those grades and types of Amino Resins currently manufactured, marketed, or sold by UCB, all of those grades and types of Amino Resins currently being researched or developed by UCB, and all of those grades and types of Amino Resins that have been researched, developed, manufactured, marketed, or sold by UCB or any predecessor any time within five years of the date this Order is accepted by the Commission for public comment. “Amino Resin Products” does not include formulated or combination products consisting of an Amino Resin and one or more polymers, other than Modacure™ resins.

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- K. “Divestiture Agreements” means any agreement that receives the prior approval of the Commission between Respondent and an Acquirer (or between a trustee appointed pursuant to Paragraph V of this Order and an Acquirer) related to the UCB Amino Resins Business required to be divested pursuant to Paragraphs II or V of this Order and the rights or assets to be licensed or otherwise made available to the Acquirer pursuant to Paragraph II of this Order, including, but not limited to any agreement between the Respondent and the Acquirer required or permitted by or pursuant to Paragraph II.B. of this Order.
- L. “Indian Orchard Manufacturing Facility” means the industrial park owned and operated by Solutia, Inc. near Springfield, Massachusetts and the immediate vicinity.
- M. “Indian Orchard Amino Resins Facility” means buildings, structures, fixtures, equipment, machinery, and other tangible property owned, operated, leased, or otherwise within the custody or control by or on behalf of UCB and located at the Indian Orchard Manufacturing Facility used for any purpose related to the research, development, manufacture, marketing, sale, and distribution of Amino Resin Products.
- N. “Fechenheim Manufacturing Facility” means the industrial park owned by AllessaChemie GmbH near Fechenheim, Germany and the immediate vicinity.
- O. “Fechenheim Amino Resins Facility” means buildings, structures, fixtures, equipment, machinery, and other tangible property owned or operated by or on behalf of UCB and located at the Fechenheim Manufacturing Facility used for any purpose related to the research, development, manufacture, marketing, sale, and distribution of Amino Resin Products.

- P. “Fechenheim Additives” means the additives listed on Exhibit A to this Order, together with any improvements.
- Q. “Fechenheim Additives Business” means:
1. the buildings, structures, fixtures, equipment, machinery, and other tangible property owned or operated by or on behalf of UCB and located at the Fechenheim Manufacturing Facility used for any purpose related to the research, development, manufacture, marketing, sale, and distribution of Fechenheim Additives;
 2. the books, records, and files (whether stored in electronic, magnetic, paper, or any other format) located at the Fechenheim Manufacturing Facility that are related to the research, development, manufacture, marketing, sale, and distribution of the Fechenheim Additives;
 3. all of UCB’s rights in intellectual property that is used exclusively in the research, development, manufacture, marketing, sale, and distribution of Fechenheim Additives;
 4. all of UCB’s rights in any tolling agreement pursuant to which AllessaChemie GmbH produces Fechenheim Additives; and
 5. a perpetual, non-exclusive, royalty-free license, limited to the field of Fechenheim Additives, to all of UCB’s other intellectual property, as of the date this Order is accepted by the Commission for public comment, used in the research, development, manufacture, marketing, sale, and distribution of Fechenheim Additives, with a right to sub-license customers for use in connection with products the customer purchases from the Acquirer.
- R. “LaSalle Toll Agreement” means the January 31, 2003, agreement between UCB Chemicals Corp. and UCB, Inc. and Solutia Canada Inc. relating to the toll manufacture of Amino

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Resin Products for UCB at Solutia Canada Inc.'s manufacturing site in LaSalle, Quebec.

- S. "Divestiture Trustee" means the divestiture trustee(s) appointed pursuant to Paragraph V. of this Order.
- T. "Effective Date of Divestiture" means the date on which the divestiture of the UCB Amino Resins Business to the Acquirer is consummated.
- U. "Hold Separate" means the Order to Hold Separate and Maintain Assets incorporated into and made a part of the Agreement Containing Consent Orders.
- V. "La Llagosta Amino Resins Facility" means the buildings, structures, fixtures, equipment, machinery, and other tangible property owned or operated by or on behalf of UCB and located at the industrial facility owned by Surface Specialties at La Llagosta, Spain.
- W. "Monitor Trustee" means the trustee appointed pursuant to Paragraph IV. of this Order.
- X. "Confidential Business Information" means any information relating to the UCB Amino Resins Business or the Fechenheim Additives Business (but excluding the assets that are described in Paragraph I.Q.5 in the definition of that business) (before or after the divestiture required by Paragraph II of this Order) that is not in the public domain, including, but not limited to:
 - 1. all contracts, sales call reports, customer purchase orders, customer product specifications and requirements, records of historical customer purchases, customer correspondence, customer information, invoices, payment records, customer records, and customer files (whether stored in electronic, magnetic, paper, or any other format) relating to the UCB Amino Resins Business, or the sale of Amino Resins to any

customers anywhere in the world at any time within five (5) years of the date this Order is accepted by the Commission for public comment; and,

2. all know-how, trade secrets, ongoing research and development, research materials, technical information, data of any kind (whether stored in electronic, magnetic, paper, or any other format) relating to the research, development, manufacture, marketing, or sale of Amino Resins anywhere in the world.

Confidential Business Information shall not include: (i) information that subsequently falls within the public domain through no violation of this Order by Respondent or breach of a confidentiality or non-disclosure agreement with respect to such information; (ii) information in the Respondent's possession as of the date hereof that was not obtained from UCB pursuant to the Confidentiality Agreement dated February 20, 2004, between Cytec and UCB; (iii) information independently developed by Respondent without reference to or use of information that Respondent obtained from the UCB Amino Resins Business after February 20, 2004; (iv) information that is required by law to be disclosed; (v) information that may be contained in documents or databases that also contain Confidential Business Information but does not relate to the UCB Amino Resins Business; or (vi) information relating to the Fechenheim Additives Business that is currently used in UCB's additives business outside Fechenheim.

- Y. "Person" means any individual, partnership, joint venture, firm, corporation, association, trust, unincorporated organization, joint venture, or other business or governmental entity.
- Z. "Primarily Related," when used to determine the appropriate allocation of an intangible asset between the UCB Amino

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Resins Business and the other Surface Specialties businesses listed in Paragraph I.AA.35, means:

1. For an asset that has commercial application, that more than fifty percent (50%) of the revenue derived from sales of products that make use of the asset were in calendar year 2004 attributable to products sold by the other Surface Specialties businesses; and
2. For an asset that does not have commercial application as of the date this Order is accepted by the Commission for public comment, that the primary inventor of the asset was employed by one or more of those other Surface Specialties businesses.

AA. "UCB Amino Resins Business" means all assets of the UCB Surface Specialties Business anywhere in the world relating to the research, development, marketing, sale, and production of Amino Resin Products, including, but not limited to:

1. the Indian Orchard Amino Resins Facility and the Fechenheim Amino Resins Facility;
2. an assignment of all of UCB's rights and obligations to the LaSalle Toll Agreement;
3. an assignment of all of UCB's rights and obligations to all contracts with Solutia that relate solely to the research, development, marketing, sale, and production of Amino Resin Products;
4. with respect to any contracts with Solutia that relate to the research, development, marketing, sale and production of both Amino Resin Products and other products, an assignment or other transfer (in a manner approved by the Commission) of all of UCB's rights and obligations under

such contracts that relate to the research, development, marketing, sale, and production of Amino Resin Products;

5. all real property (together with appurtenances, licenses, and permits) used for any purpose related to the research, development, manufacture, marketing, sale, and distribution of Amino Resins;
6. all patents, patent applications, copyrights, trademarks, trade names, owned by UCB, or that UCB has acquired any rights to use, that are related to the research, development, manufacture, marketing, sale, or use of Amino Resins;
7. all know-how, trade secrets, ongoing research and development, research materials, technical information, data of any kind (whether stored in electronic, magnetic, paper, or any other format), management information systems, information contained in management information systems, software, inventions, quality control data, test data, technological know-how, licenses, assignments, registrations, submissions, approvals, technology, specifications, designs, drawings, processes, recipes, protocols, and formulas, and all other intellectual property rights or confidential business information (in whatever form or medium), relating to the research, development, manufacture, marketing, or sale, and use of Amino Resins;
8. all contracts relating to the research, manufacture, marketing, or sale, and use of Amino Resins entered into with customers (together with associated bid and performance bonds), suppliers, sales representatives, distributors, agents, employees, personal property lessors, personal property lessees, licensors, licensees, consignors and consignees, and joint venture partners;
9. all governmental approvals, consents, licenses, permits, waivers, or other authorizations relating to the Indian

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Orchard Amino Resins Facility or the Fechenheim Amino Resins Facility;

10. all warranties and guarantees, express or implied, relating to any tangible or intangible asset, including the Indian Orchard Amino Resins Facility and the Fechenheim Amino Resins Facility, related to the research, development, manufacture, marketing, sale, and use of Amino Resins;
11. all customer lists, vendor lists, catalogs, sales promotion literature, and advertising materials relating to the research, development, manufacture, marketing, sale, and use of Amino Resins;
12. all contracts, sales call reports, customer purchase orders, customer product specifications and requirements, records of historical customer purchases, customer correspondence, customer information, information relating to customer qualification of Amino Resin Products, invoices, payment records, customer records, and customer files (whether stored in electronic, magnetic, paper, or any other format) relating to the UCB Amino Resins Business, or the sale of Amino Resins to any customers anywhere in the world at any time in the last 5 years;
13. all books, records, and files (whether stored in electronic, magnetic, paper, or any other format) relating to Amino Resins Products, together with access to any records Respondent retains to the extent necessary to permit the Acquirer to comply with applicable law or to defend itself against claims made on the basis of any liability it assumes in connection with its acquisition of the UCB Amino Resins Business and the Fechenheim Additives Business;
14. all plant facilities, machinery, equipment, furniture, fixtures, tools, vehicles, transportation and storage

facilities, and supplies relating to the research, development, manufacture, marketing, sale, and use of Amino Resins;

15. all rights in and to inventories of products, raw materials, supplies and parts, including work-in-process and finished goods relating to the research, development, manufacture, marketing, sale, and use of Amino Resins;
16. all items of prepaid expense relating to the research, development, manufacture, marketing, sale, and use of Amino Resins; and
17. any other tangible or intangible assets relating to the research and development, manufacture, marketing, distribution, or sale of Amino Resins that are reasonably necessary, in the sole discretion of the Commission, to operate the UCB Amino Resins business in a scope and manner to achieve the purposes of this Order or sufficient to remedy the harm to competition alleged in the Complaint.

Provided, however, that the UCB Amino Resins Business does not include any of the following:

18. the Werndorf Amino Resins Facility;
19. the La Llagosta Amino Resins Facility;
20. the Suzano Amino Resins Facility;
21. any assets used exclusively for the five (5) years prior to the date this Order is accepted by the Commission for public comment for the research, development, manufacture, marketing, or sale of products other than Amino Resin Products;

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22. any assets described in paragraphs I.AA.5, 10, 14 or 16 at or relating to the Werndorf Amino Resins Facility, the La Llagosta Amino Resins Facility, or the Suzano Amino Resins Facility;
23. All governmental approvals, consents, licenses, permits, waivers, or other authorizations relating to the Werndorf Amino Resins Facility, the La Llagosta Amino Resins Facility, or the Suzano Amino Resins Facility;
24. Any rights in or to inventories of products, raw materials, supplies or parts, including work-in-process, but not including finished goods, to the extent they relate to the manufacture of Amino Resins at the Werndorf Amino Resins Facility, the La Llagosta Amino Resins Facility, or the Suzano Amino Resins Facility;
25. The patents and patent applications set forth on Exhibit B to this Order;
26. The laboratory equipment at the Indian Orchard Manufacturing Facility set forth on Exhibit C to this Order;
27. Any assets transferred, retired, or disposed of during the Hold Separate period in the ordinary course of business;
28. Assets of any benefit plans allocable to the UCB Amino Resins Employees, to the extent the Acquirer does not assume liabilities associated with those plans prior to the Effective Date;
29. The UCBTM and Surface SpecialtiesTM marks and any derivatives thereof;
30. Any personnel records of UCB and Surface Specialties employees other than UCB Amino Resin Employees;

31. UCB's and Surface Specialties' corporate and regional headquarters;
32. Any management information systems (but not including Confidential Business Information that may reside on those systems), including hardware and software used by UCB or Surface Specialties prior to the Effective Date to provide services to UCB or Surface Specialties, that were not solely related to the UCB Amino Resins Business, including but not limited to all assets used by UCB and/or Surface Specialties to provide transition services to Cytec and to the UCB Amino Resins Business under the transition services agreement to be entered into between UCB and Cytec in connection with the Acquisition;
33. Assets of any UCB or Surface Specialties corporate service function that is not solely related to the UCB Amino Resins Business and all sales offices that are not solely related to the UCB Amino Resins Business;
34. Any and all cash and cash equivalents;
35. Any intangible asset that has not been used in the research, development, manufacture, marketing, distribution, or sale of Amino Resins in the two years preceding the date the Order is accepted by the Commission for public comment and that is Primarily Related to any of the following Surface Specialties Businesses: Radcure, alkyd, acrylic, urethane and epoxy coating resins, powder coating resins, adhesives, and additives (other than Fechenheim Additives and Modacure™);
36. Any tax returns of any Surface Specialties entity, Cytec or any affiliate of Cytec;
37. All insurance policies relating to the UCB Amino Resins Business and any right to proceeds thereunder;

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38. Any asset that Cyttec did not acquire as part of its acquisition of Surface Specialties.
- AA. “UCB Amino Resins Employees” means the people listed on Exhibit D to this Order, together with any other current full-time employees of Surface Specialties as of the Effective Date of Divestiture who, at any time within two years prior to the Effective Date of Divestiture of the UCB Amino Resins Business, were employed by the UCB Amino Resins Business or supported the UCB Amino Resins Business, excluding sales, distribution, technical service, customer service, legal, accounting, or other purely administrative support personnel.
- BB. “UCB Amino Resins Production Information” means all information relating to the past, present, planned, developed, or researched production of each grade of Amino Resins Products anywhere in the world, including pursuant to the LaSalle Toll Agreement, and includes all proprietary and public information relating to the specifications for each grade of Amino Resins Products, the raw material formulations, the operating conditions, the finishing process, the equipment cleaning procedures, plant maintenance information, the specifications for the manufacturing equipment, and any other information which relates to past, present, planned, developed, or researched production by UCB of any grades of Amino Resin Products in the ordinary course of business.
- CC. “Suzano Amino Resins Facility” means buildings, structures, fixtures, equipment, machinery, and other tangible property owned or operated by or on behalf of UCB and located at the industrial facility owned by Surface Specialties in Suzano, Brazil.
- DD. “Werndorf Amino Resins Facility” means buildings, structures, fixtures, equipment, machinery, and other tangible property owned or operated by or on behalf of UCB

and located at the industrial facility owned by Surface Specialties in Werndorf, Austria.

II.

IT IS FURTHER ORDERED that:

- A. Respondent shall, no later than one hundred and eighty (180) days from the date upon which this Order is accepted by the Commission for public comment, divest the UCB Amino Resins Business and the Fechenheim Additives Business, absolutely and in good faith and at no minimum price, to an Acquirer that receives the prior approval of the Commission, and in a manner that receives the prior approval of the Commission .
- B. At the option of the Acquirer (to be exercised no later than the time the Acquirer signs agreements with Respondent to effect the acquisition of the UCB Amino Resins Business) and subject to the approval of the Commission:
 1. Respondent shall enter into an agreement with the Acquirer requiring Respondent to sell and provide Acquirer with a supply of all, or any one or more, of the Amino Resin Products produced at one or more of the La Llagosta Amino Resins Facility, Suzano Amino Resins Facility, and Werndorf Amino Resins Facility at any time within five (5) years of the date this Order is accepted by the Commission for public comment. The agreement shall require Respondent to sell and provide the Acquirer with such Amino Resin Products for not longer than two (2) years at Respondent's Actual Costs. The agreement shall require Respondent to sell and provide the Acquirer with up to 110% of the greatest annual quantities of, and of comparable quality and specifications as, such Amino Resin Products sold by UCB or any predecessor to customers at any time within five (5) years of the date this Order is accepted by the Commission for public comment. The

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agreement shall provide that during the term of the agreement (and, for any particular item, for any longer period that may be required by law), Respondent may retain and have access to the books, records, or files included with the UCB Amino Resins Business to the extent reasonably necessary to comply with the terms of the agreement and this Order, and with any applicable legal obligations, insofar as those books, records, or files relate to the manufacture of Amino Resins at the Werndorf Amino Resins Facility, the La Llagosta Amino Resins Facility, or the Suzano Amino Resins Facility. Access to such books, records, and files shall be limited to personnel who need access for purposes of such compliance and shall in no event include marketing, sales, or other commercial personnel.

2. Respondent shall enter into contracts, licenses, or other agreements with the Acquirer (“Supplemental Rights Agreement”) sufficient to permit the Acquirer to use, for a period of up to two years after the Effective Date of Divestiture, assets, located anywhere in the world, that are not included in the definition of the UCB Amino Resins Business, but that have been used by Surface Specialties in some way in the twelve (12) months preceding the date this Order is accepted for public comment, in the research, development, manufacture, marketing, or sale of Amino Resins Products.
3. Respondent shall enter into a transition services agreement with the Acquirer, with an initial term of six (6) months following the Effective Date of Divestiture that can, upon a showing satisfactory to the Commission, be extended for a period of up to six (6) months, to provide the services which make use of the laboratory equipment set forth on Exhibit C to the Order, consistent with past practice at Surface Specialties.
4. Respondent shall grant the Acquirer a sole, irrevocable, perpetual, royalty-free license (with no cross-license or

grant-back obligation), with respect to the patents and patent applications listed on Exhibit B, with rights to sub-license to customers for use in connection with products the customer purchases from the Acquirer.

5. Respondent shall enter into an agreement to supply to the Acquirer administrative, human resources, and accounting services for a period not longer than six (6) months following the Effective Date.
 6. Respondent shall enter into contracts, licenses, or other agreements with the Acquirer (“Equivalent Contract Rights Agreement”): (1) sufficient to permit the Acquirer to obtain the equivalent economic and competitive benefit of any rights or obligations of UCB’s Amino Resins Business under any existing contract with Solutia that, for any reason, were not assigned, conveyed, or otherwise transferred to the Acquirer or (2) that are reasonably necessary to achieve the purposes of this Order.
 7. Respondent shall grant the Acquirer a non-exclusive, irrevocable, perpetual, royalty-free license (with no cross-license or grant-back obligations), for use in the field of Amino Resins, to all know-how, trade secrets, inventions, technological know-how, licenses, assignments, registrations, submissions, approvals, technology, specifications, designs, drawings, processes, recipes, protocols, and formulas that are included in Paragraph I.AA.35 of this Order.
- C. The Divestiture Agreements shall provide that the Acquirer can assign its rights under them, in whole but not in part, in connection with a sale of all or substantially all of the UCB Amino Resins Business and the Fechenheim Additives Business.
- D. Respondent may, at its option, require the Acquirer to grant Respondent a perpetual, royalty-free license (with no cross-

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license or grant-back obligations), for use only in fields other than Amino Resins, to all know-how, trade secrets, inventions, technological know-how, licenses, assignments, registrations, submissions, approvals, technology, specifications, designs, drawings, processes, recipes, protocols, and formulas that are included in the UCB Amino Resins Business pursuant to Paragraph I.AA.7 or I.AA.17 of this Order.

- E. Until the Effective Date of Divestiture of the UCB Amino Resins Business, Respondent shall take such actions as are necessary to maintain the viability and marketability of the UCB Amino Resins Business and to prevent the destruction, removal, wasting, deterioration, or impairment of the UCB Amino Resins Business, except for ordinary wear and tear. Respondent shall not be required to make capital expenditures other than those listed on the schedule attached as Exhibit E and those that are necessary expenditures during the Hold Separate period to maintain the viability and marketability of the UCB Amino Resins Business or to prevent the destruction, removal, wasting, deterioration, or impairment of the UCB Amino Resins Business, except for ordinary wear and tear.
- F. Subject to the approval of the Commission, Respondent shall enter into an agreement with the Acquirer that Respondent shall:
1. not provide, disclose, or otherwise make available any Confidential Business Information to any Person; and
 2. not use any Confidential Business Information for any reason other than as required or permitted by this Order;

provided, however, that the agreement shall permit Respondent to use Confidential Business Information only:
(i) for the purpose of performing or complying with Respondent's obligations under this Order, the Hold

Separate, or the Divestiture Agreements; or (ii) for the purpose of complying with Respondent's financial, tax reporting, health, safety, and environmental obligations or any other disclosure obligations imposed by law, regulation or judicial order.

G. Respondent shall:

1. not later than thirty days before the Effective Date of Divestiture, provide an opportunity for the Acquirer: (i) to meet personally, and outside the presence or hearing of any employee or agent of Cytex or Surface Specialties, with any one or more of the UCB Amino Resins Employees; and (ii) to make offers of employment to any one or more of the UCB Amino Resins Employees;
2. (i) not directly or indirectly interfere with the Acquirer's offer of employment to any one or more of the UCB Amino Resins Employees, directly or indirectly attempt to persuade any one or more of the UCB Amino Resins Employees to decline any offer of employment from the Acquirer, or offer any incentive to any UCB Amino Resins Employees to decline employment with the Acquirer; (ii) irrevocably waive any legal or equitable right to deter any UCB Amino Resins Employees from accepting employment with the Acquirer, including, but not limited to, any noncompete or confidentiality provisions of employment or other contracts with UCB that directly or indirectly relate to the UCB Amino Resins Business or the employment of any one or more of the UCB Amino Resins Employees by the Acquirer; (iii) not interfere with the employment by the Acquirer of any UCB Amino Resins Employees; and (iv) continue employee benefits offered by UCB or Cytex until the Effective Date of Divestiture, including regularly scheduled or merit raises and bonuses, and regularly scheduled vesting of all pension benefits; and,

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3. not, for a period of one year from the Effective Date of Divestiture, directly or indirectly, solicit, negotiate, hire, or enter into any arrangement for the services of all or any of the UCB Amino Resins Employees, unless such employee's employment has been terminated by the Acquirer.
- H. Prior to the Effective Date of Divestiture, Respondent shall secure all consents and waivers from all private entities that are necessary for the divestiture of the UCB Amino Resins Business, and for the continued research, development, manufacture, and sale of Amino Resin Products by the Acquirer.
 - I. Respondent shall comply with all terms of the Divestiture Agreements, and any breach by Respondent of any term of the Divestiture Agreements shall constitute a violation of this Order. If any term of the Divestiture Agreements varies from the terms of this Order ("Order Term"), then to the extent that Respondent cannot fully comply with both terms, the Order Term shall determine Respondent's obligations under this Order. Notwithstanding any paragraph, section, or other provision of the Divestiture Agreements, any failure to meet any condition precedent to closing (whether waived or not) or any modification of the Divestiture Agreements, without the prior approval of the Commission, shall constitute a failure to comply with this Order.
 - J. The purpose of the divestiture of the UCB Amino Resins Business and the Fechenheim Additives Business is to ensure the continuing, viable, and competitive operation of the UCB Amino Resins Business and the Fechenheim Additives Business in the same business and in the same manner in which the UCB Amino Resins Business and the Fechenheim Additives Business were engaged at the time of the announcement of the proposed Acquisition and to remedy the lessening of competition alleged in the Commission's complaint.

IT IS FURTHER ORDERED that:

- K. Respondent shall:
1. not provide, disclose, or otherwise make available any Confidential Business Information to any Person; and,
 2. not use any Confidential Business Information for any reason or purpose other than as otherwise required or permitted by this Order.
- L. Notwithstanding Paragraph III.A of this Order and subject to the Hold Separate, Respondent shall use Confidential Information only: (i) for the purpose of performing or complying with Respondent's obligations under this Order, the Hold Separate, or the Divestiture Agreements; or (ii) for the purpose of complying with Respondent's financial, tax reporting, health, safety, and environmental obligations or any other disclosure obligations imposed by law, regulation or judicial order.

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

- A. At any time after Respondent signs the Consent Agreement, the Commission may appoint a Person to serve as Monitor Trustee to monitor Respondent's compliance with the terms of this Order and the Divestiture Agreements made a part of this Order. The Monitor Trustee may be the same person as the Divestiture Trustee, or as the Hold Separate Trustee.
- B. If the Commission appoints a Person to serve as Monitor Trustee pursuant to this Paragraph IV. of this Order, Respondent shall consent to the following terms and

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conditions regarding the powers, duties, authorities, and responsibilities of the Monitor Trustee:

1. The Commission shall select the Monitor Trustee, subject to the consent of Respondent, which consent shall not be unreasonably withheld. If Respondent has not opposed in writing, including the reasons for opposing, the selection of any proposed trustee within ten (10) business days after notice from the staff of the Commission to Respondent of the identity of any proposed trustee, Respondent shall be deemed to have consented to the selection of the proposed trustee.
2. The Monitor Trustee shall have the power and authority to monitor Respondent'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 Trustee in a manner consistent with the purposes of this Order and in consultation with the Commission.
3. Within ten (10) days after appointment of the Monitor Trustee, Respondent shall execute an agreement ("Monitor Trustee Agreement") that, subject to the approval of the Commission, confers on the Monitor Trustee all the rights and powers necessary to permit the Monitor Trustee 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. Respondent may require the Monitor Trustee to sign a confidentiality agreement prohibiting the use, or disclosure to anyone other than the Commission, of any competitively sensitive or proprietary information gained as a result of his or her role as Monitor Trustee.
4. The Monitor Trustee shall serve until the earlier of: (i) the expiration of this Order pursuant to Paragraph IX; or (ii) the

expiration of all the terms that comprise the Divestiture Agreements.

5. The Monitor Trustee shall have full and complete access to Respondent's books, records, documents, personnel, facilities, and technical information relating to compliance with this Order and the Divestiture Agreements, or to any other relevant information, as the Monitor Trustee may reasonably request. Respondent shall cooperate with any reasonable request of the Monitor Trustee. Respondent shall take no action to interfere with or impede the Monitor Trustee's ability to monitor Respondent's compliance with this Order and the Divestiture Agreements.
6. The Monitor Trustee shall serve, without bond or other security, at the expense of Respondent, on such reasonable and customary terms and conditions as the Commission may set. The Monitor Trustee shall have authority to employ, at the expense of Respondent, such consultants, accountants, attorneys and other representatives and assistants as are reasonably necessary to carry out the Monitor Trustee's duties and responsibilities. The Monitor Trustee shall account for all expenses incurred, including fees for his or her services, subject to the approval of the Commission.
7. Respondent shall indemnify the Monitor Trustee and hold the Monitor Trustee harmless against any losses, claims, damages, liabilities, or expenses arising out of, or in connection with, the performance of the Monitor Trustee's duties (including the duties of the Monitor Trustee's employees), 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 Monitor Trustee.

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8. If at any time the Commission determines that the Monitor Trustee has ceased to act or failed to act diligently, or is unwilling or unable to continue to serve, the Commission may appoint a substitute to serve as Monitor Trustee in the same manner as provided in this Paragraph IV.
 9. The Commission may on its own initiative or at the request of the Monitor Trustee 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.
 10. The Monitor Trustee shall report in writing to the Commission concerning Respondent's compliance with this Order and the Divestiture Agreements every ninety days for a period of two years from the date Respondent signs the Consent Agreement and annually thereafter on the anniversary of the date this Order is accepted by the Commission for public comment during the remainder of the Monitor Trustee's period of appointment, and at such other times as representatives of the Commission may request.
- C. Respondent shall comply with all terms of the Monitor Trustee Agreement, and any breach by Respondent of any term of the Trustee Agreement shall constitute a violation of this Order. Notwithstanding any paragraph, section, or other provision of the Monitor Trustee Agreement, any modification of the Monitor Trustee Agreement, without the prior approval of the Commission, shall constitute a failure to comply with this Order.

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

- A. If Respondent fails to complete the divestitures required by Paragraph II. of this Order within the time periods specified

therein, then the Commission may appoint a Divestiture Trustee to divest the UCB Amino Resins Business and the Fechenheim Additives Business to an Acquirer and to execute Divestiture Agreements that satisfy the requirements of Paragraph II of this Order. The Divestiture Trustee may be the same person as the Monitor Trustee or the Hold Separate Trustee, and shall have the authority and responsibility to divest the UCB Amino Resins Business and the Fechenheim Additives Business absolutely and in good faith, and with the Commission's prior approval.

- B. Neither the decision of the Commission to appoint a Divestiture Trustee, nor the decision of the Commission not to appoint a Divestiture Trustee, to divest any of the assets under this Paragraph V. shall preclude the Commission or the Attorney General from seeking civil penalties or any relief available to it, including a court-appointed trustee, pursuant to § 5(*l*) of the Federal Trade Commission Act, 15 U.S.C. § 45(*l*), or any other statute enforced by the Commission, for any failure by the Respondent to comply with this Order.
- C. If a Divestiture Trustee is appointed by the Commission or a court pursuant to this Paragraph V. of this Order to divest the UCB Amino Resins Business, Respondent shall consent to the following terms and conditions regarding the Divestiture Trustee's powers, duties, authority, and responsibilities:
 - 1. The Commission shall select the Divestiture Trustee, subject to the consent of Respondent, which consent shall not be unreasonably withheld. If Respondent has not opposed, in writing, including the reasons for opposing, the selection of any proposed Divestiture Trustee within ten (10) days after notice from the staff of the Commission to Respondent of the identity of any proposed Divestiture Trustee, Respondent shall be deemed to have consented to the selection of the proposed Divestiture Trustee.

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2. Subject to the prior approval of the Commission, the Divestiture Trustee shall have the exclusive power and authority to divest the UCB Amino Resins Business and the Fechenheim Additives Business to an Acquirer that receives the prior approval of the Commission pursuant to the terms of this Order and to enter into Divestiture Agreements with the Acquirer pursuant to the terms of this Order, which Divestiture Agreements shall be subject to the prior approval of the Commission.
3. Within ten (10) days after appointment of the Divestiture Trustee, Respondent shall execute a (or amend the existing) trust agreement (“Divestiture Trustee Agreement”) that, subject to the prior approval of the Commission and, in the case of a court-appointed trustee, of the court, transfers to the Divestiture Trustee all rights and powers necessary to permit the Divestiture Trustee to divest the UCB Amino Resins Business and the Fechenheim Additives Business to an Acquirer and to enter into Divestiture Agreements with the Acquirer.
4. The Divestiture Trustee shall have twelve (12) months from the date the Commission, or the court, in the case of a court-appointed trustee, approves the Divestiture Trustee Agreement described in this Paragraph V. of this Order to divest the UCB Amino Resins Business and the Fechenheim Additives Business and to enter into Divestiture Agreements with an Acquirer that satisfies the requirements of Paragraph II. of this Order. If, however, at the end of the applicable twelve-month period, the Divestiture Trustee has submitted to the Commission or the court a plan of divestiture or believes that divestiture can be achieved within a reasonable time, such divestiture period may be extended by the Commission, or, in the case of a court-appointed trustee, by the court; provided, however, the Commission may extend such divestiture period only two (2) times.

5. The Divestiture Trustee shall have full and complete access to the personnel, books, records, and facilities of Respondent related to the research, development, manufacture, marketing, distribution, or sale of Amino Resin Products, or related to any other relevant information, as the Divestiture Trustee may request. Respondent shall develop such financial or other information as the Divestiture Trustee may request and shall cooperate with the Divestiture Trustee. Respondent shall take no action to interfere with or impede the Divestiture Trustee's accomplishment of his or her responsibilities.
6. The Divestiture Trustee shall use reasonable efforts to negotiate the most favorable price and terms available in each contract that is submitted to the Commission, subject to Respondent's absolute and unconditional obligation to divest at no minimum price and the Divestiture Trustee's obligation to expeditiously accomplish the remedial purpose of this Order; to assure that Respondent enters into Divestiture Agreements that comply with the provisions of Paragraph II. of this Order; to assure that Respondent complies with the remaining provisions of this Order; and to assure that the Acquirer obtains the assets required to research, develop, manufacture, sell and distribute Amino Resin Products. The divestiture shall be made to, and the Divestiture Agreements executed with, an Acquirer in the manner set forth in Paragraph II. of 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 acquiring entity, the Divestiture Trustee shall divest to the acquiring entity or entities selected by Respondent from among those approved by the Commission, *provided further, however*, that Respondent shall select such entity within five (5) days of receiving notification of the Commission's approval.
7. The Divestiture Trustee shall serve, without bond or other security, at the expense of Respondent, on such reasonable

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and customary terms and conditions as the Commission or a court may set. The Divestiture Trustee shall have the authority to employ, at the expense of Respondent, such consultants, accountants, attorneys, investment bankers, business brokers, appraisers, and other representatives and assistants as are necessary to carry out the Divestiture Trustee's duties and responsibilities. The Divestiture Trustee shall account for all monies derived from the divestiture and all expenses incurred. After approval by the Commission and, in the case of a court-appointed trustee, by the court, of the account of the trustee, including fees for his or her services, all remaining monies shall be paid at the direction of Respondent. The Divestiture Trustee's compensation shall be based at least in significant part on a commission arrangement contingent on the Divestiture Trustee's locating an Acquirer and assuring compliance with this Order.

8. Respondent shall indemnify the Divestiture Trustee and hold the Divestiture Trustee harmless against any losses, claims, damages, liabilities, or expenses arising out of, or in connection with, the performance of the Divestiture Trustee's duties, including all reasonable fees of counsel and other expenses incurred in connection with the preparation for, or defense of, any claim, whether or not resulting in any liability, except to the extent that such losses, claims, damages, liabilities, or expenses result from misfeasance, gross negligence, willful or wanton acts, or bad faith by the Divestiture Trustee.
9. If the Commission determines that the Divestiture Trustee has ceased to act or failed to act diligently, the Commission may appoint a substitute trustee in the same manner as provided in this Paragraph V. of this Order.
10. The Commission or, in the case of a court-appointed trustee, the court, may on its own initiative or at the request of the Divestiture Trustee issue such additional

orders or directions as may be necessary or appropriate to comply with the terms of this Order.

11. The Divestiture Trustee shall have no obligation or authority to operate or maintain the Divested Assets.
 12. The Divestiture Trustee shall report in writing to Respondent and to the Commission every two (2) months concerning his or her efforts to divest the UCB Amino Resins Business and the Fechenheim Additives Business and Respondent's compliance with the terms of this Order.
- D. Respondent shall comply with all terms of the Divestiture Trustee Agreement, and any breach by Respondent of any term of the Trustee Agreement shall constitute a violation of this Order. Notwithstanding any paragraph, section, or other provision of the Divestiture Trustee Agreement, any modification of the Divestiture Trustee Agreement, without the prior approval of the Commission, shall constitute a failure to comply with this Order.

V.

IT IS FURTHER ORDERED that Respondent shall notify the Commission at least thirty (30) days prior to any proposed change in the corporate Respondent such as dissolution, assignment, sale resulting in the emergence of a successor corporation, or the creation or dissolution of subsidiaries or any other change in the corporation that may affect compliance obligations arising out of this Order.

VI.

IT IS FURTHER ORDERED that:

- A. Within thirty (30) days after the date this Order becomes final and every thirty (30) days thereafter until the Respondent has fully complied with the provisions of

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Paragraphs II. and V. of this Order, Respondent shall submit to the Commission (with simultaneous copies to the Monitor Trustee, the Hold Separate Trustee and the Divestiture Trustee(s), as appropriate) verified written reports setting forth in detail the manner and form in which it intends to comply, is complying, and has complied with Paragraphs II. and V. of this Order. Respondent shall include in the reports, among other things that are required from time to time, a full description of the efforts being made to comply with Paragraphs II.A., II.B. and II.C. of this Order, including a description of all substantive contacts or negotiations for the divestitures and the identity of all parties contacted. Respondent shall include in the reports copies of all written communications to and from such parties, all internal memoranda, and all reports and recommendations concerning completing the obligations; and,

- B. One (1) year from the date this Order becomes final, annually for the next three (3) years on the anniversary of the date this Order becomes final, and at other times as the Commission may require, Respondent shall file verified written reports with the Commission setting forth in detail the manner and form in which it has complied and is complying with this Order.

VII.

IT IS FURTHER ORDERED that for the purpose of determining or securing compliance with this Order, upon written request, Respondent shall permit any duly authorized representative of the Commission:

- A. Access, during office hours and in the presence of counsel, to all facilities and access to inspect and copy all books, ledgers, accounts, correspondence, memoranda and other records and documents in the possession or under the control of Respondent relating to any matters contained in this Order; and

- B. Upon five (5) days' notice to Respondent and without restraint or interference from it, to interview officers, directors, employees, agents or independent contractors of Respondent.

VIII.

IT IS FURTHER ORDERED that this Order shall terminate on April 7, 2015.

Order to Hold Separate

ORDER TO HOLD SEPARATE AND MAINTAIN ASSETS

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

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

The Commission having thereafter considered the matter and having determined that it had reason to believe that Respondent have violated the said Acts and that a Complaint should issue stating its charges in that respect, and having determined to accept the executed Consent Agreement and to place such Consent Agreement containing the Decision and Order on the public record for a period of thirty (30) days for the receipt and consideration of public comments, now in further conformity with the procedure described in Commission Rule 2.34, 16 C.F.R. § 2.34, the Commission hereby issues its Complaint, makes the following jurisdictional findings and issues this Order to Hold Separate and Maintain Assets (“Hold Separate Order”):

1. Respondent Cytec is a corporation organized, existing and doing business under and by virtue of the laws of Delaware, with its office and principal place of business

located at Five Garret Mountain Plaza, West Paterson,
New Jersey 07424.

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 Hold Separate, the following definitions shall apply:

- A. “Cytec” means Cytec Industries Inc., its directors, officers, employees, agents, representatives, predecessors, successors, and assigns; and its parents, joint ventures, subsidiaries, divisions, groups, and affiliates controlled by Cytec, and the respective directors, officers, employees, agents, representatives, predecessors, successors, and assigns of each.
- B. “UCB” means UCB S.A., a corporation organized, existing, and doing business under and by virtue of the laws of Belgium, with its registered office located at 60 Allée de la Recherche, B-1070, Brussels, Belgium; and all joint ventures, subsidiaries, divisions, groups, and affiliates controlled by UCB, including without limitation Surface Specialties Inc. (formerly known as UCB Chemicals Corp.) and UCB, Inc.
- C. “Surface Specialties” means the Surface Specialties business of UCB which Cytec agreed to acquire as described in the October 1, 2004, Stock and Asset Purchase Agreement between UCB S.A. and Cytec Industries Inc.
- D. “Commission” means the Federal Trade Commission.
- E. “Respondent” means Cytec Industries Inc.
- F. “Acquirer” means each Person approved by the Commission to acquire the UCB Amino Resins Business pursuant to Paragraphs II or V of this Order.

Order to Hold Separate

- G. “Actual Cost” means actual direct material plus actual direct labor plus allocated actual manufacturing overhead at the Suzano Amino Resins Facility, the Werndorf Amino Resins Facility and the La Llagosta Amino Resins Facility.
- H. “Acquisition” means the proposed acquisition of Surface Specialties by Cytec, as described in the October 1, 2004, Stock and Asset Purchase Agreement between UCB S.A. and Cytec Industries Inc.
- I. “Amino Resins” means products obtained through the addition of formaldehyde to urea, melamine or benzoguanamine and such products etherified with linear or branched aliphatic alcohols (C1-C18 atoms). This definition excludes the products obtained through the addition of formaldehyde to phenols (the phenolics), the products obtained through the addition of formaldehyde to carbamates (such as HF480 and Alvnovol VPN 1759) and the products obtained through the reaction of butylated urea formaldehyde with alkyds (plasticized urea formaldehyde resins).
- J. “Amino Resin Products” means all of those grades and types of Amino Resins currently manufactured, marketed, or sold by UCB, all of those grades and types of Amino Resins currently being researched or developed by UCB, and all of those grades and types of Amino Resins that have been researched, developed, manufactured, marketed, or sold by UCB or any predecessor any time within five years of the date this Order is accepted by the Commission for public comment. “Amino Resin Products” does not include formulated or combination products consisting of an Amino Resin and one or more polymers, other than Modacure™ resins.
- K. “Divestiture Agreements” means any agreement that receives the prior approval of the Commission between Respondent and an Acquirer (or between a trustee appointed pursuant to Paragraph V of this Order and an Acquirer) related to the UCB Amino Resins Business required to be divested pursuant to Paragraphs II or V of this Order and the rights or assets to be licensed or

otherwise made available to the Acquirer pursuant to Paragraph II of this Order, including, but not limited to any agreement between the Respondent and the Acquirer required or permitted by or pursuant to Paragraph II.B. of this Order.

- L. “Indian Orchard Manufacturing Facility” means the industrial park owned and operated by Solutia, Inc. near Springfield, Massachusetts and the immediate vicinity.
- M. “Indian Orchard Amino Resins Facility” means buildings, structures, fixtures, equipment, machinery, and other tangible property owned, operated, leased, or otherwise within the custody or control by or on behalf of UCB and located at the Indian Orchard Manufacturing Facility used for any purpose related to the research, development, manufacture, marketing, sale, and distribution of Amino Resin Products.
- N. “Fechenheim Manufacturing Facility” means the industrial park owned by AllestraChemie GmbH near Fechenheim, Germany and the immediate vicinity.
- O. “Fechenheim Amino Resins Facility” means buildings, structures, fixtures, equipment, machinery, and other tangible property owned or operated by or on behalf of UCB and located at the Fechenheim Manufacturing Facility used for any purpose related to the research, development, manufacture, marketing, sale, and distribution of Amino Resin Products.
- P. “Fechenheim Additives” means the additives listed on Exhibit A to this Order, together with any improvements.
- Q. “Fechenheim Additives Business” means:
 - 1. the buildings, structures, fixtures, equipment, machinery, and other tangible property owned or operated by or on behalf of UCB and located at the Fechenheim Manufacturing Facility used for any purpose related to the research, development, manufacture, marketing, sale, and distribution of Fechenheim Additives;
 - 2. the books, records, and files (whether stored in electronic, magnetic, paper, or any other format) located at the Fechenheim Manufacturing Facility that are related

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- to the research, development, manufacture, marketing, sale and distribution of the Fechenheim Additives;
3. all of UCB's rights in intellectual property that is used exclusively in the research, development, manufacture, marketing, sale and distribution of Fechenheim Additives;
 4. all of UCB's rights in any tolling agreement pursuant to which AllessaChemie GmbH produces Fechenheim Additives; and
 5. a perpetual, non-exclusive, royalty-free license, limited to the field of Fechenheim Additives, to all of UCB's other intellectual property, as of the date this Order is accepted by the Commission for public comment, used in the research, development, manufacture, marketing, sale and distribution of Fechenheim Additives, with a right to sub-license customers for use in connection with products the customer purchases from the Acquirer.
- R. "LaSalle Toll Agreement" means the January 31, 2003, agreement between UCB Chemicals Corp. and UCB, Inc. and Solutia Canada Inc. relating to the toll manufacture of Amino Resin Products for UCB at Solutia Canada Inc.'s manufacturing site in LaSalle, Quebec.
- S. "Divestiture Trustee" means the divestiture trustee(s) appointed pursuant to Paragraph V. of this Order.
- T. "Effective Date of Divestiture" means the date on which the divestiture of the UCB Amino Resins Business to the Acquirer is consummated.
- U. "La Llagosta Amino Resins Facility" means the buildings, structures, fixtures, equipment, machinery and other tangible property owned or operated by or on behalf of UCB and located at the industrial facility owned by Surface Specialties at La Llagosta, Spain.
- V. "Confidential Business Information" means any information relating to the UCB Amino Resins Business or the Fechenheim Additives Business (but excluding the assets that are described in Paragraph I.Q.5 in the definition of that business) (before or after the divestiture required by Paragraph II of this Order) that is not in the

public domain, including, but not limited to:

1. all contracts, sales call reports, customer purchase orders, customer product specifications and requirements, records of historical customer purchases, customer correspondence, customer information, invoices, payment records, customer records, and customer files (whether stored in electronic, magnetic, paper, or any other format) relating to the UCB Amino Resins Business, or the sale of Amino Resins to any customers anywhere in the world at any time within five (5) years of the date this Order is accepted by the Commission for public comment; and,
2. all know-how, trade secrets, ongoing research and development, research materials, technical information, data of any kind (whether stored in electronic, magnetic, paper, or any other format) relating to the research, development, manufacture, marketing or sale of Amino Resins anywhere in the world.

Confidential Business Information shall not include: (i) information that subsequently falls within the public domain through no violation of this Order by Respondent or breach of a confidentiality or non-disclosure agreement with respect to such information; (ii) information in the Respondent's possession as of the date hereof that was not obtained from UCB pursuant to the Confidentiality Agreement dated February 20, 2004, between Cytec and UCB; (iii) information independently developed by Respondent without reference to or use of information that Respondent obtained from the UCB Amino Resins Business after February 20, 2004; (iv) information that is required by law to be disclosed; (v) information that may be contained in documents or databases that also contain Confidential Business Information but does not relate to the UCB Amino Resins Business or (vi) information relating to the Fechenheim Additives Business that is currently used in UCB's additives business outside Fechenheim.

W. "Person" means any individual, partnership, joint venture, firm, corporation, association, trust, unincorporated organization, joint venture, or other business or

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- governmental entity.
- X. “Primarily Related,” when used to determine the appropriate allocation of an intangible asset between the UCB Amino Resins Business and the other Surface Specialties businesses listed in Paragraph I.AA.35, means:
1. For an asset that has commercial application, that more than fifty percent (50%) of the revenue derived from sales of products that make use of the asset were in calendar year 2004 attributable to products sold by the other Surface Specialties businesses; and,
 2. For an asset that does not have commercial application as of the date this Order is accepted by the Commission for public comment, that the primary inventor of the asset was employed by one or more of those other Surface Specialties businesses.
- Y. “UCB Amino Resins Business” means all assets of the UCB Surface Specialties Business anywhere in the world relating to the research, development, marketing, sale, and production of Amino Resin Products, including, but not limited to:
1. the Indian Orchard Amino Resins Facility and the Fechenheim Amino Resins Facility;
 2. an assignment of all of UCB’s rights and obligations to the LaSalle Toll Agreement;
 3. an assignment of all of UCB’s rights and obligations to all contracts with Solutia that relate solely to the research, development, marketing, sale, and production of Amino Resin Products;
 4. with respect to any contracts with Solutia that relate to the research, development, marketing, sale and production of both Amino Resin Products and other products, an assignment or other transfer (in a manner approved by the Commission) of all of UCB’s rights and obligations under such contracts that relate to the research, development, marketing, sale, and production of Amino Resin Products;
 5. all real property (together with appurtenances, licenses and permits) used for any purpose related to the research,

- development, manufacture, marketing, sale, and distribution of Amino Resins;
6. all patents, patent applications, copyrights, trademarks, trade names, owned by UCB, or that UCB has acquired any rights to use, that are related to the research, development, manufacture, marketing, sale or use of Amino Resins;
 7. all know-how, trade secrets, ongoing research and development, research materials, technical information, data of any kind (whether stored in electronic, magnetic, paper, or any other format), management information systems, information contained in management information systems, software, inventions, quality control data, test data, technological know-how, licenses, assignments, registrations, submissions, approvals, technology, specifications, designs, drawings, processes, recipes, protocols, and formulas, and all other intellectual property rights or confidential business information (in whatever form or medium), relating to the research, development, manufacture, marketing, or sale, and use of Amino Resins;
 8. all contracts relating to the research, manufacture, marketing, or sale, and use of Amino Resins entered into with customers (together with associated bid and performance bonds), suppliers, sales representatives, distributors, agents, employees, personal property lessors, personal property lessees, licensors, licensees, consignors and consignees, and joint venture partners;
 9. all governmental approvals, consents, licenses, permits, waivers, or other authorizations relating to the Indian Orchard Amino Resins Facility or the Fechenheim Amino Resins Facility;
 10. all warranties and guarantees, express or implied, relating to any tangible or intangible asset, including the Indian Orchard Amino Resins Facility and the Fechenheim Amino Resins Facility, related to the research, development, manufacture, marketing, or sale, and use of Amino Resins;

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11. all customer lists, vendor lists, catalogs, sales promotion literature, and advertising materials relating to the research, development, manufacture, marketing, or sale, and use of Amino Resins;
12. all contracts, sales call reports, customer purchase orders, customer product specifications and requirements, records of historical customer purchases, customer correspondence, customer information, information relating to customer qualification of Amino Resin Products, invoices, payment records, customer records, and customer files (whether stored in electronic, magnetic, paper, or any other format) relating to the UCB Amino Resins Business, or the sale of Amino Resins to any customers anywhere in the world at any time in the last 5 years;
13. all books, records, and files (whether stored in electronic, magnetic, paper, or any other format) relating to Amino Resins Products, together with access to any records Respondent retains to the extent necessary to permit the Acquirer to comply with applicable law or to defend itself against claims made on the basis of any liability it assumes in connection with its acquisition of the UCB Amino Resins Business and the Fechenheim Additives Business;
14. all plant facilities, machinery, equipment, furniture, fixtures, tools, vehicles, transportation and storage facilities, and supplies relating to the research, development, manufacture, marketing, or sale, and use of Amino Resins;
15. all rights in and to inventories of products, raw materials, supplies and parts, including work-in-process and finished goods relating to the research, development, manufacture, marketing, or sale, and use of Amino Resins;
16. all items of prepaid expense relating to the research, development, manufacture, marketing, or sale, and use of Amino Resins; and

17. any other tangible or intangible assets relating to the research and development, manufacture, marketing, distribution or sale of Amino Resins that are reasonably necessary, in the sole discretion of the Commission, to operate the UCB Amino Resins business in a scope and manner to achieve the purposes of this Order or sufficient to remedy the harm to competition alleged in the Complaint.

Provided, however, that the UCB Amino Resins Business does not include any of the following:

18. the Werndorf Amino Resins Facility;
19. the La Llagosta Amino Resins Facility;
20. the Suzano Amino Resins Facility;
21. any assets used exclusively for the five (5) years prior to the date this Order is accepted by the Commission for public comment for the research, development, manufacture, marketing, or sale of products other than Amino Resin Products;
22. any assets described in paragraphs I.AA.5, 10, 14 or 16 at or relating to the Werndorf Amino Resins Facility, the La Llagosta Amino Resins Facility or the Suzano Amino Resins Facility;
23. All governmental approvals, consents, licenses, permits, waivers, or other authorizations relating to the Werndorf Amino Resins Facility, the La Llagosta Amino Resins Facility or the Suzano Amino Resins Facility;
24. Any rights in or to inventories of products, raw materials, supplies or parts, including work-in-process, but not including finished goods, to the extent they relate to the manufacture of Amino Resins at the Werndorf Amino Resins Facility, the La Llagosta Amino Resins Facility or the Suzano Amino Resins Facility;
25. The patents and patent applications set forth on Exhibit B to this Order;

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26. The laboratory equipment at the Indian Orchard Manufacturing Facility set forth on Exhibit C to this Order;
27. Any assets transferred, retired or disposed of during the Hold Separate period in the ordinary course of business;
28. Assets of any benefit plans allocable to the UCB Amino Resins Employees, to the extent the Acquirer does not assume liabilities associated with those plans prior to the Effective Date;
29. The UCBTM and Surface SpecialtiesTM marks and any derivatives thereof;
30. Any personnel records of UCB and Surface Specialties employees other than UCB Amino Resin Employees;
31. UCB's and Surface Specialties' corporate and regional headquarters;
32. Any management information systems (but not including Confidential Business Information that may reside on those systems), including hardware and software used by UCB or Surface Specialties prior to the Effective Date to provide services to UCB or Surface Specialties, that were not solely related to the UCB Amino Resins Business, including but not limited to all assets used by UCB and/or Surface Specialties to provide transition services to Cytec and to the UCB Amino Resins Business under the transition services agreement to be entered into between UCB and Cytec in connection with the Acquisition;
33. Assets of any UCB or Surface Specialties corporate service function that is not solely related to the UCB Amino Resins Business and all sales offices that are not solely related to the UCB Amino Resins Business;
34. Any and all cash and cash equivalents;
35. Any intangible asset that has not been used in the research and development, manufacture, marketing,

- distribution or sale of Amino Resins in the two years preceding the date the Order is accepted by the Commission for public comment and that is Primarily Related to any of the following Surface Specialties Businesses: Radcure, alkyd, acrylic, urethane and epoxy coating resins, powder coating resins, adhesives, and additives (other than Fechenheim Additives and Modacure™);
36. Any tax returns of any Surface Specialties entity, Cytec or any affiliate of Cytec;
 37. All insurance policies relating to the UCB Amino Resins Business and any right to proceeds thereunder;
 38. Any asset that Cytec did not acquire as part of its acquisition of Surface Specialties.
- Z. “UCB Amino Resins Employees” means the people listed on Exhibit D to this Order, together with any other current full-time employees of Surface Specialties as of the Effective Date of Divestiture who, at any time within two years prior to the Effective Date of Divestiture of the UCB Amino Resins Business, were employed by the UCB Amino Resins Business or supported the UCB Amino Resins Business, excluding sales, distribution, technical service, customer service, legal, accounting or other purely administrative support personnel.
- AA. “UCB Amino Resins Production Information” means all information relating to the past, present, planned, developed, or researched production of each grade of Amino Resins Products anywhere in the world, including pursuant to the LaSalle Toll Agreement, and includes all proprietary and public information relating to the specifications for each grade of Amino Resins Products, the raw material formulations, the operating conditions, the finishing process, the equipment cleaning procedures, plant maintenance information, the specifications for the manufacturing equipment, and any other information which relates to past, present, planned, developed, or researched production by UCB of any grades of Amino Resin Products in the ordinary course of business.

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- BB. “Suzano Amino Resins Facility” means buildings, structures, fixtures, equipment, machinery and other tangible property owned or operated by or on behalf of UCB and located at the industrial facility owned by Surface Specialties in Suzano, Brazil.
- CC. “Werndorf Amino Resins Facility” means buildings, structures, fixtures, equipment, machinery and other tangible property owned or operated by or on behalf of UCB and located at the industrial facility owned by Surface Specialties in Werndorf, Austria.
- DD. “Decision and Order” means:
1. until the issuance of a final Decision and Order by the Commission, the proposed Decision and Order incorporated into and made a part of the Consent Agreement; or,
 2. following the issuance of a final Decision and Order by the Commission, the Decision and Order issued by the Commission.
- EE. “Divestiture Trustee” means the divestiture trustee(s) appointed pursuant to Paragraph V. of the Decision and Order.
- FF. “Held Separate Business” means the UCB Amino Resins Business.
- GG. “Hold Separate Order” means the Order to Hold Separate and Maintain Assets incorporated into and made a part of the Agreement Containing Consent Orders.
- HH. “Hold Separate Period” means the time period during which the Hold Separate is in effect, which shall begin on the date that the Acquisition is consummated and terminated pursuant to Paragraph VII. hereof.
- II. “Hold Separate Trustee” means the trustee appointed pursuant to Paragraph II of this Hold Separate Order.
- JJ. “Monitor Trustee” means the trustee appointed pursuant to Paragraph IV. of the Decision and Order.

II.**IT IS FURTHER ORDERED THAT:**

- A. During the Hold Separate Period, Respondent shall hold the Held Separate Business separate, apart, and independent as required by this Hold Separate Order and shall vest the Held Separate Business with all rights, powers, and authority necessary to conduct its business; Respondent shall not exercise direction or control over, or influence directly or indirectly, the Held Separate Business or any of its operations, or the Hold Separate Trustee, except to the extent that Respondent must exercise direction and control over the Held Separate Business as is necessary to assure compliance with this Hold Separate Order, the Consent Agreement, and with all applicable laws, including, in consultation with the Hold Separate Trustee, continued oversight of the Held Separate Business's compliance with policies and standards concerning the safety, health, and environmental aspects of its operations and the integrity of its financial controls; and Respondent shall have the right to defend any legal claims, investigations or enforcement actions threatened or brought against any Held Separate Business.
- B. Until the Effective Date of Divestiture, Respondent shall take such actions as are necessary to maintain the viability and marketability of the Held Separate Business to prevent the destruction, removal, wasting, deterioration, or impairment of any of the assets, except for ordinary wear and tear.
- C. The purposes of this Hold Separate Order are to: (1) preserve the Held Separate Business as a viable, competitive, and ongoing business independent of Respondent until the divestiture required by the Decision and Order is achieved; (2) assure that no Confidential Business Information is exchanged between Respondent and the Held Separate Business, except in accordance with the provisions of this Hold Separate Order; (3) prevent interim harm to competition pending the relevant divestitures and

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other relief; and (4) help remedy any anticompetitive effects of the proposed Acquisition.

- D. Respondent shall hold the Held Separate Business separate, apart, and independent on the following terms and conditions:
1. Richard M. Klein shall serve as Hold Separate Trustee.
 2. Within five (5) days of the date this Hold Separate Order becomes final, Respondent shall execute an agreement with the Hold Separate Trustee (“Trustee Agreement”) that, subject to the approval of the Commission, confers at least the following rights and obligations upon the Respondent and the Hold Separate Trustee:
 - a. The Trustee Agreement shall require that, no later than one (1) day after the Acquisition Date, Respondent transfer to the Hold Separate Trustee all rights, powers, and authorities necessary to permit the Hold Separate Trustee to perform his/her duties and responsibilities, pursuant to this Hold Separate Order and consistent with the purposes of the Decision and Order.
 - b. No later than one (1) day after the Acquisition Date, Respondent shall, pursuant to the Trustee Agreement, transfer to the Hold Separate Trustee all rights, powers, and authorities necessary to permit the Hold Separate Trustee to perform his/her duties and responsibilities, pursuant to this Hold Separate Order and consistent with the purposes of the Decision and Order.
 - c. The Hold Separate Trustee shall have the responsibility, consistent with the terms of this Hold Separate Order and the Decision and Order, for monitoring the organization of the Held Separate Business; for managing the Held Separate Business through the Manager; for maintaining the independence of the Held Separate Business; and for monitoring Respondent’s compliance with its obligations pursuant to this Hold Separate Order and the Decision and Order.

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- d. The Hold Separate Trustee shall have full and complete access to all personnel, books, records, documents and facilities of the Held Separate Business or to any other relevant information as the Hold Separate Trustee may reasonably request including, but not limited to, all documents and records kept by Respondent in the ordinary course of business that relate to the Held Separate Business. Respondent shall develop such financial or other information as the Hold Separate Trustee may request and shall cooperate with the Hold Separate Trustee. Respondent shall take no action to interfere with or impede the Hold Separate Trustee's ability to monitor Respondent's compliance with this Hold Separate Order and the Consent Agreement or otherwise to perform his/her duties and responsibilities consistent with the terms of this Hold Separate.
- e. The Hold Separate Trustee shall have the authority to employ, at the cost and expense of Respondent, such consultants, accountants, attorneys, and other representatives and assistants as are reasonably necessary to carry out the Hold Separate Trustee's duties and responsibilities.
- f. The Commission may require the Hold Separate Trustee to sign an appropriate confidentiality agreement relating to Commission materials and information received in connection with performance of the Hold Separate Trustee's duties.
- g. Respondent may require the Hold Separate Trustee to sign a confidentiality agreement prohibiting the disclosure of any Confidential Business Information gained as a result of his or her role as Hold Separate Trustee to anyone other than the Commission.
- h. Thirty (30) days after the Hold Separate Order becomes final, and every thirty (30) days thereafter until the Hold Separate Order terminates, the Hold Separate Trustee shall report in writing to the Commission concerning the efforts to accomplish the

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purposes of this Hold Separate Order. Included within that report shall be the Hold Separate Trustee's assessment of the extent to which the businesses comprising the Held Separate Business are meeting (or exceeding) their projected goals as are reflected in operating plans, budgets, projections or any other regularly prepared financial statements.

- i. If the Hold Separate Trustee ceases to act or fails to act diligently and consistent with the purposes of this Hold Separate Order, the Commission may appoint a substitute Hold Separate Trustee consistent with the terms of this paragraph, subject to the consent of Respondent, which consent shall not be unreasonably withheld. If Respondent has not opposed, in writing, including the reasons for opposing, the selection of the substitute Hold Separate Trustee within five (5) days after notice by the staff of the Commission to Respondent of the identity of any substitute Hold Separate Trustee, Respondent shall be deemed to have consented to the selection of the proposed substitute trustee. Respondent and the substitute Hold Separate Trustee shall execute a Trustee Agreement, subject to the approval of the Commission, consistent with this paragraph.
3. Respondent shall comply with all terms of the Trustee Agreement, and any breach by Respondent of any term of the Trustee Agreement shall constitute a violation of this Order. Notwithstanding any paragraph, section, or other provision of the Trustee Agreement, any modification of the Trustee Agreement, without the prior approval of the Commission, shall constitute a failure to comply with this Order.
4. No later than one (1) day after the Acquisition Date, Respondent shall enter into a management agreement with, and transfer all rights, powers, and authorities necessary to manage and maintain the Held Separate Business, to Steven Zollmann ("Manager").

- a. In the event that Steven Zollmann ceases to act as Manager, then Respondent shall select a substitute Manager, subject to the approval of the Commission, and transfer to the substitute Manager all rights, powers and authorities necessary to permit the substitute Manager to perform his/her duties and responsibilities, pursuant to this Hold Separate Order.
- b. The Manager shall report directly and exclusively to the Hold Separate Trustee and shall manage the Held Separate Business independently of the management of Respondent. The Manager shall not be involved, in any way, in the operations of the other businesses of Respondent during the term of this Hold Separate Order.
- c. The Manager shall have no financial interests affected by Respondent's revenues, profits or profit margins, except that the Manager's compensation for managing the Held Separate Business may include economic incentives dependent on the financial performance of the Held Separate Business if there are also sufficient incentives for the Manager to operate the Held Separate Business at no less than current rates of operation (including, but not limited to, current rates of production and sales) and to achieve the objectives of this Hold Separate Order.
- d. The Manager shall make no material changes in the present operation of the Held Separate Business except with the approval of the Hold Separate Trustee, in consultation with the Commission staff.
- e. The Manager shall have the authority, with the approval of the Hold Separate Trustee, to remove UCB Amino Resins Employees and replace them with others of similar experience or skills. If any person ceases to act or fails to act diligently and consistent with the purposes of this Hold Separate Order, the Manager, in consultation with the Hold Separate Trustee, may request Respondent to, and Respondent shall, appoint a substitute person, which person the

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- Manager shall have the right to approve.
- f. In addition to those UCB Amino Resins Employees within the Held Separate Business, the Manager may employ such Persons as are reasonably necessary to assist the Manager in managing the Held Separate Business.
 - g. The Hold Separate Trustee shall be permitted, in consultation with the Commission staff, to remove the Manager for cause. Within fifteen (15) days after such removal of the Manager, Respondent shall appoint a replacement Manager, subject to the approval of the Commission, on the same terms and conditions as provided in Paragraph II.D.2 of this Hold Separate Order.
5. The Held Separate Business shall be staffed with sufficient employees to maintain the viability and competitiveness of the Held Separate Business. To the extent that any UCB Amino Resins Employees leave or have left the Held Separate Business prior to the Effective Date of Divestiture, the Manager, with the approval of the Hold Separate Trustee, may replace departing or departed employees with persons who have similar experience and expertise or determine not to replace such departing or departed employees.
 6. In connection with support services or products not included within the Held Separate Business, Respondent shall continue to provide, or offer to provide, the same support services to the Held Separate Business as are being provided to such business interest by Respondent or UCB as of the date the Consent Agreement is signed by Respondent. For any services or products that Respondent and UCB may provide to the Held Separate Business, Respondent may charge no more than the same price they charge others (or subsidiaries, divisions, affiliates, or units of Respondent or UCB) for the same services or products. Respondent's personnel providing such services or products must retain and maintain all Confidential Business Information of the Held Separate

Business on a confidential basis, and, except as is permitted by this Hold Separate Order, such persons shall be prohibited from providing, discussing, exchanging, circulating, or otherwise furnishing any such information to or with any person whose employment involves any of Respondent's or UCB's businesses, other than the Held Separate Business. Such personnel shall also execute confidentiality agreements prohibiting the disclosure of any Confidential Business Information of the Held Separate Business.

- a. Respondent shall offer to the Held Separate Business any services and products that Respondent or UCB provided to their other businesses directly or through third party contracts, or that they have provided directly or through third party contracts to the businesses constituting the Held Separate Business at any time since January 1, 2003. The Held Separate Business may, at the option of the Manager with the approval of the Hold Separate Trustee, obtain such services and products from Respondent. The services and products that Respondent shall offer the Held Separate Business shall include, but shall not be limited to, the following:
 - (1) Human resources administrative services, including but not limited to payroll processing, labor relations support, pension administration, and health benefits;
 - (2) Environmental health and safety services, which are used to develop corporate policies and insure compliance with federal and state regulations and corporate policies;
 - (3) Preparation of tax returns;
 - (4) Audit services;

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- (5) Information systems, which constructs, maintains, and supports all computer systems;
 - (6) Processing of accounts payable;
 - (7) Technical support;
 - (8) Finance and financial accounting services;
 - (9) Procurement of supplies;
 - (10) Procurement of goods and services utilized in the ordinary course of business by the Held Separate Business; and
 - (11) Legal services;
- b. the Held Separate Business shall have, at the option of the Manager with the approval of the Hold Separate Trustee, the ability to acquire services and products from third parties unaffiliated with Respondent or UCB.
7. In addition to any other support services or products required by this Hold Separate Order, Respondent shall sell and provide to the Held Separate Business during the term of the Hold Separate Order a supply of all, or any one or more, of the Amino Resins Products that complies with the requirements of Paragraph II.B.1. of the Decision and Order.
8. Respondent shall cause the Hold Separate Trustee, the Manager, and each UCB Amino Resins Employee having access to Confidential Business Information to submit to the Commission a signed statement that the individual will maintain the confidentiality required by the terms and conditions of this Hold Separate Order. These individuals must retain and maintain all Confidential

Business Information relating to the Held Separate Business on a confidential basis and, except as is permitted by this Hold Separate Order, such persons shall be prohibited from providing, discussing, exchanging, circulating, or otherwise furnishing any such information to or with any other person whose employment involves any of Respondent's businesses other than the Held Separate Business. These persons shall not be involved in any way in the management, production, distribution, sale, marketing, or financial operations of the competing products of Respondent.

9. No later than five (5) days after the Acquisition Date, Respondent shall establish written procedures, subject to the approval of the Hold Separate Trustee, covering the management, maintenance, and independence of the Held Separate Business consistent with the provisions of this Hold Separate Order.
10. No later than five (5) days after the date this Hold Separate Order becomes final, Respondent shall circulate to employees of the Held Separate Business and to Respondent's employees who are responsible for the development, manufacture and sale of Amino Resins Products, a notice of this Hold Separate Order and the Consent Agreement.
11. The Hold Separate Trustee and the Manager shall serve, without bond or other security, at the cost and expense of Respondent, on reasonable and customary terms commensurate with the person's experience and responsibilities.
12. Respondent shall indemnify the Hold Separate Trustee and Manager and hold each harmless against any losses, claims, damages, liabilities, or expenses arising out of, or in connection with, the performance of the Hold Separate Trustee's or the Manager's

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duties, including all reasonable fees of counsel and other expenses incurred in connection with the preparation for, or defense of any claim, whether or not resulting in any liability, except to the extent that such liabilities, losses, damages, claims, or expenses result from misfeasance, gross negligence, willful or wanton acts, or bad faith by the Hold Separate Trustee or the Manager.

13. Respondent shall provide the Held Separate Business with sufficient financial resources:
 - a. as are appropriate in the judgment of the Hold Separate Trustee to operate the Held Separate Business as it is currently operated;
 - b. to perform all maintenance to, and replacements of, the assets of the Held Separate Business;
 - c. to carry on existing and planned capital projects (including, but not limited to, those projects related to any services or products provided under contracts with Solutia) and business plans; and
 - d. to maintain the viability, competitive vigor, and marketability of the Held Separate Business.

Such financial resources to be provided to the Held Separate Business shall include, but shall not be limited to, (i) general funds, (ii) capital, (iii) working capital, and (iv) reimbursement for any operating losses, capital losses, or other losses; *PROVIDED, HOWEVER*, that, consistent with the purposes of the Decision and Order, the Manager may reduce in scale or pace any capital or research and development project, or substitute any capital or research and development project for another of the same cost.

14. Respondent shall not, during the Hold Separate Period, offer UCB Amino Resins Employees positions with Respondent. The Acquirer shall have the option of offering employment to any UCB Amino Resins Employees. Respondent shall not interfere with the employment, by the Acquirer of such employees; shall not offer any incentive to such employees to decline employment with the Acquirer or to accept other employment with the Respondent; and shall remove any impediments that may deter such employees from accepting employment with the Acquirer including, but not limited to, any non-compete or confidentiality provisions of employment or other contracts that would affect the ability of such employees to be employed by the Acquirer, and the payment, or the transfer for the account of the employee, of all current and accrued bonuses, pensions and other current and accrued benefits to which such employees would otherwise have been entitled had they remained in the employment of the Respondent.
15. For a period of two (2) years commencing on the Effective Date of Divestiture, Respondent shall not employ or make offers of employment to UCB Amino Resins Employees who have accepted offers of employment with the Acquirer unless the individual's employment has been terminated by the Acquirer.
16. Except for the Manager, UCB Amino Resins Employees, and support services employees involved in providing services to the Held Separate Business pursuant to Paragraph II.D.4., and except to the extent provided in Paragraph II.A., Respondent shall not permit any other of its employees, officers, or directors to be involved in the operations of the Held Separate Business.

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17. Respondent shall assure that UCB Amino Resins Employees receive, during the Hold Separate Period, their salaries, all current and accrued bonuses, pensions and other current and accrued benefits to which those employees would otherwise have been entitled.
18. Respondent's employees (excluding support services employees involved in providing support to the Held Separate Business pursuant to this Hold Separate Order) shall not receive, or have access to, or use or continue to use any Confidential Business Information of the Held Separate Business not in the public domain except:
 - a. as required by law;
 - b. to the extent that necessary information is exchanged in the course of consummating the Acquisition;
 - c. in negotiating agreements to divest assets pursuant to the Consent Agreement and engaging in related due diligence;
 - d. in complying with this Hold Separate Order or the Consent Agreement;
 - e. in overseeing compliance with policies and standards concerning the safety, health and environmental aspects of the operations of the Held Separate Business and the integrity of the Held Separate Business's financial controls;
 - f. in defending legal claims, investigations or enforcement actions threatened or brought against or related to the Held Separate Business; or
 - g. in obtaining legal advice.

Nor shall the Manager or UCB Amino Resins Employees receive or have access to, or use or continue to use, any Confidential Business Information not in the public domain about Respondent and relating to Respondent's businesses, except such information as is necessary to maintain and operate the Held Separate Business. Respondent may receive aggregate financial and operational information relating to the Held Separate Business only to the extent necessary to allow Respondent to comply with the requirements and obligations of the laws of the United States and other countries, and to prepare consolidated financial reports, tax returns, reports required by securities laws, and personnel reports. Any such information that is obtained pursuant to this subparagraph shall be used only for the purposes set forth in this subparagraph.

19. Respondent and the Held Separate Business shall jointly implement, and at all times during the Hold Separate Period maintain in operation, a system, as approved by the Hold Separate Trustee, of access and data controls to prevent unauthorized access to or dissemination of Confidential Business Information of the Held Separate Business, including, but not limited to, the opportunity by the Hold Separate Trustee, on terms and conditions agreed to with Respondent, to audit Respondent's networks and systems to verify compliance with this Hold Separate Order.

III.

IT IS FURTHER ORDERED that Respondent shall notify the Commission at least thirty (30) days prior to any proposed (1) dissolution of the Respondent, (2) acquisition, merger or consolidation of Respondent, or (3) any other change in the Respondent that may affect compliance obligations arising out of

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this Hold Separate Order, including but not limited to assignment and the creation or dissolution of subsidiaries.

IV.

IT IS FURTHER ORDERED that, for the purpose of determining or securing compliance with this Hold Separate Order, and subject to any legally recognized privilege, and upon written request with reasonable notice to Respondent made to their principal United States offices, Respondent shall permit any duly authorized representative of the Commission:

- A. Access, during office hours of Respondent and in the presence of counsel, to all facilities, and access to inspect and copy all books, ledgers, accounts, correspondence, memoranda and all other records and documents in the possession or under the control of Respondent relating to any matters contained in this Hold Separate Order; and
- B. Upon five (5) days' notice to Respondent and without restraint or interference from Respondent, to interview officers, directors, or employees of Respondent, who may have counsel present, regarding any such matters.

V.

IT IS FURTHER ORDERED that this Hold Separate Order shall terminate at the earlier of:

- A. three (3) business days after the Commission withdraws its acceptance of the Consent Agreement pursuant to the provisions of Commission Rule 2.34, 16 C.F.R. § 2.34; or
- B. the day after the Effective Date of Divestiture required by the Consent Agreement.

By the Commission.

Analysis of Proposed Consent to Aid Public Comment

The Federal Trade Commission (“Commission”) has accepted, subject to final approval, an Agreement Containing Consent Orders (“Consent Agreement”) from Cytec Industries Inc. (“Cytec”). The Consent Agreement is intended to resolve anticompetitive effects stemming from Cytec’s proposed acquisition of the Surface Specialties Business of UCB S.A. (“UCB”). The Consent Agreement includes a proposed Decision and Order (“Order”) that would require Cytec to divest UCB assets relating to the research, development, marketing, sale, and production of amino resins (“UCB Amino Resins Business”). The Consent Agreement also includes an Order to Hold Separate and Maintain Assets, which requires Cytec to preserve the UCB Amino Resins Business as a viable, competitive, and ongoing operation until the divestiture is achieved.

The Consent Agreement, if finally accepted by the Commission, would settle charges that Cytec’s proposed acquisition of UCB’s Surface Specialties Business may have substantially lessened competition in the markets for amino resins for: (1) industrial liquid coatings; and (2) adhesion promotion in rubber. The Commission has reason to believe that Cytec’s proposed acquisition of UCB’s Surface Specialties Business would have violated Section 7 of the Clayton Act and Section 5 of the Federal Trade Commission Act.

The proposed Order has been placed on the public record for thirty (30) days to receive comments by interested persons. Comments received during this period will become part of the public record. After thirty (30) days, the Commission will review the Consent Agreement and comments received and decide whether to withdraw its agreement or make final the Consent Agreement’s proposed Order and Order to Hold Separate and Maintain Assets.

Analysis

I. Amino Resins for Industrial Liquid Coatings and Adhesion Promotion in Rubber

According to the Commission's proposed complaint, the relevant product markets in which to analyze the effects of Cytec's proposed acquisition of UCB's Surface Specialties Business are the manufacture and sale of amino resins for: (1) industrial liquid coatings; and (2) adhesion promotion in rubber. The types of amino resins that Cytec and UCB manufacture are used as cross-linking agents in thermoset surface coatings for a variety of applications, including automotive coatings, coil coatings, can coatings, appliance coatings, and general maintenance coatings. These types of resins are also used, primarily in tires, to promote the adhesion of rubber to materials such as steel or fiber. As the proposed complaint describes, there are no effective substitutes for amino resins in the applications in which they are used. The proposed complaint also alleges that the relevant geographic market in which to assess the impact of the proposed acquisition is no broader than North America and is potentially limited to the United States.

The proposed complaint alleges that the markets for amino resins for industrial liquid coatings and adhesion promotion in rubber are highly concentrated, that Cytec and UCB have been for many years the two major competitors in these markets, and that these companies compete with one another across a wide range of amino resin grades and applications in which customers have qualified their resins for use. As the proposed complaint describes, customers have relied on the competition between these companies to maintain competitive amino resin prices. The proposed complaint alleges that the proposed acquisition of UCB's Surface Specialties division by Cytec would reduce competition by eliminating the direct competition that has existed between these two companies. The proposed complaint further alleges that entry into the relevant markets would not be timely, likely, or sufficient to deter or offset the acquisition's adverse competitive effects. Other firms would not in the foreseeable future be able to offer the range of grades that Cytec and UCB

have developed over the years, nor would they be able to meet the requirements necessary to commercially qualify their resins for use in demanding customer applications.

II. The Consent Agreement

The proposed Order requires that Cytec divest the UCB Amino Resins Business to an acquirer approved by the Commission within one-hundred and eighty (180) days from the date upon which the Commission accepts the proposed Order for public comment. The divested business includes two manufacturing facilities, in Massachusetts and in Germany, where UCB manufactures amino resins, together with UCB's rights to obtain amino resins pursuant to a tolling agreement between UCB and Solutia Canada, Inc. The divested business also includes certain lines of additives that are the only other products that UCB manufactures at the plant in Germany. In connection with the divestiture, Cytec is required to divest to an acquirer the set of assets that comprise UCB's amino resins business. In addition to the manufacturing assets, for example, Cytec is required to divest the patents and other intellectual property that UCB has relied upon in its amino resins business, the sales and marketing materials, including customer information, that UCB has relied upon, and the other books and records of the business. Further, Cytec is required to assign the different contracts relating to the amino resins business, and to secure all consents necessary for the divestiture. Cytec is also required, until the divestiture is completed, to take the steps necessary to maintain the viability of the UCB Amino Resins Business. The acquirer of the divested assets would have the opportunity, without interference from Cytec, to interview and potentially hire key UCB personnel who have been involved in supporting all aspects of the company's amino resins business.

The proposed Order also provides that if Cytec does not complete its divestiture within the specified six-month period, the Commission may appoint a Divestiture Trustee to divest the UCB Amino Resins Business in a manner acceptable to the

Analysis

Commission. The proposed Order also provides for the Commission to appoint a Monitor Trustee to oversee Cytec's compliance with the terms of the proposed Order and the divestiture agreements that Cytec enters pursuant to the proposed Order.

The proposed Order to Hold Separate and Maintain Assets that is also included in the Consent Agreement requires that Cytec hold separate and maintain the viability and marketability of UCB's Amino Resins Business as a viable and competitive operation until the business is transferred to the Commission-approved acquirer. Furthermore, it contains measures designed to ensure that no material confidential information is exchanged between Cytec and the UCB Amino Resins Business (except as otherwise provided in the Order to Hold Separate and Maintain Assets) and measures designed to prevent interim harm to competition in the relevant markets pending divestiture. The Order to Hold Separate and Maintain Assets provides for the Commission to appoint a Hold Separate Trustee who is charged with the duty of monitoring Cytec's compliance with the Order to Hold Separate and Maintain Assets.

The proposed Order requires Cytec to provide the Commission, within thirty (30) days from the date the Order becomes final, a verified written report setting forth in detail the manner and form in which Cytec intends to comply, is complying, and has complied with the provisions relating to the proposed Order and the Order to Hold Separate and Maintain Assets. The proposed Order further requires Cytec to provide the Commission with a report of compliance with the Order every thirty (30) days after the date when the Order becomes final until the divestiture has been completed.

The purpose of this analysis is to facilitate public comment on the proposed Order. This analysis is not intended to constitute an official interpretation of the Consent Agreement, the proposed Order, or the Order to Hold Separate and Maintain Assets, or in any way to modify the terms of the Consent Agreement, the

proposed Order, or the Order to Hold Separate and Maintain Assets.

Complaint

IN THE MATTER OF

NATIONWIDE MORTGAGE GROUP, INC., ET AL.

CONSENT ORDER, ETC., IN REGARD TO ALLEGED VIOLATIONS OF
THE SAFEGUARDS RULE AND THE PRIVACY RULE

Docket 9319; File No. 0423104

Complaint, November 9, 2004--Decision, April 12, 2005

This consent order, among other things, prohibits the respondent, a Florida-based corporation, from violating the GLB Safeguards Rule and the GLB Financial Privacy Rule, and requires the respondent, for ten years, to secure biennial assessments and reports to ensure that its information security program complies with the Safeguards Rule and is sufficiently effective to provide reasonable assurance that the security, confidentiality, and integrity of customer information is protected.

Participants

For the Commission: *Susan E. McDonald, Kathryn Ratte, Alain Sheer, Jessica L. Rich, Joel Winston, and Louis Silversin.*

For the Respondents: *F. Douglas Ross, Odin, Feldman & Pittleman.*

COMPLAINT

The Federal Trade Commission (“Commission”), having reason to believe that Nationwide Mortgage Group, Inc. and John D. Eubank, individually and as President and owner of Nationwide Mortgage Group, Inc. (“respondents”), have violated the provisions of the Commission’s Standards for Safeguarding Customer Information Rule (“Safeguards Rule”), 16 C.F.R. Part 314, and the Commission’s Privacy of Consumer Financial Information Rule (“Privacy Rule”), 16 C.F.R. Part 313, each issued pursuant to Title V of the Gramm-Leach-Bliley Act (“GLB Act”), 15 U.S.C. § 6801 *et seq.*, and it appearing to the Commission that this proceeding is in the public interest, alleges:

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1. Respondent Nationwide Mortgage Group, Inc. (“Nationwide”) is a mortgage broker with its principal office or place of business at 10301 Democracy Lane, Fairfax, Virginia, 22030. Nationwide collects nonpublic personal information from its customers, including customer names, Social Security numbers, credit histories, bank account numbers, and income tax returns, in the course of processing, underwriting, and closing residential mortgage loans.
2. Respondent John D. Eubank is President and owner of Nationwide. Individually or in concert with others, he formulates, directs, or controls the policies, acts, or practices of Nationwide, including the acts or practices alleged in this complaint. His principal office or place of business is the same as that of Nationwide.
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, 15 U.S.C. § 44.
4. Nationwide is a “financial institution,” as that term is defined in Section 509(3)(A) of the GLB Act, and is therefore subject to the requirements of the Safeguards Rule and the Privacy Rule.

SAFEGUARDS RULE

5. The Safeguards Rule, which implements Section 501(b) of the GLB Act, was promulgated by the Commission on May 23, 2002, and became effective on May 23, 2003. The Rule requires financial institutions to protect the security, confidentiality, and integrity of customer information by developing a comprehensive written information security program that contains reasonable administrative, technical, and physical safeguards, including:
 - A. Designating one or more employees to coordinate the information security program;

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- B. Identifying reasonably foreseeable internal and external risks to the security, confidentiality, and integrity of customer information, and assessing the sufficiency of any safeguards in place to control those risks;
- C. Designing and implementing information safeguards to control the risks identified through risk assessment, and regularly testing or otherwise monitoring the effectiveness of the safeguards' key controls, systems, and procedures;
- D. Overseeing service providers, and requiring them by contract to protect the security and confidentiality of customer information; and
- E. Evaluating and adjusting the information security program in light of the results of testing and monitoring, changes to the business operation, and other relevant circumstances.

VIOLATIONS OF THE SAFEGUARDS RULE

- 6. Since the Rule's effective date, Nationwide has collected sensitive customer information, including Social Security numbers and bank account numbers, without implementing reasonable policies and procedures to ensure the security and confidentiality of that information. For example, although Nationwide stored customer information on a computer network accessible to all employees and connected to the Internet, it failed to monitor the network for vulnerabilities that would expose customer information to attack. Nationwide also failed to assess its security risks, implement reasonable policies and procedures with respect to information security, train employees on information security issues, or oversee the collection and handling of customer information by its loan officers.
- 7. By failing to implement reasonable security policies and procedures, respondents engaged in violations of the Safeguards Rule, including but not limited to:

Complaint

- A. Failing to identify reasonably foreseeable internal and external risks to the security, confidentiality, and integrity of customer information;
 - B. Failing to implement information safeguards to control the risks to customer information and failing to regularly test or monitor them;
 - C. Failing to develop, implement, and maintain a comprehensive written information security program; and
 - D. Failing to designate one or more employees to coordinate the information security program.
8. A violation of the Safeguards Rule constitutes an unfair or deceptive act or practice in violation of Section 5(a)(1) of the FTC Act.

PRIVACY RULE

9. The Privacy Rule, promulgated under Section 502 of the GLB Act, went into effect on July 1, 2001. The Rule requires financial institutions, *inter alia*, to provide customers with clear and conspicuous notices, both when the customer relationship is formed and annually for the duration of the customer relationship, that accurately reflect the financial institution's privacy policies and practices.

VIOLATIONS OF THE PRIVACY RULE

10. Since the Rule's effective date, respondents have failed to provide their customers with the notice required by the Privacy Rule.
11. A violation of the Privacy Rule constitutes an unfair or deceptive act or practice in violation of Section 5(a)(1) of the FTC Act.

Complaint

12. The acts and practices of respondents as alleged in this complaint constitute unfair or deceptive acts or practices in violation of Section 5(a)(1) of the FTC Act.

NOTICE

Proceedings on the charges asserted against you in this complaint will be held before an Administrative Law Judge (ALJ) of the Federal Trade Commission, under Part 3 of the Commission's Rules of Practice, 16 C.F.R. Part 3. A copy of Part 3 of the Rules is enclosed with this complaint.

You may file an answer to this complaint. Any such answer must be filed within 20 days after service of the complaint on you. If you contest the complaint's allegations of fact, your answer must concisely state the facts constituting each ground of defense, and must specifically admit, deny, explain, or disclaim knowledge of each fact alleged in the complaint. You will be deemed to have admitted any allegations of the complaint that you do not so answer.

If you elect not to contest the allegations of fact set forth in the complaint, your answer shall state that you admit all of the material allegations to be true. Such an answer will constitute a waiver of hearings as to the facts alleged in the complaint and, together with the complaint, will provide a record basis on which the ALJ will file an initial decision containing appropriate findings and conclusions and an appropriate order disposing of the proceeding. Such an answer may, however, reserve the right to submit proposed findings and conclusions and the right to appeal the initial decision to the Commission under Section 3.52 of the Commission's Rules of Practice.

If you do not answer within the specified time, you waive your right to appear and contest the allegations of the complaint. The ALJ is then authorized, without further notice to you, to find that the facts are as alleged in the complaint and to enter an initial decision and a cease and desist order.

Complaint

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

A hearing on the complaint will begin on February 9, 2005, at 10:00 A.M. in Room 532, or such other date as determined by the ALJ. At the hearing, you will have the right to contest the allegations of the complaint and to show cause why a cease and desist order should not be entered against you.

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

Moreover, the Commission has reason to believe that, if the facts are found as alleged in the complaint, it may be necessary and appropriate for the Commission to seek relief to redress injury to consumers, or other persons, partnerships or corporations, in the form of restitution for past, present, and future consumers and such other types of relief as are set forth in Section 19(b) of the Federal Trade Commission Act. The Commission will determine whether to apply to a court for such relief on the basis of the adjudicative proceedings in this matter and such other factors as are relevant to consider the necessity and appropriateness of such action.

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ORDER

DEFINITIONS

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

1. “Commerce” shall mean as defined in Section 4 of the Federal Trade Commission Act, 15 U.S.C. § 44.
2. Unless otherwise specified, “respondents” shall mean Nationwide Mortgage Group, Inc., its successors and assigns and its officers; John D. Eubank, President and owner of Nationwide; and each of the above’s agents, representatives, and employees.
3. All other terms are synonymous in meaning and equal in scope to the usage of such terms in the Gramm-Leach-Bliley Act, 15 U.S.C. § 6801 *et seq.*

I.

IT IS ORDERED that respondents shall not, directly or through any corporation, subsidiary, division, Web site, or other device, violate any provision of the Gramm-Leach-Bliley Act’s (“GLB Act”) Standards for Safeguarding Customer Information Rule (“Safeguards Rule”), 16 C.F.R. Part 314, or the Gramm-Leach-Bliley Act’s Privacy of Consumer Financial Information Rule (“Privacy Rule”), 16 C.F.R. Part 313.

In the event the Safeguards Rule or Privacy Rule is hereafter amended or modified, respondents’ compliance with these Rules as so amended or modified shall not be a violation of this order.

II.

IT IS FURTHER ORDERED that, in connection with their compliance with the Safeguards Rule, respondents shall obtain an assessment and report (an “Assessment”) from a qualified, objective, independent third-party professional, using procedures

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and standards generally accepted in the profession, within one hundred and eighty (180) days after service of the order, and biennially thereafter for ten (10) years after service of the order, that:

A. sets forth the specific administrative, technical, and physical safeguards that respondents have implemented and maintained during the reporting period;

B. explains how such safeguards are appropriate to Nationwide's size and complexity, the nature and scope of Nationwide's activities, and the sensitivity of the personal information collected from or about consumers;

C. explains how the safeguards that have been implemented meet or exceed the protections required by the Safeguards Rule; and

D. certifies that respondents' security program is operating with sufficient effectiveness to provide reasonable assurance that the security, confidentiality, and integrity of personal information is protected and, for biennial reports, has so operated throughout the reporting period.

Each assessment shall be prepared by a person qualified as a Certified Information System Security Professional (CISSP) or as a Certified Information Systems Auditor (CISA); a person holding Global Information Assurance Certification (GIAC) from the SysAdmin, Audit, Network, Security Institute (SANS); or by a similarly qualified person or organization approved by the Associate Director for Enforcement, Bureau of Consumer Protection, Federal Trade Commission.

Respondents shall provide the first Assessment, as well as all plans, reports, studies, reviews, policies, training materials, and assessments, whether prepared by or on behalf of respondents, relied upon to prepare such Assessment to the Associate Director for Enforcement, Bureau of Consumer Protection, Federal Trade

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Commission, Washington, D.C. 20580, within ten (10) days after the Assessment has been prepared. Respondents shall retain all subsequent biennial Assessments until the order is terminated and shall retain all materials relied upon in preparing each such Assessment, as listed above, for a period of three (3) years after the date of the preparation of such Assessment. Respondents shall provide such subsequent Assessments and related materials to the Associate Director of Enforcement within ten (10) days of request.

III.

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

IV.

IT IS FURTHER ORDERED that respondent John D. Eubank, for a period of ten (10) years, after the date of issuance of this order, shall notify the Commission of the discontinuance of his current business or employment, or of his affiliation with any new business or employment. The notice shall include respondent John D. Eubank's new business address and telephone number and a description of the nature of the business or employment and his duties and responsibilities. All notices required by this Part shall be sent by certified mail to the Associate Director, Division of Enforcement, Bureau of Consumer Protection, Federal Trade Commission, Washington, D.C. 20580.

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V.

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

VI.

IT IS FURTHER ORDERED that respondents shall within one hundred eighty (180) days after service of this order, and at such other times as the Federal Trade Commission may require, file with the Commission a report, in writing, setting forth in detail the manner and form in which they have complied with this order. This report shall include a copy of the initial Assessment required by Part II of this order.

VII.

This order will terminate twenty (20) years from the date of its issuance, or twenty (20) years from the most recent date that the United States or the Federal Trade Commission files a complaint (with or without an accompanying consent decree) in federal court alleging any violation of the order, whichever comes later;

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provided, however, that the filing of such a complaint will not affect the duration of:

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

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

THEREFORE, the Federal Trade Commission this ninth day of November, 2004, has issued this complaint against respondents.

DECISION AND ORDER

The Federal Trade Commission having heretofore issued its Complaint charging Respondents named in the caption hereof with violation of the Federal Trade Commission's Standards for Safeguarding Customer Information Rule ("Safeguards Rule"), 16 C.F.R. Part 314, and the Federal Trade Commission's Privacy of Consumer Financial Information Rule ("Privacy Rule"), 16 C.F.R. Part 313, each issued pursuant to Title V of the Gramm-Leach-Bliley Act, 15 U.S.C. § 6801 *et seq.*, and Section 5(a)(1) of the Federal Trade Commission Act, 15 U.S.C. § 45(a)(1), and Respondents having been served with a copy of that Complaint, together with a notice of contemplated relief; and

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

The Secretary of the Commission having thereafter withdrawn this matter from adjudication in accordance with Section 3.25(c) of its Rules, 16 C.F.R. § 3.25(c) (2005); and

The Commission having considered the matter and having thereupon accepted the executed Consent Agreement and placed such Consent Agreement on the public record for a period of thirty (30) days, now in further conformity with the procedure described in Section 3.25(f) of its Rules, the Commission hereby makes the following jurisdictional findings and enters the following Order:

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1. Respondent Nationwide Mortgage Group, Inc. is a corporation with its principal office or place of business at 10301 Democracy Lane, Fairfax, Virginia, 22030.

2. Respondent John D. Eubank is President and owner of Nationwide. His principal office or place of business is the same as that of Nationwide.

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

ORDER

DEFINITIONS

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

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

2. Unless otherwise specified, “respondents” shall mean Nationwide Mortgage Group, Inc., its successors and assigns and its officers; John D. Eubank, President and owner of Nationwide; and each of the above’s agents, representatives, and employees.

3. All other terms are synonymous in meaning and equal in scope to the usage of such terms in the Gramm-Leach-Bliley Act, 15 U.S.C. § 6801 *et seq.*

I.

IT IS ORDERED that respondents shall not, directly or through any corporation, subsidiary, division, Web site, or other device, violate any provision of the Gramm-Leach-Bliley Act’s (“GLB Act”) Standards for Safeguarding Customer Information Rule

(“Safeguards Rule”), 16 C.F.R. Part 314, or the Gramm-Leach-Bliley Privacy of Consumer Financial Information Rule (“Privacy Rule”), 16 C.F.R. Part 313.

In the event the Safeguards Rule or Privacy Rule is hereafter amended or modified, respondents’ compliance with these Rules as so amended or modified shall not be a violation of this order.

II.

IT IS FURTHER ORDERED that, in connection with its compliance with the Safeguards Rule, respondents shall obtain an assessment and report (an “Assessment”) from a qualified, objective, independent third-party professional, using procedures and standards generally accepted in the profession, within one hundred and eighty (180) days after service of the order, and biennially thereafter for ten (10) years after service of the order, that:

A. sets forth the specific administrative, technical, and physical safeguards that respondents have implemented and maintained during the reporting period;

B. explains how such safeguards are appropriate to Nationwide’s size and complexity, the nature and scope of Nationwide’s activities, and the sensitivity of the personal information collected from or about consumers;

C. explains how the safeguards that have been implemented meet or exceed the protections required by the Safeguards Rule; and

D. certifies that respondents’ security program is operating with sufficient effectiveness to provide reasonable assurance that the security, confidentiality, and integrity of personal information is protected and, for biennial reports, has so operated throughout the reporting period.

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Each assessment shall be prepared by a person qualified as a Certified Information System Security Professional (CISSP) or as a Certified Information Systems Auditor (CISA); a person holding Global Information Assurance Certification (GIAC) from the SysAdmin, Audit, Network, Security Institute (SANS); or by a similarly qualified person or organization approved by the Associate Director for Enforcement, Bureau of Consumer Protection, Federal Trade Commission.

Respondents shall provide the first Assessment, as well as all plans, reports, studies, reviews, policies, training materials, and assessments, whether prepared by or on behalf of respondents, relied upon to prepare such Assessment to the Associate Director for Enforcement, Bureau of Consumer Protection, Federal Trade Commission, Washington, D.C. 20580, within ten (10) days after the Assessment has been prepared. Respondents shall retain all subsequent biennial Assessments until the order is terminated and shall retain all materials relied upon in preparing each such Assessment, as listed above, for a period of three (3) years after the date of the preparation of such Assessment. Respondents shall provide such subsequent Assessments and related materials to the Associate Director of Enforcement within ten (10) days of request.

III.

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

IV.

IT IS FURTHER ORDERED that respondent John D. Eubank, for a period of ten (10) years, after the date of issuance of this order, shall notify the Commission of the discontinuance of his current business or employment, or of his affiliation with any new business or employment. The notice shall include respondent John D. Eubank's new business address and telephone number and a description of the nature of the business or employment and his duties and responsibilities. All notices required by this Part shall be sent by certified mail to the Associate Director, Division of Enforcement, Bureau of Consumer Protection, Federal Trade Commission, Washington, D.C. 20580.

V.

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

VI.

IT IS FURTHER ORDERED that respondents shall within one hundred eighty (180) days after service of this order, and at such

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other times as the Federal Trade Commission may require, file with the Commission a report, in writing, setting forth in detail the manner and form in which they have complied with this order. This report shall include a copy of the initial Assessment required by Part II of this order.

VII.

This order will terminate on April 12, 2025, or twenty (20) years from the most recent date that the United States or the Federal Trade Commission files a complaint (with or without an accompanying consent decree) in federal court alleging any violation of the order, whichever comes later; provided, however, that the filing of such a complaint will not affect the duration of:

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

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

Analysis of Proposed Consent Order to Aid Public Comment

The Federal Trade Commission (“Commission”) has accepted a consent agreement, subject to final approval, from Nationwide Mortgage Group, Inc., and John D. Eubank (collectively “Nationwide”). Nationwide is a mortgage broker with headquarters in Fairfax, Virginia. Nationwide collects sensitive customer information, including customer names, social security numbers, credit histories, bank account numbers, and income tax returns, and is a “financial institution” subject to the Gramm-Leach-Bliley Act’s Standards for Safeguarding Customer Information Rule, 16 C.F.R. Part 314 (“Safeguards Rule”) and Privacy of Consumer Financial Information Rule, 16 C.F.R. Part 313 (“Privacy Rule”).

The proposed consent agreement has been placed on the public record for thirty (30) days for receipt of comments by interested persons. Comments received during this period will become part of the public record. After thirty (30) days, the Commission will again review the 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 Nationwide’s alleged violations of the Safeguards and Privacy Rules. The Safeguards Rule, which became effective on May 23, 2003, requires financial institutions to implement reasonable policies and procedures to ensure the security and confidentiality of customer information, including:

- Designating one or more employees to coordinate the information security program;
- Identifying reasonably foreseeable internal and external risks to the security, confidentiality, and integrity of customer information, and assessing the sufficiency of any safeguards in place to control those risks;

Analysis

- Designing and implementing information safeguards to control the risks identified through risk assessment, and regularly testing or otherwise monitoring the effectiveness of the safeguards' key controls, systems, and procedures;
- Overseeing service providers, and requiring them by contract to protect the security and confidentiality of customer information; and
- Evaluating and adjusting the information security program in light of the results of testing and monitoring, changes to the business operation, and other relevant circumstances.

The Privacy Rule, which became effective on July 1, 2001, requires financial institutions to provide customers with clear and conspicuous notices that explain the financial institution's information collection and sharing practices and allow customers to opt out of having their information shared with certain non-affiliated third parties.

The Commission's administrative complaint, issued on November 9, 2004, charges that Nationwide engaged in violations of the Safeguards Rule, specifically by: (1) failing to identify reasonably foreseeable internal and external risks to the security, confidentiality, and integrity of customer information; (2) failing to implement information safeguards to control the risks to customer information and failing to regularly test or monitor them; (3) failing to develop, implement, and maintain a comprehensive written information security program; and (4) failing to designate one or more employees to coordinate the information security program. The complaint also alleges that Nationwide failed to provide its customers with the notice required by the Privacy Rule.

The proposed order contains provisions designed to prevent Nationwide from engaging in future practices similar to those alleged in the complaint. Specifically, Part I of the proposed order prohibits Nationwide from violating the Safeguards Rule or the Privacy Rule. Part II of the proposed order requires that Nationwide obtain, within 180 days after being served with the

final order approved by the Commission, and on a biennial basis thereafter for a period of ten (10) years, an assessment and report from a qualified, objective, independent third-party professional, certifying that: (1) Nationwide has in place a security program that provides protections that meet or exceed the protections required by the Safeguards Rule, and (2) Nationwide's security program is operating with sufficient effectiveness to provide reasonable assurance that the security, confidentiality, and integrity of consumers' personal information has been protected. This provision is substantially similar to comparable provisions obtained in prior Commission orders under Section 5 of the FTC Act. *See In the Matter of Petco Animal Supplies Inc.*, FTC File No. 032-3221 (consent order) (Placed on the public record on Nov. 17, 2004); *In the Matter of MTS, Inc., doing business as Tower Records/Books/Video, et al.*, FTC Docket No. C-4110 (consent order) (Issued May 28, 2004); *In the Matter of Guess?, Inc., and Guess.com, Inc.*, FTC Docket No. C-4091 (consent order) (Issued July 30, 2003); and *In the Matter of Microsoft Corporation*, FTC Docket No. C-4069 (consent order) (Issued Dec. 20, 2002).

Part II of the proposed order also requires Nationwide to retain documents relating to compliance. For the assessments and supporting documents, Nationwide must retain the documents for three years after the date that each assessment is prepared.

Parts III through VI of the proposed order are reporting and compliance provisions. Part III requires dissemination of the order now and in the future to all employees and other persons having responsibilities with respect to the subject matter of the order. Part IV requires Mr. Eubank to notify the FTC, for a period of ten years, if he discontinues his current business or becomes affiliated with a new one. Part V ensures notification to the FTC of changes in corporate status. Part VI mandates that Nationwide submit compliance reports to the FTC. Part VII is a provision "sunsetting" the order after twenty (20) years, with certain exceptions.

Analysis

The purpose of this analysis is to facilitate public comment on the proposed order. It is not intended to constitute an official interpretation of the proposed order or to modify its terms in any way.

Complaint

IN THE MATTER OF

PREFERRED HEALTH SERVICES, INC.CONSENT ORDER, ETC., IN REGARD TO ALLEGED VIOLATIONS OF
SEC. 5 OF THE FEDERAL TRADE COMMISSION ACT*Docket C-4134; File No. 0410099*
Complaint, April 13, 2005—Decision, April 13, 2005

This consent order, among other things, prohibits the respondent from entering into, participating in, implementing, or otherwise facilitating any combination, conspiracy, agreement, or understanding between or among any physicians (1) to negotiate on behalf of any physician with any payor; (2) to deal, refuse to deal, or threaten to refuse to deal with any payor; (3) regarding any term, condition, or requirement upon which any physician deals, or is willing to deal, with any payor, including, but not limited to, price terms; or (4) not to deal individually with any payor, or not to deal with any payor through any arrangement other than the respondent. The order also prohibits the respondent, for three years, from acting as or using a messenger or agent on behalf of any physicians, in dealing with health plans regarding contracts under which physicians would be compensated for the provision of services. In addition, the order requires the respondent, for three years, to notify the Commission at least sixty days before taking certain steps concerning the prices or other terms on which physicians in certain other arrangements deal with any payor.

Participants

For the Commission: *Steve Vieux, Melea Greenfeld, Karan Singh, Elizabeth Argeris, David R. Pender, Jeffrey W. Brennan, Daniel P. Ducore, and Louis Silvia.*

For the Respondent: *Michael Cowie, Howrey, Simon, Arnold & White.*

COMPLAINT

Pursuant to the provisions of the Federal Trade Commission Act, as amended, 15 U.S.C. § 41 *et seq.*, and by virtue of the authority vested in it by said Act, the Federal Trade Commission (“Commission”), having reason to believe that Preferred Health Services, Inc. (“Preferred Health”), hereinafter sometimes referred

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

NATURE OF THE CASE

1. This matter concerns horizontal agreements among competing physicians in the Seneca, South Carolina, area to fix prices charged to health care plans and other third-party payors (“payors”), and to refuse to deal with payors except on collectively agreed upon terms. These physicians, who constitute most of the physicians in the Seneca area, orchestrated these price-fixing agreements and refusals to deal through the Respondent.

RESPONDENT

2. Preferred Health, a physician-hospital organization (“PHO”), is a not-for-profit corporation, organized, existing, and doing business under and by virtue of the laws of the State of South Carolina, with its principal address at 301 Memorial Drive, Suite E, Seneca, South Carolina 29672. Preferred Health was formed in 1996, and consists of a non-profit hospital (Oconee Memorial Hospital) and over 100 physicians. Preferred Health’s eight-member Board of Directors (“Board”) consists of four physician members elected by the entire physician membership, and four representatives of the hospital. The Chair and Vice-Chair of the Board are both physicians.

THE FTC HAS JURISDICTION OVER RESPONDENT

3. At all times relevant to this Complaint, Preferred Health has been engaged in the business of contracting with payors, on behalf of Preferred Health’s members, for the provision of health care services to persons for a fee.

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4. Except to the extent that competition has been restrained as alleged herein, Preferred Health physician members have been, and are now, in competition with each other for the provision of physician services in the Seneca, South Carolina, area to persons for a fee.

5. Preferred Health was founded in 1996. Its physician members and Oconee Memorial Hospital control Preferred Health. It carries on business for the pecuniary benefit of its physician members. Accordingly, Preferred Health is a corporation within the meaning of Section 4 of the Federal Trade Commission Act, as amended, 15 U.S.C. § 44.

6. Preferred Health's general business practices, including the acts and practices herein alleged, are in or affecting "commerce" as defined in the Federal Trade Commission Act, as amended, 15 U.S.C. § 44.

OVERVIEW OF REGION AND PHYSICIAN CONTRACTING WITH PAYORS

7. Seneca, located in Oconee County, is in northwest South Carolina. The closest major cities to Seneca are Greenville, South Carolina, approximately 50 miles to the east; Spartanburg, South Carolina, approximately 75 miles to the northeast; Asheville, North Carolina, approximately 100 miles to the north; and Atlanta, Georgia, approximately 120 miles to the southwest.

8. Preferred Health's physician members are licensed to practice allopathic or osteopathic medicine in the State of South Carolina. Preferred Health's physician members account for approximately 70% of the physicians who independently practice in the Seneca area. To be marketable in the Seneca area, a payor's health insurance plan must have access to a large number of physicians who are members of Preferred Health.

9. Physicians contract with payors to establish the terms and conditions, including price terms, under which they render

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services to the subscribers to the payors' health insurance plans ("insureds"). Physicians entering into such contracts often agree to lower compensation to obtain access to additional patients made available by the payors' relationship with insureds. These contracts may reduce payors' costs and enable them to lower the price of insurance, and thereby result in lower medical care costs for insureds. Competing physicians, absent agreements among them on the terms, including price, on which they will provide services to insureds, decide individually whether to enter into payor contracts to provide services to insureds, and what prices they will accept pursuant to such contracts.

10. Competing physicians sometimes use a "messenger" to facilitate their contracting with payors in ways that do not constitute an unlawful agreement on prices and other competitively significant terms. Legitimate messenger arrangements can reduce contracting costs between payors and physicians. A messenger can be an efficient conduit to which a payor submits a contract offer, with the understanding that the messenger will transmit that offer to a group of physicians and inform the payor how many physicians across specialties accept the offer or have a counter-offer. At less cost, payors can thus discern physician willingness to contract at particular prices, and assemble networks, while physicians can market themselves to payors and assess contracting opportunities. A messenger may not negotiate prices or other competitively significant terms, however, and may not facilitate coordination among physicians on their responses to contract offers.

11. The Medicare Resource Based Relative Value Scale ("RBRVS") is a system used by the Centers for Medicare and Medicaid Services ("CMS") to determine the amount to pay physicians for the services they render to Medicare patients. Generally, payors in South Carolina make contract offers to individual physicians or groups at price levels specified by some percentage of the RBRVS fee for a particular year (*e.g.* "110% of 2004 RBRVS").

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**PREFERRED HEALTH NEGOTIATED PAYOR
CONTRACTS
ON BEHALF OF ITS MEMBER PHYSICIANS**

12. Preferred Health refers to itself as the “contracting representative” for its members in negotiations with payors. It touts itself to its physician members as a “collective bargaining unit for the negotiation of managed care contracts.” To further collective negotiations of payor contracts on behalf of physician members, Preferred Health’s Executive Director created, and the Board approved, a fee schedule, with fees for some procedures as high as 300% of 2000 RBRVS. Preferred Health negotiates with payors for payment terms under this fee schedule.

13. Physician members of Preferred Health participate in Preferred Health’s payor contracts by entering into a “Physician Participation Agreement” with Preferred Health. The Physician Participation Agreement automatically binds a physician member of Preferred Health to payor contracts that incorporate “the [Preferred Health] fee schedule.” If a contract uses “a Payor’s fee schedule that is at a comparable level to the [Preferred Health] fee schedule,” then the physician member will be given notice of the “comparable” fee schedule and be automatically bound to accept the contract unless he or she rejects it within 30 days. A physician member who rejects such a contract is expected to terminate his or her participation in Preferred Health.

14. When payors reject the Preferred Health fee schedule, Preferred Health’s Executive Director, under the Board’s direction, negotiates “comparable” fee schedules. During negotiations with such payors, the Executive Director transmits payor offers to the Board, which then votes on whether to approve a proposed payor contract, including the fee schedule. Only if the Board approves a contract does the Executive Director transmit it to Preferred Health physicians for their acceptance.

15. Preferred Health physician members have agreed with each other and with Preferred Health not to deal individually, or

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through any organization besides Preferred Health, with any payor with which Preferred Health is attempting to negotiate a contract for physician services. Physician members, at Preferred Health's urging, refuse payor offers made to them individually. This hinders payor efforts to establish competitive physician networks in the Seneca area. Due to Preferred Health's large share of Seneca area physicians and demand for collective negotiation, payors have repeatedly acceded to Preferred Health's price demands.

16. At an August 2002 Board meeting, Preferred Health's Executive Director stated that "there are two kinds of PHOs: (1) **Risk** - where you negotiate and sign on behalf of all the members and (2) **Messenger** - the model we use - no risk involved - a collective bargaining voice" (emphasis in original). Preferred Health repeatedly operated according to this illegitimate, non-risk, concerted contracting method, and unlawfully negotiated payor contracts on the collective behalf of its physician members.

CONTRACT NEGOTIATIONS WITH UNITED HEALTHCARE

17. United Healthcare of South Carolina, Inc. ("United"), is a payor doing business in the Seneca area. United had accessed Preferred Health physician members by contracting with a third party administrator that had contracts with Preferred Health for physician services. United could not obtain a contract directly with Preferred Health because United would not agree to Preferred Health's high prices. In late 2001, United attempted to contract directly with individual Preferred Health physician members and also initiated contract discussions with Preferred Health, offering prices for most procedures at 106% or 108% of 2001 RBRVS. The prices for most procedures on the Preferred Health fee schedule were approximately 10% to 165% higher than United's proposal on prices. Preferred Health discouraged its members from contracting unilaterally with United, by sending a

Complaint

memorandum to the entire membership, asking the physicians to “hold off on doing anything with United Health Care until we can complete our discussions.”

18. In January 2002, Preferred Health informed its members that contract discussions with United were unsuccessful, because United “showed little interest in meeting the criteria we require of all payors.” A month later, the Board formally rejected United’s offer, stating that United’s payment terms were “very low.” Preferred Health has repeatedly rejected subsequent United contract offers, for the same reason. Preferred Health told United that it “needed better rates in order to move forward” and told its physician members that the “United fee schedule is way off.” United also was unsuccessful in contracting directly with Preferred Health physician members after the physicians received Preferred Health’s criticisms of United’s payment terms.

19. In April 2003, United asked Preferred Health to transmit to its physician members a contract proposal containing rates ranging from 75% to 185% of 2002 RBRVS. The Preferred Health fee schedule included higher prices for almost all procedures – typically in the range of 10% to 30% higher. Preferred Health responded that it could not transmit the United offer “without a Board vote,” and informed United that “if you want to mail [direct contracts] now, the [Preferred Health member] offices will just call us and we’ll tell them to hold on until [the Board members] meet and vote.” Preferred Health also informed United that if the Preferred Health Board voted not to contract with United, then Preferred Health “would not do any form of negotiation.”

20. The minutes of a May 2003 Preferred Health Board meeting report that Preferred Health was unable to agree with United “on the various methods of reimbursement,” and that “the Board agreed to decline their fee schedule offer and inform [Preferred Health] members to contract directly with United should there be any interest.” Preferred Health did not transmit any United offer to the Preferred Health members.

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21. United also has been unable to contract directly with Preferred Health physician members, who refused to deal with United because it would not agree to Preferred Health's price demands. For example, in July 2003, United approached the largest primary care practice in Seneca with an offer to begin contract negotiations. The physicians refused to negotiate with United, because United "did not agree to take the [Preferred Health] fee schedule."

CONTRACTING WITH CAROLINA CARE PLAN

22. Carolina Care Plan, Inc. ("Carolina Care"), is a health plan doing business in the Seneca area. Prior to 2000, Carolina Care developed its physician network in the Seneca area through direct contracts with individual physicians. In early 2000, the Preferred Health physician members terminated their Carolina Care contracts and agreed that Preferred Health would negotiate all future payor contracts on their joint behalf.

23. In June 2000, Preferred Health proposed its fee schedule to Carolina Care. Carolina Care counter-proposed its standard price list, which contains the rates that it pays other physicians in South Carolina. These rates – almost all of which were at least 10% to 30% below the Preferred Health fee schedule – were between 100% and 140% of 2000 RBRVS for most procedures and closely matched what Carolina Care was previously paying the Preferred Health members with whom it had direct contracts prior to 2000. By September 2000, the Preferred Health Board rejected Carolina Care's contract offer and demanded that Carolina Care accept the Preferred Health fee schedule.

24. Shortly thereafter, Carolina Care made another contract proposal to Preferred Health, increasing its proposed payment terms for certain procedures by as much as 42%. In October 2000, the Preferred Health Board instructed the Executive Director to reject this proposal as well. Ultimately, Carolina Care met Preferred Health's demand in May 2001, and signed a contract containing Preferred Health's fee schedule. Preferred

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Health never transmitted Carolina Care's various fee proposals to member physicians during the course of negotiations, and never notified members of the Carolina Care contract until after signing it. Carolina Care told Preferred Health that "[the] physician fee schedule is significantly higher than [Carolina Care's] standard" in the rest of South Carolina.

CONTRACTING WITH CIGNA

25. Cigna of South Carolina, Inc. ("Cigna"), is a payor doing business in the Seneca area. In early 2000, Preferred Health physician members who had direct contracts with Cigna terminated those contracts, and informed Cigna that Preferred Health would now jointly handle their contract negotiations. In late 2000, Preferred Health proposed its fee schedule to Cigna, which contained rates that were approximately 5% to 40% higher than the rates that Cigna had been paying under direct contracts with Preferred Health physician members. Confronted with Preferred Health's collective demands, and needing Preferred Health's physician members to assemble a marketable health plan in the Seneca area, Cigna, in March 2001, agreed to Preferred Health's price demands. Preferred Health did not notify physician members of the Cigna contract and fee schedule until after Cigna signed the contract.

CONTRACTING WITH OTHER PAYORS

26. Preferred Health, on behalf of its physician members, has orchestrated collective negotiations with other payors who do business, or attempted to do business, in the Seneca area, including Private Healthcare Systems, Inc., Premier Health Systems, Inc., and Medcost, LLC. Preferred Health negotiated with these payors on price, making proposals and counter-proposals, as well as accepting or rejecting offers, without transmitting them to members for their individual acceptance or rejection. Preferred Health also facilitated collective refusals to deal and threats of refusals to deal with payors. Preferred Health's members collectively accepted or rejected these payor contracts,

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and refused to deal with these payors individually. Due to Preferred Health's dominant market position in the Seneca area, these coercive tactics have been successful in raising the prices paid to its physician members.

RESPONDENT'S PRICE-FIXING IS NOT JUSTIFIED

27. Respondent's joint negotiation of fees and other competitively significant contract terms has not been, and is not, reasonably related to any efficiency-enhancing integration.

RESPONDENT'S ACTIONS HAVE HAD SUBSTANTIAL ANTICOMPETITIVE EFFECTS

28. Respondent's actions described in Paragraphs 12 through 26 of this Complaint have had, or tend to have had, the effect of restraining trade unreasonably and hindering competition in the provision of physician services in the Seneca area in the following ways, among others:

- a. price and other forms of competition among physician members of Preferred Health were unreasonably restrained;
- b. prices for physician services were increased; and
- c. health plans, employers, and individual consumers were deprived of the benefits of competition among physicians.

VIOLATION OF THE FEDERAL TRADE COMMISSION ACT

29. The combination, conspiracy, acts, and practices described above constitute unfair methods of competition in violation of Section 5 of the Federal Trade Commission Act, 15 U.S.C. § 45.

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Such combination, conspiracy, acts, and practices, or the effects thereof, are continuing and will continue or recur in the absence of the relief herein requested.

WHEREFORE, THE PREMISES CONSIDERED, the Federal Trade Commission on this thirteenth day of April, 2005, issues its Complaint against Respondent Preferred Health.

Decision and Order

DECISION AND ORDER

The Federal Trade Commission (“Commission”), having initiated an investigation of certain acts and practices of Preferred Health Services, Inc. (“Preferred Health”), hereinafter sometimes referred to as “Respondent,” and Respondent having been furnished thereafter with a copy of the draft of Complaint that counsel for the Commission proposed to present to the Commission for its consideration and which, if issued, would charge Respondent with violations of Section 5 of the Federal Trade Commission Act, as amended, 15 U.S.C. § 45; and

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

The Commission having thereafter considered the matter and having determined that it had reason to believe that Respondent has violated the said Act, and that a Complaint should issue stating its charges in that respect, and having accepted the executed Consent Agreement and placed such Consent Agreement on the public record for a period of thirty (30) days for the receipt and consideration of public comments, and having duly considered the comment received from an interested person pursuant to Commission Rule 2.34, 16 C.F.R. § 2.34, now in further conformity with the procedure described in Commission Rule 2.34, the Commission hereby issues its Complaint, makes the following jurisdictional findings and issues the following Order:

1. Respondent Preferred Health is a not-for-profit corporation, organized, existing, and doing business under and by virtue of the laws of the State of South Carolina, with its principal address at 301 Memorial Drive, Suite E, Seneca, SC 29672.
2. The Federal Trade Commission has jurisdiction of the subject matter of this proceeding and of Respondent, and the proceeding is in the public interest.

ORDER

I.

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

- A. “Respondent” means Preferred Health Services, Inc., its officers, directors, employees, agents, attorneys, representatives, successors, and assigns; and the subsidiaries, divisions, groups, and affiliates controlled by Preferred Health Services, Inc., and the respective officers, directors, employees, agents, attorneys, representatives, successors, and assigns of each.
- B. “Medical group practice” means a bona fide, integrated firm in which physicians practice medicine together as partners, shareholders, owners, members, or employees, or in which only one physician practices medicine.
- C. “Participate” in an entity means (1) to be a partner, shareholder, owner, member, or employee of such entity, or (2) to provide services, agree to provide services, or offer to provide services, to a payor through such entity. This definition also applies to all tenses and forms of the word “participate,” including, but not limited to, “participating,” “participated,” and “participation.”

Decision and Order

- D. “Payor” means any person that pays, or arranges for the payment, for all or any part of any physician services for itself or for any other person. Payor includes any person that develops, leases, or sells access to networks of physicians.
- E. “Person” means both natural persons and artificial persons, including, but not limited to, corporations, unincorporated entities, and governments.
- F. “Physician” means a doctor of allopathic medicine (“M.D.”) or a doctor of osteopathic medicine (“D.O.”).
- G. “Preexisting contract” means a contract that was in effect on the date of the receipt by a payor that is a party to such contract of notice sent by Respondent, pursuant to Paragraph V.B of this Order, of such payor’s right to terminate such contract.
- H. “Principal address” means either (1) primary business address, if there is a business address, or (2) primary residential address, if there is no business address.
- I. “Qualified clinically-integrated joint arrangement” means an arrangement to provide physician services in which:
1. all physicians that participate in the arrangement participate in active and ongoing programs of the arrangement to evaluate and modify the practice patterns of, and create a high degree of interdependence and cooperation among, the physicians who participate in the arrangement, in order to control costs and ensure the quality of services provided through the arrangement; and
 2. any agreement concerning price or other terms or conditions of dealing entered into by or within the arrangement is reasonably necessary to obtain significant efficiencies through the joint arrangement.

- J. “Qualified risk-sharing joint arrangement” means an arrangement to provide physician services in which:
1. all physicians who participate in the arrangement share substantial financial risk through their participation in the arrangement and thereby create incentives for the physicians who participate jointly to control costs and improve quality by managing the provision of physician services, such as risk-sharing involving:
 - a. the provision of physician services for a capitated rate from payors;
 - b. the provision of physician services for a predetermined percentage of premium or revenue from payors;
 - c. the use of significant financial incentives (*e.g.*, substantial withholds) for physicians who participate to achieve, as a group, specified cost-containment goals; or
 - d. the provision of a complex or extended course of treatment that requires the substantial coordination of care by physicians in different specialties offering a complementary mix of services, for a fixed, predetermined price, where the costs of that course of treatment for any individual patient can vary greatly due to the individual patient’s condition, the choice, complexity, or length of treatment, or other factors; and
 2. any agreement concerning price or other terms or conditions of dealing entered into by or within the arrangement is reasonably necessary to obtain significant efficiencies through the joint arrangement.

II.

IT IS FURTHER ORDERED that Respondent, directly or indirectly, or through any corporate or other device, in connection

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with the provision of physician services in or affecting commerce, as “commerce” is defined in Section 4 of the Federal Trade Commission Act, 15 U.S.C. § 44, cease and desist from:

- A. Entering into, adhering to, participating in, maintaining, organizing, implementing, enforcing, or otherwise facilitating any combination, conspiracy, agreement, or understanding between or among any physicians:
 - 1. To negotiate on behalf of any physician with any payor,
 - 2. To deal, refuse to deal, or threaten to refuse to deal with any payor,
 - 3. Regarding any term, condition, or requirement upon which any physician deals, or is willing to deal, with any payor, including, but not limited to, price terms, or
 - 4. Not to deal individually with any payor, or not to deal with any payor through any arrangement other than Respondent;
- B. Exchanging or facilitating in any manner the exchange or transfer of information among physicians concerning any physician’s willingness to deal with a payor, or the terms or conditions, including price terms, on which the physician is willing to deal;
- C. Attempting to engage in any action prohibited by Paragraph II.A or II.B, above;
- D. Encouraging, suggesting, advising, pressuring, inducing, or attempting to induce any person to engage in any action that would be prohibited by Paragraphs II.A through II.C above; and
- E. For a period of three (3) years after the date this Order becomes final, acting as or using a messenger or agent on behalf of any physicians, in dealing with health plans

regarding contracts under which physicians would be compensated for the provision of services.

PROVIDED, HOWEVER, that nothing in Paragraph II of this Order shall prohibit any agreement involving or conduct by Respondent that is reasonably necessary to form, participate in, or take any action in furtherance of a qualified risk-sharing joint arrangement or a qualified clinically-integrated joint arrangement, so long as the arrangement does not restrict the ability, or facilitate the refusal, of physicians who participate in it to deal with payors on an individual basis or through any other arrangement.

III.

IT IS FURTHER ORDERED that:

- A. Respondent shall, pursuant to each purported qualified risk-sharing joint arrangement or purported qualified clinically-integrated joint arrangement (“Arrangement”), for three (3) years from the date this Order becomes final, notify the Secretary of the Commission in writing (“Qualified Arrangement Notification”) at least sixty (60) days prior to:
1. Participating in, organizing, or facilitating any discussion or understanding with or among any physicians in such Arrangement relating to price or other terms or conditions of dealing with any payor; or
 2. Contacting a payor, pursuant to an Arrangement to negotiate or enter into any agreement concerning price or other terms or conditions of dealing with any payor, on behalf of any physician in such Arrangement.

PROVIDED, HOWEVER, that the Qualified Arrangement Notification required by this Paragraph III.A is not required for negotiations or agreements with subsequent payors pursuant to any Arrangement for which the Qualified Arrangement Notification was given.

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- B. Respondent shall include the following information in the Qualified Arrangement Notification:
1. for each physician participant, his or her name, address, telephone number, medical specialty, medical practice group, if applicable, and the name of each hospital where he or she has privileges;
 2. a description of the Arrangement, its purpose, function, and area of operation;
 3. a description of the nature and extent of the integration and the efficiencies resulting from the Arrangement;
 4. an explanation of the relationship of any agreement on prices, or contract terms related to price, to furthering the integration and achieving the efficiencies of the Arrangement;
 5. a description of any procedures proposed to be implemented to limit possible anticompetitive effects resulting from the Arrangement or its activities; and
 6. all studies, analyses, and reports, that were prepared for the purpose of evaluating or analyzing competition for physician services in the Seneca, South Carolina, area, including, but not limited to, the market share of physician services.
- C. If, within sixty (60) days from the Commission's receipt of the Qualified Arrangement Notification, a representative of the Commission makes a written request for additional information to the Respondent, then Respondent shall not engage in any conduct described in Paragraph III.A.1 or Paragraph III.A.2 of this Order prior to the expiration of thirty (30) days after substantially complying with such request for additional information, or such shorter waiting period as may be granted in writing from the Bureau of Competition. The expiration of any waiting period

described herein without a request for additional information or without the initiation of an enforcement proceeding shall not be construed as a determination by the Commission, or its staff, that a violation of the law, or of this Order, may not have occurred. Further, receipt by the Commission from Respondent of any Qualified Arrangement Notification, pursuant to Paragraph III of this Order, is not to be construed as a determination by the Commission that any such Arrangement does or does not violate this Order or any law enforced by the Commission.

IV.

IT IS FURTHER ORDERED that, for three (3) years from the date Respondent is permitted to enter into an arrangement with any physician to act as or use a messenger or agent in dealing with health plans regarding contracts or terms of dealing with payors, Respondent shall notify the Secretary of the Commission in writing (“Messenger Notification”) at least sixty (60) days prior to entering into any arrangement with any physicians under which Respondent would act as a messenger, or an agent on behalf of those physicians, with payors regarding contracts or terms of dealing. The Messenger Notification shall include the identity of each proposed physician participant, the proposed geographic area of operation, a copy of any proposed physician participation agreement (including a copy of each form intended to be used to communicate with physician participants regarding contracts or terms of dealing with payors), a description of the proposed arrangement’s purpose and function, a description of any resulting efficiencies expected to be obtained through the arrangement, and a description of procedures to be implemented to limit possible anticompetitive effects, such as those prohibited by this Order. Messenger Notification is not required for Respondent’s subsequent acts as a messenger pursuant to an arrangement for which the Messenger Notification has been given. Receipt by the Commission from Respondent of any Messenger Notification, pursuant to Paragraph IV of this Order, is not to be construed as a determination by the Commission that any action described in

Decision and Order

such Messenger Notification does or does not violate this Order or any law enforced by the Commission.

V.

IT IS FURTHER ORDERED that Respondent shall:

- A. Within thirty (30) days after the date on which this Order becomes final, send by electronic mail with electronic return receipt, a copy of this Order and the Complaint to:
 1. each physician who participates, or has participated, since January 1, 2003, in Respondent; and
 2. each officer, director, manager, and employee of Respondent;
- B. Within thirty (30) days after the date on which this Order becomes final, send by first-class mail, return receipt requested, a copy of this Order and the Complaint to the chief executive officer of each payor with which Respondent has a record of having been in contact since January 1, 2003, regarding contracting for the provision of physician services, and include in such mailing the notice specified in Appendix A to this Order;
- C. Terminate, without penalty or charge, and in compliance with any applicable laws, any preexisting contract with any payor for the provision of physician services, at the earlier of: (1) receipt by Respondent of a written request from a payor to terminate such contract, or (2) the earliest termination or renewal date (including any automatic renewal date) of such contract; *provided, however*, a preexisting contract may extend beyond any such termination or renewal date no later than one (1) year after the date on which the Order becomes final if, prior to such termination or renewal date, (a) the payor submits to Respondent a written request to extend such contract to a

specific date no later than one (1) year after the date this Order becomes final, and (b) Respondent has determined not to exercise any right to terminate; *provided further*, that any payor making such request to extend a contract retains the right, pursuant to part (1) of Paragraph V.C of this Order, to terminate the contract at any time;

- D. Within ten (10) days after receiving a written request from a payor, pursuant to Paragraph V.C(1) of this Order, distribute, by first-class mail, return receipt requested, a copy of that request to each physician participating in Respondent as of the date Respondent receives such request;
- E. For a period of three (3) years after the date this Order becomes final:
 - 1. distribute by first-class mail, return receipt requested, a copy of this Order and the Complaint to:
 - a. each physician who begins participating in Respondent, and who did not previously receive a copy of this Order and the Complaint from Respondent, within thirty (30) days of the time that such participation begins;
 - b. each payor that contracts with Respondent for the provision of physician services, and that did not previously receive a copy of this Order and the Complaint from Respondent, within thirty (30) days of the time that such payor enters into such contract; and
 - c. each person who becomes an officer, director, manager, or employee of Respondent, and who did not previously receive a copy of this Order and the Complaint from Respondent, within thirty (30) days of the time that he or she assumes such responsibility with Respondent; and
 - 2. annually publish a copy of this Order and the Complaint in an official annual report or newsletter sent to all physicians

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who participate in Respondent, with such prominence as is given to regularly featured articles;

- F. File a verified written report within sixty (60) days after the date this Order becomes final, annually thereafter for three (3) years on the anniversary of the date this Order becomes final, and at such other times as the Commission may by written notice require. Each such report shall include:
1. a detailed description of the manner and form in which Respondent has complied and is complying with this Order; and
 2. copies of the return receipts required by Paragraphs V.A, V.B, V.D, and V.E.1 of this Order; and
- G. Notify the Commission at least thirty (30) days prior to any proposed (1) dissolution of Respondent, (2) acquisition, merger or consolidation of Respondent, or (3) any other change in Respondent that may affect compliance obligations arising out of this Order, including but not limited to assignment, the creation or dissolution of subsidiaries, or any other change in Respondent.

VI.

IT IS FURTHER ORDERED that Respondent shall notify the Commission of any change in its principal address within twenty (20) days of such change in address.

VII.

IT IS FURTHER ORDERED that, for the purpose of determining or securing compliance with this Order, Respondent shall permit any duly authorized representative of the Commission:

- A. Access, during office hours, and in the presence of counsel, to inspect and copy all books, ledgers, accounts, correspondence, memoranda, calendars, and other records and documents in its possession, or under its control, relating to any matter contained in this Order; and
- B. Upon five (5) days' notice to Respondent, and in the presence of counsel, and without restraint or interference from it, to interview Respondent or employees of Respondent.

VIII.

IT IS FURTHER ORDERED that this Order shall terminate on April 13, 2025.

Decision and Order

Appendix A

[letterhead of Preferred Health]

[name of payor's CEO]
[address]

Dear _____:

Enclosed is a copy of a complaint and a consent order ("Order") issued by the Federal Trade Commission against Preferred Health Services, Inc. ("Preferred Health").

Pursuant to Paragraph V.C of the Order, Preferred Health must allow you to terminate, upon your written request, without any penalty or charge, any contracts with Preferred Health that were in effect prior to your receipt of this letter.

Paragraph V.C of the Order also provides that, if you do not terminate a contract, the contract will terminate on its earliest termination or renewal date (including any automatic renewal date). However, at your request, the contract may be extended to a date no later than [appropriate date, pursuant to the Order, to be filled in by Preferred Health]. If you choose to extend the term of the contract, you may later terminate the contract at any time.

Any request either to terminate or to extend the contract should be made in writing, and sent to me at the following address: [address].

Sincerely,

Analysis of Agreement Containing Consent Order to Aid Public Comment

The Federal Trade Commission has accepted, subject to final approval, an agreement containing a proposed consent order with Preferred Health Services, Inc. (Preferred Health). The agreement settles charges that Preferred Health violated Section 5 of the Federal Trade Commission Act, 15 U.S.C. § 45, by orchestrating and implementing agreements among members of Preferred Health to fix prices and other terms on which they would deal with health plans, and to refuse to deal with such purchasers except on collectively-determined terms. The proposed consent order has been placed on the public record for 30 days to receive comments from interested persons. Comments received during this period will become part of the public record. After 30 days, the Commission will review the agreement and the comments received, and will decide whether it should withdraw from the agreement or make the proposed order final.

The purpose of this analysis is to facilitate public comment on the proposed order. The analysis is not intended to constitute an official interpretation of the agreement and proposed order, or to modify their terms in any way. Further, the proposed consent order has been entered into for settlement purposes only and does not constitute an admission by Preferred Health that it violated the law or that the facts alleged in the complaint (other than jurisdictional facts) are true.

The Complaint

The allegations of the complaint are summarized below.

Preferred Health is a physician-hospital organization consisting of over 100 physicians and Oconee Memorial Hospital. Preferred Health does business in the Seneca, South Carolina, area, which is located in northwestern South Carolina. Preferred Health acts as a “contracting representative” for its physician members in

Analysis

negotiations with health plans, and a “collective bargaining unit for the negotiation of managed care contracts.”

Preferred Health’s physician members account for approximately 70% of the physicians independently practicing (that is, those not employed by area hospitals) in and around the Seneca area. To be marketable in the Seneca area, a health plan must have access to a large number of physicians who are members of Preferred Health.

Although Preferred Health purports to operate as a “messenger model”¹ – that is, an arrangement that does not facilitate horizontal agreements on price – it orchestrated such price agreements. In contract negotiations with payors, Preferred Health uses a physician fee schedule created by its Executive Director and approved by its Board of Directors. Preferred Health’s membership agreement automatically binds physician members to contracts using the Preferred Health fee schedule. Whenever a health plan rejects the Preferred Health fee schedule, Preferred Health’s Executive Director negotiates, under the Board’s direction, a contract with a “comparable” fee schedule. The Executive Director transmits these contracts to the Board, and then to the physician members if the Board approves it. If a contract contains a Board-approved “comparable” fee schedule, physician members have 30 days to reject the contract. The only recourse available to a physician member who rejects a contract with a “comparable” fee schedule is to terminate his or her membership in Preferred Health.

¹ Some arrangements can facilitate contracting between health care providers and payors without fostering an illegal agreement among competing physicians on fees or fee-related terms. One such approach, sometimes referred to as a “messenger model” arrangement, is described in the 1996 Statements of Antitrust Enforcement Policy in Health Care jointly issued by the Federal Trade Commission and U.S. Department of Justice, at 125. See <http://www.ftc.gov/reports/hlth3s.htm#9>.

Preferred Health has orchestrated collective agreements on fees and other terms of dealing with health plans, carried out collective negotiations with health plans, fostered refusals to deal, and threatened to refuse to deal with health plans that resisted Respondent's desired terms. Respondent succeeded in forcing numerous health plans to raise the fees paid to Preferred Health physician members, and thereby raised the cost of medical care in the Seneca area. Preferred Health engaged in no efficiency-enhancing integration sufficient to justify joint negotiation of fees. By the acts set forth in the Complaint, Respondent violated Section 5 of the FTC Act.

The Proposed Consent Order

The proposed order is designed to remedy the illegal conduct charged in the complaint and prevent its recurrence. It is similar to recent consent orders that the Commission has issued to settle charges that physician groups engaged in unlawful agreements to raise fees they receive from health plans.

The proposed order's specific provisions are as follows:

Paragraph II.A prohibits Respondent from entering into or facilitating any agreement between or among any physicians: (1) to negotiate with payors on any physician's behalf; (2) to deal, not to deal, or threaten not to deal with payors; (3) on what terms to deal with any payor; or (4) not to deal individually with any payor, or to deal with any payor only through an arrangement involving the Respondent.

Other parts of Paragraph II reinforce these general prohibitions. Paragraph II.B prohibits the Respondent from facilitating exchanges of information between physicians concerning whether, or on what terms, to contract with a payor. Paragraph II.C bars attempts to engage in any action prohibited by Paragraph II.A or II.B, and Paragraph II.D proscribes Respondent from inducing anyone to engage in any action prohibited by Paragraphs II.A through II.C.

Analysis

Paragraph II.E contains certain additional “fencing-in” relief, which is imposed for three years. Under this provision, Preferred Health may not, in connection with physician health plan contracting, either (1) act as an agent for any physicians; or (2) use an agent with respect to contracting. Such relief, designed to assure that Preferred Health does not seek to use other arrangements to continue the challenged conduct, is warranted in light of the complaint charges that Preferred Health engaged in overt price-fixing behavior, and its assertion that its conduct was legitimate “messengering” of health plan contract offers.

As in other Commission orders addressing providers’ collective bargaining with health care purchasers, certain kinds of agreements are excluded from the general bar on joint negotiations. Respondent would not be precluded from engaging in conduct that is reasonably necessary to form or participate in legitimate joint contracting arrangements among competing physicians in a “qualified risk-sharing joint arrangement” or a “qualified clinically-integrated joint arrangement.” The arrangement, however, must not facilitate the refusal of, or restrict, physicians in contracting with payors outside of the arrangement.

As defined in the proposed order, a “qualified risk-sharing joint arrangement” possesses two key characteristics. First, all physician participants must share substantial financial risk through the arrangement, such that the arrangement creates incentives for the physician participants jointly to control costs and improve quality by managing the provision of services. Second, any agreement concerning reimbursement or other terms or conditions of dealing must be reasonably necessary to obtain significant efficiencies through the joint arrangement.

A “qualified clinically-integrated joint arrangement,” on the other hand, need not involve any sharing of financial risk. Instead, as defined in the proposed order, physician participants must participate in active and ongoing programs to evaluate and modify their clinical practice patterns in order to control costs and

ensure the quality of services provided, and the arrangement must create a high degree of interdependence and cooperation among physicians. As with qualified risk-sharing arrangements, any agreement concerning price or other terms of dealing must be reasonably necessary to achieve the efficiency goals of the joint arrangement.

Paragraph III, for three years, requires Preferred Health to notify the Commission before participating in contracting with health plans on behalf of a qualified risk-sharing joint arrangement or qualified clinically-integrated joint arrangement. Paragraph III sets out the information necessary to make the notification complete.

Paragraph IV, for three years after the bar on messengering ends, requires Preferred Health to notify the Commission before entering into any arrangement to act as a messenger, or as an agent on behalf of any physicians, with payors regarding contracts. Paragraph IV also sets out the information necessary to make the notification complete.

Paragraph V requires Preferred Health to distribute the complaint and order to all physicians who have participated in Preferred Health, and to payors that negotiated contracts with Preferred Health or indicated an interest in contracting with Preferred Health. Paragraph V.C requires Preferred Health, at any payor's request and without penalty, or within one year after the Order is made final, to terminate its current contracts with respect to providing physician services. Paragraph V.D requires Preferred Health to distribute payor requests for contract termination to all physicians who participate in Preferred Health. Paragraph V.E.1.b requires Preferred Health to distribute the complaint and order to any payors that negotiate contracts with Preferred Health in the next three years.

Analysis

Paragraphs VI and VII of the proposed order impose various obligations on Respondent to report or provide access to information to the Commission to facilitate monitoring Respondent's compliance with the order.

The proposed order will expire in 20 years.

Complaint

IN THE MATTER OF

**VISION I PROPERTIES, LLC, doing business as
CARTMANAGER INTERNATIONAL**CONSENT ORDER, ETC., IN REGARD TO ALLEGED VIOLATIONS OF
SEC. 5 OF THE FEDERAL TRADE COMMISSION ACT*Docket C-4135; File No. 0423068
Complaint, April 19, 2005—Decision, April 19, 2005*

This consent order, among other things, prohibits the respondent from making, expressly or by implication, any false or misleading representation regarding the collection, use, or disclosure of personally identifiable information (“PII”). The order also prohibits the respondent from selling, renting, or disclosing to any third party for marketing purposes any PII collected from consumers -- through shopping cart software used at a merchant customer’s Web site -- before the order became effective. In addition, the order prohibits the respondent from selling, renting or disclosing to any third party for marketing purposes any PII collected from consumers -- through shopping cart or other software used at a merchant customer’s Web site -- after the order became effective, without taking certain steps to ensure that consumers receive advance notice that the information they provide may be sold, rented, or disclosed to third parties. The order also requires the respondent to disgorge to the United States Treasury the fees it received from renting consumer information.

Participants

For the Commission: *Loretta H. Garrison, Laura Mazzarella, Jessica L. Rich, Joel Winston, Louis Silversin, and Gerard R. Butters.*

For the Respondent: *Joseph Emig.*

COMPLAINT

The Federal Trade Commission, having reason to believe that Vision I Properties, LLC, doing business as CartManager International, a corporation (“Vision One” or “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:

Complaint

1. Respondent Vision One is a Utah corporation with its principal office or place of business at 2250 N. University Parkway, Suite 4880, Provo, UT 84604.
2. The acts and practices of Respondent as alleged in this complaint have been in or affecting commerce, as “commerce” is defined in Section 4 of the Federal Trade Commission Act.
3. Respondent licenses shopping cart software and provides related services to thousands of small online retail merchants through its Web site, www.cartmanager.com. The shopping cart software generates customizable “shopping cart” and “check out” Web pages for use on the merchants’ Web sites. These pages reside on Respondent’s Web site but are designed to look like the other pages on the merchant’s site and typically display the merchant’s name and logo.
4. When a consumer seeks to make a purchase from a merchant Web site that uses Respondent’s software, the software generates shopping cart and check out pages, which collect information provided by the consumer. Such information includes the consumer’s name, billing and shipping addresses, phone number, email address, credit card information, and the item and quantity of merchandise selected by the consumer. The software then transmits the customer information to Respondent and notifies the merchant so that the merchant can fulfill the customer’s order.
5. Some of the merchants using Respondent’s shopping cart software have disseminated or caused to be disseminated various privacy policies on their Web sites. These privacy policies contain statements regarding the use and disclosure of personal information collected through their Web sites. A few examples of these statements are as follows:
 - A. “[] is committed to protecting customer privacy. We use the information we collect from you to process orders and to provide an enhanced shopping experience. [] does not sell,

Complaint

trade or rent personal information or shopping habits to third parties. Customer account and transaction information, as well as correspondence, is handled with the utmost discretion.”

- B. “PRIVACY POLICY: It’s simple. We don’t sell, trade, or lend any information on our customers or visitors to anyone.”
- C. “[] Pledges and solidly guarantees that all personal information, from any source, that is submitted, gathered, tracked or otherwise obtained or retained in the normal course of online business activity associated with the company’s Web site/s, is secure and held confidential at all times from sale, disclosure, rental, and tampering by any known third party. . . .”
- D. “[] is committed to protecting your privacy. . . . We never sell any information to outside parties. We protect your information from unauthorized access. Information you give us is used only to the extent needed to conduct our business and to meet the highest quality service standards for processing, verifying and filling your orders.”
6. In January 2003, Respondent began renting to third parties for marketing purposes consumers’ personal information collected through shopping cart and check out pages generated by its software at merchant sites. Such personal information includes the name, address, phone number, and purchase history of nearly one million consumers. This personal information was used by third parties to send direct mail and make telemarketing calls to consumers who shopped at merchant sites using the software.
7. Although the shopping cart and check out pages generated by Respondent’s software appear to be part of the merchants’ sites, the pages do not disclose to consumers that the information entered on them is not subject to the merchant

Complaint

privacy policies or that it will be shared with third parties for marketing purposes. Further, because the shopping cart and check out pages are typically the only pages on the merchants' sites that collect personal information, consumers reasonably expect that the merchants' privacy policies cover information consumers provide on those pages.

8. Respondent also does not adequately inform merchants – in promoting its shopping cart software or at a later time – that it intends to use information collected from merchants' customers in a manner that may be inconsistent with the merchants' privacy policies or that it intends to share the information with third parties for marketing purposes. Although Respondent's online license agreement asserts that "CartManager shall retain full ownership of all data submitted by either Merchant or Purchaser through the CartManager Shopping Cart . . . including, but not limited to name, mailing & shipping address, email address, phone number, dollar amount of purchase, type of purchase and description of purchase," this statement is buried in the middle of the online agreement and does not explain how Respondent intends to use the information or that such use may conflict with the merchants' privacy policies.
9. Through shopping cart software used at merchant Web sites, Respondent has collected personal information from consumers and shared it with third parties knowing that such practices were contrary to merchant privacy policies. Respondent's practices have caused consumers substantial injury that is not offset by countervailing benefits to consumers or competition. Further, because Respondent's practices were not adequately disclosed to merchants or consumers, the injury was not reasonably avoidable.
10. The acts and practices of Respondent as alleged in this complaint constitute unfair acts or practices in or affecting commerce in violation of Section 5(a) of the Federal Trade Commission Act, 15 U.S.C. § 45(a).

Complaint

THEREFORE, the Federal Trade Commission this nineteenth day of April, 2005, has issued this complaint against Respondent.

Decision and Order

DECISION AND ORDER

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

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

The Commission having thereafter considered the matter and having determined that it has reason to believe that the Respondent has violated the said Act, and that a Complaint should issue stating its charges in that respect, and having thereupon accepted the executed Consent Agreement and placed such Consent Agreement on the public record for a period of thirty (30) days, now in further conformity with the procedure described in Section 2.34 of its Rules, the Commission hereby issues its Complaint, makes the following jurisdictional findings and enters the following Order:

1. Respondent Vision I Properties, LLC, d/b/a CartManager International (“Vision One”), a corporation with its principal office or place of business at 2250 N. University Parkway, Suite 4880, Provo, UT 84604.

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

ORDER

DEFINITIONS

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

1. “Personally identifiable information” or “personal information” shall mean individually identifiable information from or about an individual including, but not limited to: (a) a first and last name; (b) a home or other physical address, including street name and name of city or town; (c) an email address or other online contact information, such as an instant messaging user identifier or a screen name that reveals an individual’s email address; (d) a telephone number; (e) a Social Security number; (f) a persistent identifier, such as a customer number held in a “cookie” or processor serial number, that is combined with other available data that identifies an individual; or (g) any information that is combined with any of (a) through (f) above.
2. Unless otherwise specified, “Respondent” shall mean Vision One and its successors and assigns and its officers, and its agents, representatives, and employees.
3. “Merchant customer” shall mean a person or entity that uses Respondent’s shopping cart software and related services in connection with the sale of products and services on a Web site.
4. “Clearly and conspicuously” shall mean as follows:
 - A. In print communications, the message shall be in a type size and location sufficiently noticeable for an ordinary consumer to read and comprehend it, in print that contrasts with the background against which it appears.

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- B. In communications disseminated orally, the message shall be delivered in a volume and cadence sufficient for an ordinary consumer to hear and comprehend it.
- C. In communications made through an electronic medium (such as television, video, radio, and interactive media such as the Internet, online services and software), the message shall be presented simultaneously in both the audio and visual portions of the communication. In any communication presented solely through visual or audio means, the message may be made through the same means in which the communication is presented. Any audio message shall be delivered in a volume and cadence sufficient for an ordinary consumer to hear and comprehend it. Any visual message shall be of a size and shade, with a degree of contrast to the background against which it appears, and shall appear on the screen for a duration and in a location, sufficiently noticeable for an ordinary consumer to read and comprehend it.

The message shall be in understandable language and syntax. Nothing contrary to, inconsistent with, or in mitigation of the message shall be used in any communication.

- 5. “Commerce” shall mean as defined in Section 4 of the Federal Trade Commission Act, 15 U.S.C. § 44.

I.

IT IS ORDERED that Respondent, directly or through any corporation, subsidiary, division, or other device, in connection with the collection of personally identifiable information from or about consumers, shall not make, expressly or by implication, any false or misleading representation regarding the collection, use, or disclosure of personally identifiable information.

II.

IT IS FURTHER ORDERED that Respondent, directly or through any corporation, subsidiary, division, or other device, shall not sell, rent, or disclose to any third party for marketing purposes any personally identifiable information that was collected from consumers through shopping cart software used at a merchant customer's Web site prior to the date of service of this Order.

III.

IT IS FURTHER ORDERED that Respondent, directly or through any corporation, subsidiary, division, or other device, shall not sell, rent, or disclose to any third party for marketing purposes any personally identifiable information collected from consumers through shopping cart or other software used at a merchant customer's Web site after the date of service of this Order unless, prior to the date such information was collected, Respondent took one of the following two actions:

- A. Provided to the merchant customer a clear and conspicuous written notice of its information practices and obtained from the merchant customer a written certification stating:
 - (1) that the merchant customer received such notice; and
 - (2) either (a) that its posted privacy policy states that consumers' information may be sold, rented, or disclosed to third parties, or (b) that it provides a clear and conspicuous disclosure, before any personally identifiable information is collected from consumers through Respondent's shopping cart or other software, stating that the consumer is leaving the merchant customer's Web site and entering Respondent's Web site, and that Respondent's site is governed by Respondent's own privacy policy.

Decision and Order

The written notice to merchants required by this Paragraph shall be labeled "**Important Notice to Merchants from CartManager**" and must: (1) state that Respondent intends to sell, rent, or disclose such information; (2) identify the types or categories of any entities to which such information will be disclosed; (3) advise the merchant customer that it may be liable for any misrepresentations it makes about the use or disclosure of information collected from consumers at its Web site, including through software used at the site; and (4) contain no other information;

OR

- B. Provided a clear and conspicuous disclosure on the page(s) through which it collected such information stating: (1) that the consumer is on Respondent's Web site, and (2) that information provided by the consumer to Respondent will be used, sold, rented, or disclosed to third parties for marketing purposes.

IV.

IT IS FURTHER ORDERED that within five (5) days of the date of service of this Order, Respondent shall pay \$9,101.63 to the United States Treasury as disgorgement. Such payment shall be by cashier's check or certified check made payable to the Treasurer of the United States. In the event of any default in payment, which default continues for more than ten (10) days beyond the due date of payment, Respondent shall also pay interest as computed under 28 U.S.C. § 1961, which shall accrue on the unpaid balance from the date of default until the date the balance is fully paid.

V.

IT IS FURTHER ORDERED that Respondent Vision One and its successors and assigns shall, for a period of five (5) years after the last date of dissemination of any representation covered by this

Order, maintain and upon request make available to the Federal Trade Commission for inspection and copying a print or electronic copy of all documents demonstrating their compliance with the terms and provisions of this Order, including, but not limited to:

- A. A sample copy of each different privacy statement or communication relating to the collection of personally identifiable information containing representations about how personally identifiable information will be used and/or disclosed. Each Web page copy shall be dated and contain the full URL of the Web page where the material was posted online. Electronic copies shall include all text and graphics files, audio scripts, and other computer files used in presenting the information on the Web; provided, however, that after creation of any Web page or screen in compliance with this Order, Respondent shall not be required to retain a print or electronic copy of any amended Web page or screen to the extent that the amendment does not affect Respondent's compliance obligations under this Order;
- B. A sample copy of each different document containing the disclosures required by Part III.A. of this Order; a list of all merchant customers who received each different document containing such disclosures; all communications by merchant customers in response to such disclosures, including all written certifications received pursuant to Part III.A. and any complaints received from merchant customers; and a sample copy of each different document containing the disclosures required by Part III.B.; and
- C. All invoices, communications, and records relating to the disclosure to third parties of personally identifiable information collected through merchant customer Web sites.

Decision and Order

VI.

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

VII.

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

VIII.

IT IS FURTHER ORDERED that Respondent Vision One and its successors and assigns shall, within sixty (60) days after service of this Order, and at such other times as the Federal Trade Commission may require, file with the Commission a report, in writing, setting forth in detail the manner and form in which it has complied with this Order.

IX.

This Order will terminate on April 19, 2025, or twenty (20) years from the most recent date that the United States or the Federal Trade Commission files a complaint (with or without an accompanying consent decree) in federal court alleging any violation of the Order, whichever comes later; provided, however, that the filing of such a complaint will not affect the duration of:

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

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

Analysis

Analysis of Proposed Consent Order to Aid Public Comment

The Federal Trade Commission has accepted an agreement, subject to final approval, to a proposed consent order from Vision I Properties, LLC, d/b/a CartManager International (“Vision One”). Vision One licenses shopping cart software and provides related services to thousands of small online retail merchants through its Web site, www.cartmanager.com.

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 other appropriate action or make final the agreement’s proposed order.

This matter concerns Vision One’s collection and rental of personal information obtained from consumers making purchases from online merchants that used Vision One’s software. Vision One provides shopping cart software and services to thousands of small online retail merchants. The shopping cart software generates customizable “shopping cart” and “check out” Web pages that enable the merchant to process consumer purchases. A consumer uses these pages to select items for purchase. These pages then collect the consumer’s payment, shipping, and billing information.

The shopping cart and check out pages reside on Vision One’s Web site, enabling Vision One to collect consumers’ personal information through its software. The shopping cart and check out pages are designed to look like the other pages on the merchant’s site and typically display the merchant’s name and logo.

Many of the merchants using Vision One’s shopping cart software have posted privacy policies on their Web sites, which

generally limit the disclosure of personal information collected from consumers. Many of these privacy policies have stated that the merchant's practice is never to sell or rent personal information to third parties. Notwithstanding the promises made in these merchants' privacy policies, Vision One rented the personal information (including name, address, telephone number, and purchase history) of nearly one million consumers it obtained through its software to third parties for marketing purposes. According to the complaint, Vision One failed to inform adequately these merchants or the consumers shopping at their sites that it intended to disclose this information. The Commission's complaint charges that, by collecting consumers' personal information at these merchant sites and renting it to third parties, knowing that such practices were contrary to these merchants' privacy policies, Vision One engaged in unfair practices prohibited by Section 5 of the Federal Trade Commission Act.

The proposed consent order is designed to stop Vision One from violating Section 5 and to prevent Vision One from engaging in such violations in the future. Part I of the proposed consent order prohibits Vision One from making any misrepresentations regarding its collection, use, or disclosure of consumers' personal information. Part II of the order prohibits Vision One from disclosing to any third party for marketing purposes any personal information it previously collected from consumers through its shopping cart software used at a merchant's site.

Part III of the proposed order addresses Vision One's future collection of personal information. It prohibits Vision One from selling, renting, or disclosing to any third party for marketing purposes any personal information it collects from consumers through its shopping cart software, unless consumers are provided with notice. Vision One must disclose its information practices either to the merchants or directly to consumers prior to its collection of any personal information. If Vision One provides the notice directly to its merchants, it must obtain certifications from the merchants that they received the notice and have either

Analysis

(1) posted a privacy policy stating that consumers' information may be sold, rented, or disclosed to third parties, or (2) posted a clear and conspicuous notice on their Web sites advising consumers that they are leaving the merchant's site and entering Vision One's site where a different privacy policy governs. If Vision One chooses to provide notice directly to consumers rather than to the merchants, it must clearly and conspicuously post the notice on the page(s) where it collects personal information. The notice must state that the consumer is on Vision One's site and that personal information provided by the consumer will be used, sold, rented, or disclosed to third parties for marketing.

Part IV of the proposed order requires Vision One to pay \$9,101.63 to the United States Treasury as disgorgement of the fees it received from renting consumer information.

The remainder of the proposed order contains standard requirements that Vision One: maintain copies of privacy statements and other documents relating to the collection, use, or disclosure of personally identifiable information, and all notices, certifications, and other documents relating to the disclosures required by Part III of the order; distribute copies of the order to certain company officials and employees; notify the Commission of any change in the corporation that may affect compliance obligations under the order; and file one or more reports detailing its compliance with the order. Part IX of the proposed order is a provision whereby the order, absent certain circumstances, terminates twenty years from the date of issuance.

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

The proposed order, if issued in final form, will resolve the claims alleged in the complaint against the named respondent. It is not the Commission's intent that acceptance of this consent agreement and issuance of a final decision and order will release

any claims against any unnamed persons or entities associated with the conduct described in the complaint.

Complaint

IN THE MATTER OF

HI-HEALTH SUPERMART CORPORATION, ET AL.

CONSENT ORDER, ETC., IN REGARD TO ALLEGED VIOLATIONS OF
SEC. 5 AND SEC. 12 OF THE FEDERAL TRADE COMMISSION ACT

*Docket C-4136; File No. 0323239
Complaint, May 12, 2005--Decision, May 12, 2005*

This consent order, among other things, prohibits the respondents from making unsubstantiated claims that their dietary supplement -- which the respondents had marketed for the treatment of age-related macular degeneration of and cataracts and floaters in the eyes -- or any substantially similar product restores vision lost from macular degeneration or eliminates floaters. The order also prohibits the respondents from making unsubstantiated benefits, performance, efficacy, or safety claims for -- and from misrepresenting the existence, contents, validity, results, conclusions, or interpretations of any test or study in connection with the marketing of -- any health-related service or program, dietary supplement, food, drug, or device. In addition, the order requires the respondents to pay \$450,000 to the Commission as consumer redress.

Participants

For the Commission: *Matthew Daynard, Heather A. Hipsley, Mary K. Engle, Carolyn A. Cox, and Gerard R. Butters.*

For the Respondents: *James H. Sneed and William Diaz, McDermott, Will & Emery.*

COMPLAINT

The Federal Trade Commission, having reason to believe that Hi-Health Supermart Corporation, a corporation, and Simon D. Chalpin, individually and as an officer of the corporation ("respondents"), have violated the provisions of the Federal Trade Commission Act, and it appearing to the Commission that this proceeding is in the public interest, alleges:

1. Respondent Hi-Health Supermart Corporation ("Hi-Health") is an Arizona corporation with its principal office or place of business at 7428 East Karen Drive, Scottsdale, Arizona 85260.

Complaint

2. Respondent Simon D. Chalpin is president and chief executive officer of Hi-Health. Individually, or in concert with others, he formulates, directs, controls, or participates in the policies, acts, or practices of Hi-Health, including the acts and practices alleged in this complaint. His principal office or place of business is the same as that of the corporation.
3. The acts and practices of respondents alleged in this complaint have been in or affecting commerce, as "commerce" is defined in Section 4 of the Federal Trade Commission Act.
4. Respondents have advertised, offered for sale, and sold directly to the public and through the Paul Harvey "News and Comment" radio show "Premier Formula for Ocular Nutrition-Optim 3" ("Ocular Nutrition"), a dietary supplement containing Vitamins A, C, and E, zinc, lutein, zeaxanthin, and other ingredients for the purported treatment of eye diseases and conditions, including age-related macular degeneration, cataract, and floaters. Consumers pay \$39.95 plus shipping and handling for a 25-day supply of Ocular Nutrition. Ocular Nutrition is a "food" or "drug" within the meaning of Sections 12 and 15 of the Federal Trade Commission Act.
5. Respondents have disseminated or have caused to be disseminated advertisements through the Paul Harvey "News and Comment" radio show, including but not necessarily limited to the attached Exhibits A - F. These advertisements contain the following statements:

A. PAUL HARVEY NOON NEWS 6/17/03

PAUL HARVEY: From the mailbag: Dear Paul Harvey News, I was starting to get gray lines in my vision five years ago when I went to an eye care specialist and I was told that there were floaters made of protein deposits and nothing could be done. Well, they got worse 'til I had them in both eyes. I thought it was a lifetime thing.

Complaint

Then I heard you advertising a product called Ocular Nutrition and I thought, what did I have to lose, so I ordered it. And on the first day, my vision became brighter. And now, I've taken them for two days and the dark areas in my vision are nearly gone. I just wanted you to know how well it worked. Thank you very much. Signed, Dorothy Farnum (phonetic), Kearney, Nebraska.

The nutritional supplements now prescribed in three responsible medical journals are Flora Glo Lutein and Vitamins A and C and E and zinc, and you get them all in one capsule from Hi-Health Ocular Nutrition. You can order as I do with a phone call to 1-800-686-2299. Again, the 800 number is 686-2299. [Exhibit A]

B. PAUL HARVEY NOON NEWS 8/7/03

PAUL HARVEY: From the mailbag. Mr. Harvey, my mother is 84; has been to four different eye doctors and bought the strongest eyeglasses that she could get, but her eyesight was fading. We were not going to renew our newspaper or magazine subscriptions because she could not see. But then we got the vitamins you recommended and she started taking them Tuesday, and by Thursday, she was reading our county paper and by Friday, she was reading our Singing News Magazine, which she hadn't been able to read for more than six months. Thank you for telling us about Ocular Nutrition. Signed, Joanne Menshaw (phonetic) of Brighton, Georgia.

There are now several nutritional studies in three responsible medical journals reporting that Flora Glo Lutein and Vitamins A and C and E and zinc can help some individuals with macular degeneration and you can get all of these in one capsule from Hi-Health Ocular Nutrition.

You can order with a phone call as I do to 1-800-686-2299 or go online at www.hihealth.com. Ocular Nutrition from Hi-Health. Again, the 800 number is 686-2299. [Exhibit B]

Complaint

C. PAUL HARVEY NOON NEWS 8/20/03

PAUL HARVEY: Page four. Mr. Harvey -- I'm reading from the mailbag -- I'm a man of 83. I have had macular degeneration for four years. I was beginning to think that I'd have to spend the rest of my life in the dark. And then we heard you talking about Ocular Nutrition. My wife said, let's try it. Thank God, Paul Harvey, we did.

We ordered the Premier Formula Ocular Nutrition on March of this year. I stepped out on the porch the other night and I could see a beautiful sky filled with millions of stars and I can see my beautiful wife's face again. Thanks to you and your associates I'll not have to spend the rest of my life in the dark.

P.S. I had been to four eye doctors. They all said there was no cure until I found yours, end quote.

Well, Americans, there are now several nutritional studies confirming, three responsible medical journals confirming that Flora Glo Lutein and Vitamins A and C and E and zinc may help some individuals with macular degeneration and/or with cataracts. And you can get all this nutrition in one capsule from Hi-Health. It's called Ocular Nutrition. You order it with a phone call as I do to 1-800-686-2299 or online at www.hihealth.com.

By the way, a doctor in Chula Vista, California says, with Ocular Nutrition the floaters in his eyes that had been there for two years vanished in two weeks with Ocular Nutrition from Hi-Health. Again, that 800 number is 686-2299. 686-2299. [Exhibit C]

D. PAUL HARVEY SAT. NOON 8/23/03

PAUL HARVEY: Page three. Macular degeneration, MD, it used to a terrifying prognosis. Go home and go blind.

Complaint

We've come a long way. Today's newest nationwide study of ophthalmologists reveals that 93 percent of these professional ophthalmologists are now recommending nutrition therapy.

Now, this is the fourth published study in three years recommending that patients with macular degeneration and/or cataracts should try a combination of vitamins and minerals, A, C, and E and zinc and Flora Glo lutein. This newest study was financed by Hi-Health which makes and markets these vitamins and minerals in a single capsule. They call it Ocular Nutrition and 83 percent of the specialists, the ophthalmologists or anybody with age-related cataracts and/or macular degeneration, 83 percent of them specifically prescribe Ocular Nutrition.

You can get yours as I do with a phone call to 1-800-686-2299 or online at hihealth.com. You can get a copy of this newest research if you'd like to have it by asking for it. But let's start with a phone call to 1-800-686-2299. And for further information, you can go online at hihealth.com. That's hi spelled H-I-, hihealth.com. [Exhibit D]

E. PAUL HARVEY NOON NEWS 8/28/03

PAUL HARVEY: This is from the mailbag. Dear Paul Harvey News: Two years ago, I was diagnosed with macular degeneration and no chance of improvement. I couldn't read the newspaper. But my loving wife heard you touting the benefits of Hi-Health on radio. Immediately she called and ordered some Hi-Health Ocular Nutrition.

My vision has steadily improved. I can read the paper again. What a marvelous feeling. I want everybody to know that there is help for macular degeneration. My thanks to you and to Hi-Health and my wonderful wife for the fact that I can see again. Signed, Jeff Holland of Belle Verde, Texas.

There are several nutritional studies now in three responsible medical journals Reporting that certain nutrients may help

Complaint

individuals with macular degeneration and/or cataracts and/or those little floaters that get in your eyes sometimes, and all of those vitamins and minerals, all of them are available in one capsule, if you'll make a phone call to 1-800-686-2299. Ask for Ocular Nutrition. 1-800-686-2299.

If you want to go out and purchase all of those minerals and vitamins and such separately, they're Vitamins A and C and E and zinc and Flora Glo Lutein. But if you want them all in one capsule, just make a phone call as I do to 1-800-686-2299. 1-800-686-2299. [Exhibit E]

F. PAUL HARVEY NOON NEWS 9/9/03

PAUL HARVEY: In Denton, Texas, Harold Reed is a dental doctor, and when his mother was diagnosed with macular degeneration, when she was told there is no treatment for her blurred vision, Dr. Reed remembered that you and I had been talking about a special vitamin formula for Ocular Nutrition and he ordered some for his mother.

Within one month, she reported the dark spot -- the dark spot in her field of vision was gone. Gone. Her vision was back to normal. Dr. Reed says he's always been skeptical of testimonials, but he would never doubt his mother. Well, the nutritional supplements, since prescribed in three responsible medical journals, are Flora Glo Lutein and Vitamins A and C and E and zinc, and you can get them all in one capsule if you like from Hi-Health Ocular Nutrition.

You order with a phone call as I do to 1-800 then 686-2299 or online at www.hihealth.com, www.hihealth.com. Or you can always contact any client of this program through paulharvey.com.

By the way, a doctor in Chula Vista, California says, with Ocular Nutrition, the floaters in his eyes for two years vanished in two weeks. Ocular Nutrition from Hi-Health. Again, the 800 number is 686-2299. [Exhibit F]

Complaint

6. Through the means described in Paragraph 5, respondents have represented, expressly or by implication, that Ocular Nutrition:

A. Restores vision lost from macular degeneration.

B. Eliminates floaters.

7. Through the means described in Paragraph 5, respondents have represented, expressly or by implication, that they possessed and relied upon a reasonable basis that substantiated the representations set forth in Paragraph 6, at the time the representations were made.

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

Therefore, the representation set forth in Paragraph 7 was, and is, false or misleading.

9. Through the means described in Paragraph 5, respondents have represented, expressly or by implication, that:

A. Several nutritional studies in responsible medical journals confirm that the ingredients available in Ocular Nutrition may help individuals with cataracts and/or floaters.

B. A study financed by Hi-Health shows that 83% of ophthalmologists recommend or prescribe Ocular Nutrition to treat age-related macular degeneration and cataracts.

10. In truth and in fact:

A. There are no nutritional studies in responsible medical journals that confirm that the ingredients available in Ocular Nutrition may help individuals with cataracts and/or floaters. In fact, a seven-year study by the National Eye Institute that included all of the primary ingredients

Complaint

available in Ocular Nutrition except lutein found that the ingredients used did not prevent the development or progression of cataracts and did not assess the effects of any ingredients on floaters. In addition, a statement issued by the National Eye Institute with regard to lutein cautions that while a number of studies suggest a link between lutein and decreased risk of eye disease, there is little, if any, definitive scientific evidence at this time to support claims that lutein can decrease the risk of developing cataracts.

- B. A study financed by Hi-Health does not show that 83% of ophthalmologists recommend or prescribe Ocular Nutrition to treat age-related macular degeneration and cataracts. In fact, the study respondents were not asked whether they recommend or prescribe Ocular Nutrition to their patients with age-related macular degeneration and cataracts.

Therefore, the representations set forth in paragraph 9 were, and are, false or misleading.

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

THEREFORE, the Federal Trade Commission this twelfth day of May, 2005, has issued this complaint against respondents.

P R O C E E D I N G S

PAUL HARVEY NOON NEWS 8/17/03

PAUL HARVEY: From the mailbag: Dear Paul Harvey News, I was starting to get gray lines in my vision five years ago when I went to an eye care specialist and I was told that there were floaters made of protein deposits and nothing could be done. Well, they got worse 'til I had them in both eyes. I thought it was a lifetime thing.

Then I heard you advertising a product called Ocular Nutrition and I thought, what did I have to lose, so I ordered it. And on the first day, my vision became brighter. And now, I've taken them for two days and the dark areas in my vision are nearly gone. I just wanted you to know how well it worked. Thank you very much. Signed, Dorothy Farnum (phonetic), Kearney, Nebraska.

The nutritional supplements now prescribed in three responsible medical journals are Flora Glo Lutein and Vitamins A and C and E and zinc, and you get them all in one capsule from Hi-Health Ocular Nutrition. You can order as I do with a phone call to 1-800-686-2299. Again, the 800 number is 686-2299.

(The taping was concluded.)

EXHIBIT A

P R O C E E D I N G S

PAUL HARVEY NOON NEWS 8/7/03

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4 PAUL HARVEY: From the mailbag. Mr. Harvey, my
5 mother is 84; has been to four different eye doctors and
6 bought the strongest eyeglasses that she could get, but
7 her eyesight was fading. We were not going to renew our
8 newspaper or magazine subscriptions because she could not
9 see. But then we got the vitamins you recommended and
10 she started taking them Tuesday, and by Thursday, she was
11 reading our county paper and by Friday, she was reading
12 our Singing News Magazine, which she hadn't been able to
13 read for more than six months. Thank you for telling us
14 about Ocular Nutrition. Signed, Joanne Menshaw
15 (phonetic) of Brighton, Georgia.

16 There are now several nutritional studies in
17 three responsible medical journals reporting that Flora
18 Glo Lutein and Vitamins A and C and E and zinc can help
19 some individuals with macular degeneration and you can
20 get all of these in one capsule from Hi-Health Ocular
21 Nutrition.

22 You can order with a phone call as I do to 1-
23 800-686-2299 or go online at www.hihealth.com. Ocular
24 Nutrition from Hi-Health. Again, the 800 number is 686-
25 2299.

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PAUL HARVEY: Page four. Mr. Harvey -- I'm reading from the mailbag -- I'm a man of 83. I have had macular degeneration for four years. I was beginning to think that I'd have to spend the rest of my life in the dark. And then we heard you talking about Ocular Nutrition. My wife said, let's try it. Thank God, Paul Harvey, we did.

We ordered the Premier Formula Ocular Nutrition on March of this year. I stepped out on the porch the other night and I could see a beautiful sky filled with millions of stars and I can see my beautiful wife's face again. Thanks to you and your associates I'll not have to spend the rest of my life in the dark.

P.S. I had been to four eye doctors. They all said there was no cure until I found yours, end quote.

Well, Americans, there are now several nutritional studies confirming, three responsible medical journals confirming that Flora Glo Lutein and Vitamins A and C and E and zinc may help some individuals with macular degeneration and/or with cataracts. And you can get all this nutrition in one capsule from Hi-Health. It's called Ocular Nutrition. You order it with a phone

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2 www.hihealth.com.

3 By the way, a doctor in Chula Vista, California
4 says, with Ocular Nutrition the floaters in his eyes that
5 had been there for two years vanished in two weeks with
6 Ocular Nutrition from Hi-Health. Again, that 800 number
7 is 686-2299. 686-2299.

8 (The taping was concluded.)
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P R O C E E D I N G S

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PAUL HARVEY: Page three. Macular degeneration, MD, it used to a terrifying prognosis. Go home and go blind.

We've come a long way. Today's newest nationwide study of ophthalmologists reveals that 93 percent of these professional ophthalmologists are now recommending nutrition therapy.

Now, this is the fourth published study in three years recommending that patients with macular degeneration and/or cataracts should try a combination of vitamins and minerals, A, C, and E and zinc and Flora Glo lutein. This newest study was financed by Hi-Health which makes and markets these vitamins and minerals in a single capsule. They call it Ocular Nutrition and 83 percent of the specialists, the ophthalmologists or anybody with age-related cataracts and/or macular degeneration, 83 percent of them specifically prescribe Ocular Nutrition.

You can get yours as I do with a phone call to 1-800-686-2299 or online at hihealth.com. You can get a copy of this newest research if you'd like to have it by asking for it. But let's start with a phone call to 1-

1 800-686-2299. And for further information, you can go
2 online at hihealth.com. That's hi spelled H-I-,
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4 (The taping was concluded.)
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P R O C E E D I N G S

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There are several nutritional studies now in three responsible medical journals reporting that certain nutrients may help individuals with macular degeneration and/or cataracts and/or those little floaters that get in your eyes sometimes, and all of those vitamins and minerals, all of them are available in one capsule, if you'll make a phone call to 1-800-686-2299. Ask for Ocular Nutrition. 1-800-686-2299.

If you want to go out and purchase all of those

For The Record, Inc.
Waldorf, Maryland
(301) 870-8025

EXHIBIT E

1 minerals and vitamins and such separately, they're
2 Vitamins A and C and E and zinc and Flora Glo Lutein.
3 But if you want them all in one capsule, just make a
4 phone call as I do to 1-800-686-2299. 1-800-686-2299.

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P R O C E E D I N G S

PAUL HARVEY NOON NEWS 9/9/03

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Within one month, she reported the dark spot -- the dark spot in her field of vision was gone. Gone. Her vision was back to normal. Dr. Reed says he's always been skeptical of testimonials, but he would never doubt his mother. Well, the nutritional supplements, since prescribed in three responsible medical journals, are Flora Glo Lutein and Vitamins A and C and E and zinc, and you can get them all in one capsule if you like from Hi-Health Ocular Nutrition.

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Decision and Order

DECISION AND ORDER

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

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

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

1. Respondent Hi-Health Supermart Corporation ("Hi-Health") is an Arizona corporation with its principal office or place of business at 7428 East Karen Drive, Scottsdale, Arizona 85260.

2. Respondent Simon D. Chalpin is president and chief executive officer of Hi-Health. Individually, or in concert with others, he formulates, directs, controls, or participates in the policies, acts, or practices of Hi-Health, including the acts and practices alleged in this complaint. His principal office or place of business is the same as that of the corporation.

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

ORDER

DEFINITIONS

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

1. Unless otherwise specified, "respondents" shall mean Hi-Health Supermart Corporation, a corporation, its successors and assigns and its officers, and Simon D. Chalpin, individually and as an officer of the corporation; and each of the above's employees with managerial authority.
2. "Commerce" shall mean as defined in Section 4 of the Federal Trade Commission Act, 15 U.S.C. § 44.
3. "Competent and reliable scientific evidence" shall mean tests, analyses, research, studies, or other evidence based on the expertise of professionals in the relevant area, that has been conducted and evaluated in an objective manner by persons qualified to do so, using procedures generally accepted in the profession to yield accurate and reliable results.
4. "Covered product or service" shall mean any health-related service or program, dietary supplement, food, drug, or device.
5. "Endorsement" shall mean as defined in 16 C.F.R. § 255.0(b).

Decision and Order

6. "Food," "drug," and "device," shall mean "food," "drug," and "device" as defined in Section 15 of the FTC Act, 15 U.S.C. § 55.
7. "Substantially similar product" shall mean any product that is (1) substantially similar in ingredients to "Premier Formula for Ocular Nutrition-Optim 3" and (2) promoted for the treatment of eye diseases and conditions, including age-related macular degeneration, cataract, or floaters.
8. The term "including" in this Order shall mean "without limitation."
9. The terms "and" and "or" in this Order shall be construed conjunctively or disjunctively as necessary, to make the applicable phrase or sentence inclusive rather than exclusive.

I.

IT IS ORDERED that respondents, directly or through any corporation, subsidiary, division, trade name, or other device, in connection with the advertising, promotion, offering for sale, or sale of "Premier Formula for Ocular Nutrition-Optim 3" or any substantially similar product, in or affecting commerce, shall not represent, in any manner, expressly or by implication, including through the use of endorsements, that such product:

- A. Restores vision lost from macular degeneration; or
- B. Eliminates floaters,

unless, at the time it is made, respondents possess and rely upon competent and reliable scientific evidence that substantiates the representation.

II.

IT IS FURTHER ORDERED that respondents, directly or through any corporation, subsidiary, division, trade name, or other

device, in connection with the advertising, promotion, offering for sale, or sale, of any covered product or service, in or affecting commerce, shall not make any representation, in any manner, expressly or by implication, including through the use of endorsements, about the benefits, performance, efficacy, or safety of any such product or service, unless, at the time it is made, respondents possess and rely upon competent and reliable scientific evidence that substantiates the representation.

III.

IT IS FURTHER ORDERED that respondents, directly or through any corporation, subsidiary, division, trade name, or other device, in connection with the advertising, promotion, offering for sale, or sale, of any covered product or service, in or affecting commerce, shall not misrepresent, in any manner, expressly or by implication, the existence, contents, validity, results, conclusions, or interpretations of any test or study.

IV.

IT IS FURTHER ORDERED that:

A. Nothing in this order shall prohibit respondents from making any representation for any drug that is permitted in labeling for such drug under any tentative final or final standard promulgated by the Food and Drug Administration, or under any new drug application approved by the Food and Drug Administration;

B. Nothing in this order shall prohibit respondents from making any representation for any product that is specifically permitted in labeling for such product by regulations promulgated by the Food and Drug Administration pursuant to the Nutrition Labeling and Education Act of 1990; and

C. Nothing in this order shall prohibit respondents from making any representation for any device that is permitted in

Decision and Order

labeling for such device under any new medical device application approved by the Food and Drug Administration.

V.

IT IS FURTHER ORDERED that respondents shall pay to the Federal Trade Commission the sum of **four hundred fifty thousand dollars** (\$450,000). This payment shall be made in the following manner:

- A. The payment shall be made by wire transfer or certified or cashier's check made payable to the Federal Trade Commission, the payment to be made no later than ten (10) days after the date that this order becomes final.
- B. In the event of any default in payment, which default continues for ten (10) days beyond the due date of payment, the amount due, together with interest, as computed pursuant to 28 U.S.C. § 1961 from the date of default to the date of payment, shall immediately become due and payable to the Commission.
- C. The funds paid by respondents, together with any accrued interest, shall, in the discretion of the Commission, be used by the Commission to provide direct redress to purchasers of Premier Formula for Ocular Nutrition in connection with the acts and practices alleged in the complaint, and to pay any attendant costs of administration. If the Commission determines, in its sole discretion, that redress to purchasers of this product is wholly or partially impracticable or is otherwise unwarranted, any funds not so used shall be paid to the United States Treasury. Respondents shall be notified as to how the funds are distributed, but shall have no right to contest the manner of distribution chosen by the Commission. No portion of the payment as herein provided shall be deemed a payment of any fine, penalty or punitive assessment.

- D. Respondents relinquish all dominion, control, and title to the funds paid, and all legal and equitable title to the funds vests in the Treasurer of the United States and in the designated consumers. Respondents shall make no claim to or demand for return of funds, directly or indirectly, through counsel or otherwise; and in the event of bankruptcy of any respondent, respondents acknowledge that the funds are not part of the debtor's estate, nor does the estate have any claim or interest therein.

VI.

IT IS FURTHER ORDERED that respondents Hi-Health, and its successors and assigns, and respondent Simon D. Chalpin shall, for five (5) years after the last date of dissemination of any representation covered by this order, maintain and upon request make available to the Federal Trade Commission for inspection and copying:

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

VII.

IT IS FURTHER ORDERED that respondents Hi-Health, and its successors and assigns, and respondent Simon D. Chalpin shall deliver a copy of this order to all current and future principals, officers, directors, and other employees with managerial authority

Decision and Order

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

VIII.

IT IS FURTHER ORDERED that respondent Hi-Health, and its successors and assigns, shall notify the Commission at least thirty (30) days prior to any change in the corporations that may affect compliance obligations arising under this order, including, but not limited to, dissolution, assignment, sale, merger, or other action that would result in the emergence of a successor corporation; the creation or dissolution of a subsidiary, parent, or affiliate that engages in any acts or practices subject to this order; the proposed filing of a bankruptcy petition; or a change in the corporate name or address. Provided, however, that, with respect to any proposed change in the corporations about which respondents learn less than thirty (30) days prior to the date such action is to take place, respondents shall notify the Commission as soon as is practicable after obtaining such knowledge. All notices required by this Part shall be sent by certified mail to the Associate Director, Division of Enforcement, Bureau of Consumer Protection, Federal Trade Commission, 600 Pennsylvania Avenue, N.W., Washington, D.C. 20580.

IX.

IT IS FURTHER ORDERED that respondent Simon D. Chalpin, for a period of five (5) years after the date of issuance of this order, shall notify the Commission of the discontinuance of his individual current business or employment, or of his individual affiliation with any new business or employment. The notice shall include respondent's new business address and telephone number and a description of the nature of the business or employment and

his duties and responsibilities. All notices required by this Part shall be sent by certified mail to the Associate Director, Division of Enforcement, Bureau of Consumer Protection, Federal Trade Commission, 601 New Jersey Avenue, N.W., Washington, D.C. 20580.

X.

IT IS FURTHER ORDERED that respondents Hi-Health, and its successors and assigns, and respondent Simon D. Chalpin shall, within sixty (60) days after service of this order, and at such other times as the Federal Trade Commission may require, file with the Commission a report, in writing, setting forth in detail the manner and form in which they have complied with this order.

XI.

This order will terminate on May 12, 2025, or twenty (20) years from the most recent date that the United States or the Federal Trade Commission files a complaint (with or without an accompanying consent decree) in federal court alleging any violation of the order, whichever comes later; provided, however, that the filing of such a complaint will not affect the duration of:

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

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

Decision and 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.

Analysis of Proposed Consent Order to Aid Public Comment

The Federal Trade Commission has accepted, subject to final approval, an agreement containing a consent order from Hi-Health Supermart Corporation and Simon D. Chalpin (collectively, “Hi-Health”).

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

This matter involves alleged misleading representations about a dietary supplement, Premier Formula for Ocular Nutrition-Optim3 (“Ocular Nutrition”), marketed by Hi-Health for the treatment of age-related macular degeneration (“AMD”), cataracts, and floaters.

The complaint alleges that Hi-Health failed to substantiate claims that its Ocular Nutrition: (1) restores vision lost from AMD; and (2) eliminates floaters. In addition, the complaint alleges that Hi-Health falsely claimed that: (1) several nutritional studies in responsible medical journals confirm that the ingredients available in Ocular Nutrition may help individuals with cataracts and/or floaters; and (2) a study financed by Hi-Health shows that 83% of ophthalmologists recommend or prescribe Ocular Nutrition to treat age-related macular degeneration and cataracts. The complaint alleges that there are no nutritional studies in responsible medical journals that confirm that the ingredients available in Ocular Nutrition may help individuals with cataracts and/or floaters. In fact, the complaint further alleges that a seven-year study by the National Eye Institute that included all of the primary ingredients available in Ocular Nutrition except lutein found that the ingredients used did

Analysis

not prevent the development or progression of cataract and did not assess the effects of any ingredients on floaters. According to the complaint, a statement issued by the National Eye Institute with regard to lutein cautions that while a number of studies suggest a link between lutein and decreased risk of eye disease, there is little, if any, definitive scientific evidence at this time to support claims that lutein can decrease the risk of developing cataract.

The proposed consent order contains provisions designed to prevent Hi-Health from engaging in similar acts and practices in the future. It also requires a monetary payment to the Commission.

Part I of the proposed order bans unsubstantiated claims that the Ocular Nutrition supplement, or any substantially similar product (1) restores vision lost from macular degeneration, or (2) eliminates floaters. “Substantially similar product” is defined as any product that is (1) substantially similar in ingredients to Ocular Nutrition and (2) promoted for the treatment of eye diseases and conditions, including age-related macular degeneration, cataract, or floaters.

Part II is a fencing-in provision that would prohibit unsubstantiated benefits, performance, efficacy, or safety claims for any covered product or service. The proposed order defines “covered product or service” as any health-related service or program, dietary supplement, food, drug, or device.

Part III prohibits misrepresentations of the existence, contents, validity, results, conclusions, or interpretations of any test or study in connection with the marketing of any covered product or service.

Part IV permits drug, food, or device claims approved by the Food and Drug Administration under any tentative final or final standard or any new drug application, pursuant to the Nutrition

Labeling and Education Act of 1990, or under any new medical device application, respectively.

Part V requires Hi-Health to pay \$450,000 to the Commission as consumer redress no later than ten days after the order becomes final.

Parts VI and VII require Hi-Health to keep copies of relevant advertisements and materials substantiating claims made in the advertisements, and provide copies of the order to certain of its personnel.

Part VIII requires the corporate respondent to notify the Commission of changes in corporate structure.

Part IX of the proposed order requires the individual respondent to notify the Commission of his employment status.

Part X of the order requires Hi-Health to file compliance reports with the Commission, and Part XI provides that the order will terminate after twenty (20) years under certain circumstances.

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

Complaint

IN THE MATTER OF

**PRITI SHARMA AND RAJEEV SHARMA,
INDIVIDUALLY AND AS OFFICERS OF Q.P.S., INC.**

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

*Docket C-4138; File No. 0223278
Complaint, June 1, 2005--Decision, June 1, 2005*

This consent order, among other things, prohibits the respondents -- in connection with the manufacturing or marketing of any product or service sold to consumers -- from making any unsubstantiated representation about the time in which any rebate will be mailed or otherwise provided to qualifying consumers; from failing to provide any such rebate within the time specified (or within 30 days, if no time is specified); and from misrepresenting any material terms of any such rebate program.

Participants

For the Commission: *Kerry O'Brien, Linda K. Badger, Matthew D. Gold, Jeffrey A. Klurfeld, Gerard R. Butters, and Paul A. Pautler.*

For the Respondents: *Carlton Varner, Sheppard Mullin Richter & Hampton.*

COMPLAINT

The Federal Trade Commission, having reason to believe that Priti Sharma and Rajeev Sharma, individually and as officers of Q.P.S., Inc. ("respondents"), have violated the provisions of the Federal Trade Commission Act, and it appearing to the Commission that this proceeding is in the public interest, alleges:

1. Respondent Priti Sharma is an officer of Q.P.S., Inc. ("QPS"). Individually or in concert with others, she has formulated, directed, or controlled the policies, acts, or practices of QPS, including the acts or practices alleged in this complaint. Her

Complaint

principal office or place of business is at 8015 E. Crystal Drive, Anaheim, CA 92807.

2. Respondent Rajeev Sharma is an officer of QPS. Individually or in concert with others, he has formulated, directed, or controlled the policies, acts, or practices of QPS, including the acts or practices alleged in this complaint. His principal office or place of business is at 8015 E. Crystal Drive, Anaheim, CA 92807.

3. QPS is a California corporation with its principal office or place of business at 8015 E. Crystal Drive, Anaheim, CA 92807. QPS advertised, labeled, offered for sale, sold, and distributed computer peripheral products to the public, including CD-R, CD-RW, and DVD storage products, under the brand name *Que!* On August 12, 2002, QPS filed a voluntary petition for relief under Chapter 11 of the Bankruptcy Code, 11 U.S.C. §§ 101 et seq., in the United States Bankruptcy Court for the Central District of California, Case No. SA 02-16187JB.

4. 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.

FALSE SHIPMENT REPRESENTATIONS

5. Respondents have disseminated or have caused to be disseminated advertisements and rebate forms for QPS-funded mail-in rebates, including but not necessarily limited to the attached Exhibits A and B. This advertisement and rebate form contain the following statements:

- A. **“SAVE! \$50**
32x10x40 FireWire
CD-RW Drive
....
\$129⁹⁹ After Savings & Rebate
179.99 - 20 Instant Savings

Complaint

-30 Mfr. Mail-In Rebate”

(Exhibit A, an excerpt from a typical freestanding newspaper insert that advertised a QPS-funded mail-in rebate (Offer # 8372). Respondents disseminated or caused to be disseminated similar advertisements from September 2001 to July 2002).

B. “\$30 Mail-in Rebate

QPS

32x10x40 FireWire CD-RW Drive

.....

Rebate checks will be mailed in 6-8 weeks. If you have not received your check within 10 weeks, visit

www.wheresmyrebate.com or call 800-390-2344.”

[The “COMPUSA” logo is printed on the rebate form.]

(Exhibit B, a typical QPS rebate form (Offer # 8372).

Respondents disseminated or caused to be disseminated similar forms to consumers from September 2001 to July 2002).

6. Through the means described in Paragraph 5, respondents have represented, expressly or by implication, that:

- A. Rebate checks will be mailed to purchasers of advertised QPS products within six to eight weeks of receipt of their valid requests; and
- B. Rebate checks will be mailed to purchasers of advertised QPS products within a reasonable period of time of receipt of their valid requests.

7. In truth and in fact, in numerous instances, purchasers of advertised QPS products were not mailed rebate checks within either six to eight weeks or within a reasonable period of time of receipt of their valid requests. From September 2001 until

Complaint

December 2001, many consumers experienced delays ranging from one to six months in receiving their promised rebates, which ranged from \$15 to \$100 in value. From January 2002 through July 2002, many consumers experienced similar delays, and thousands of consumers never received their promised rebates from QPS. Therefore, the representations set forth in Paragraph 6 were, and are, false or misleading.

**UNILATERAL MODIFICATION OF TERMS OR
CONDITIONS OF REBATE OFFER: UNFAIR BUSINESS
PRACTICE**

8. In the advertising and sale of computer peripheral products, respondents have offered, expressly or by implication, that consumers would receive rebate checks within six to eight weeks if they purchased the advertised computer peripheral product and submitted a valid rebate request.
9. After receiving rebate requests in conformance with the offer described in Paragraph 8, respondents extended the time period in which they would deliver the rebates to consumers without consumers agreeing to this extension of time. Consumers often learned about this unilateral extension of time when they inquired about the status of a rebate request. Respondents then failed to deliver the rebates to consumers within the originally-promised time period.
10. Respondents' practice set forth in Paragraphs 8 and 9 was not reasonably avoidable, and caused substantial injury to consumers that was not outweighed by countervailing benefits to consumers or competition. This practice was, and is, an unfair act or practice.
11. The acts and practices of respondents as alleged in this complaint constitute unfair or deceptive acts or practices in or affecting commerce in violation of Section 5(a) of the Federal Trade Commission Act.

Complaint

THEREFORE, the Federal Trade Commission this first day of June, 2005, has issued this complaint against respondents.

Complaint

SAVE!
\$50 Fuel Fire
 32X10X40 FireWire
 CD-RW Drive*
 *Up to 40X max. 289522
\$129.99 After Savings & Rebate
 179.99 - 20 Instant Savings
 - 30 Min. Mail-In Rebate

1-800-448-0000



Complaint

**\$30
Mail-in
Rebate**

(CompUSA Sku #289522)

1. Purchase 32x10x40 FireWire CD-RW Drive at CompUSA between 7/13/02 and 7/20/02. Request must be postmarked by 8/3/02.
2. Fill out this form completely. Incomplete forms will not be accepted.
3. Mail this form with a copy of your sales receipt and original UPC code from product package to:

QPS Offer #8372
P. O. Box 821
New Rochelle, NY 10802-0821

COMP

0228-087

See Reverse Side for Details

Sku #289522

QPS Offer #8372

THIS REQUEST MUST BE POSTMARKED BY 8/3/02

Name:

Address:

City: State: ZIP:

Telephone: - -

E-mail:

Notification of Rebate Status

Required Signature _____ Date _____
I have complied with the requirements of this offer

TERMS AND CONDITIONS-Offer valid on purchase of specified product(s) only. Submit this rebate form completely filled out with a copy of the sales receipt and the original UPC label from package. Incomplete forms will be denied. Your request must be postmarked prior to deadline. Manufacturer is not responsible for lost or misdirected mail. Limit ONE rebate per person, receipt, household, family or address. Rebate value will not exceed purchase price. Requests from PO Boxes not accepted. Requests with invalid or undeliverable mailing address will be denied. Offer limited to end-users only. Your rebate rights cannot be transferred, and this offer is void where taxed, restricted or prohibited by law. This offer valid in US only. Keep copies of all materials submitted: originals become Manufacturer's property and will not be returned. Warning: Fraudulent submission could result in federal prosecution under mail fraud statutes (Title 18, USC Sections 1341 & 1342). This offer is no longer valid if not fully redeemed within 6 months from last valid purchase date. Rebate checks will be mailed in 6-8 weeks. If you have not received your check within 10 weeks, visit www.wheresmyrebate.com or call 800-390-2344.

Decision and Order

DECISION AND ORDER

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

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

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

1. Respondent, Priti Sharma, is an officer of Q.P.S., Inc. ("QPS"). Her principal office or place of business is 8015 E. Crystal Drive, Anaheim, CA 92807.

2. Respondent, Rajeev Sharma, is an officer of Q.P.S., Inc. (“QPS”). His principal office or place of business is 8015 E. Crystal Drive, Anaheim, CA 92807.

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

ORDER

DEFINITIONS

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

1. Unless otherwise specified, “respondents” shall mean Priti Sharma and Rajeev Sharma, individually and as officers of QPS; and each of the above’s agents, representatives, and employees.

2. “Rebate” shall mean check, cash, credit towards future purchases, or any other consideration offered to consumers who purchase products or services, and which is to be provided subsequent to the purchase.

3. “Receiving a properly completed request” shall mean the time at which the respondents receive from the rebate applicant all the documentation, information and other materials required by the express terms of the rebate offer, and in compliance with such terms.

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

I.

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

Decision and Order

promotion, offering for sale, sale, or distribution of any product or service sold to consumers, in or affecting commerce, shall not:

- A. make any representation, in any manner, expressly or by implication, about the time in which any rebate will be mailed, or otherwise provided to qualifying consumers unless, at the time the representation is made, they possess and rely upon competent and reliable evidence that substantiates the representation;
- B. fail to provide any rebate within the time specified or, if no time is specified, within thirty (30) days of receiving a properly completed request for such rebate; or
- C. misrepresent, in any manner, expressly or by implication, any material terms of any rebate program, including the status of or reasons for any delay in providing any rebate.

II.

IT IS FURTHER ORDERED that respondents Priti Sharma and Rajeev Sharma shall, for five (5) years after the last date of dissemination of any representation covered by this order, maintain and upon request make available to the Federal Trade Commission for inspection and copying:

- A. All advertisements and promotional materials containing the representation;
- B. A specimen copy of all rebate forms containing the representation;
- C. All materials that were relied upon in disseminating the representation; and

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

III.

IT IS FURTHER ORDERED that respondents Priti Sharma and Rajeev Sharma shall deliver a copy of this order to all current and future principals, officers, directors, and managers, and to all current and future employees, agents, and representatives having responsibilities with respect to the subject matter of this order. Respondents shall deliver this order to current personnel within thirty (30) days after the date of service of this order, and to future personnel within thirty (30) days after the person assumes such position or responsibilities.

IV.

IT IS FURTHER ORDERED that respondents Priti Sharma and Rajeev Sharma, for a period of ten (10) years after the date of issuance of this order, shall notify the Commission of the discontinuance of his or her current business or employment, or of his or her affiliation with any new business or employment. The notice shall include respondent's new business address and telephone number and a description of the nature of the business or employment and his or her duties and responsibilities. All notices required by this Part shall be sent by certified mail to the Associate Director, Division of Enforcement, Bureau of Consumer Protection, Federal Trade Commission, 600 Pennsylvania Avenue, N.W., Washington, D.C. 20580.

Decision and Order

V.

IT IS FURTHER ORDERED that respondents Priti Sharma and Rajeev Sharma shall, within sixty (60) days after the date of service of this order, and at such other times as the Federal Trade Commission may require, file with the Commission a report, in writing, setting forth in detail the manner and form in which they have complied with this order.

VI.

This order will terminate on June 1, 2025, or twenty (20) years from the most recent date that the United States or the Federal Trade Commission files a complaint (with or without an accompanying consent decree) in federal court alleging any violation of the order, whichever comes later; provided, however, that the filing of such a complaint will not affect the duration of:

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

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

By the Commission.

Analysis of Proposed Consent Order to Aid Public Comment

The Federal Trade Commission has accepted an agreement to a proposed consent order with Priti Sharma and Rajeev Sharma (“proposed respondents”). Proposed respondents were officers of Q.P.S., Inc. (“QPS”), a company that marketed computer peripheral products to the public, including CD-R, CD-RW, and DVD storage products, under the brand name *Que!* In 2002, QPS filed for bankruptcy.

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

The complaint alleges that proposed respondents engaged in deceptive and unfair practices relating to mail-in rebate offers that QPS advertised to consumers. Proposed respondents are named individually in this complaint because they formulated, directed, or controlled the policies, acts, or practices of QPS, including the acts or practices alleged in the complaint. Specifically, the complaint alleges that proposed respondents falsely represented that QPS-funded rebate checks would be mailed to purchasers of advertised QPS products within six to eight weeks, or within a reasonable period of time. From September 2001 until December 2001, many consumers experienced delays ranging from one to six months in receiving their promised rebates, which ranged from \$15 to \$100 in value. From January 2002 through July 2002, many consumers experienced similar delays, and thousands of consumers never received their promised rebates from QPS. Despite these significant problems, proposed respondents continually advertised these QPS rebates until shortly before QPS filed for bankruptcy in August 2002.

Analysis

Finally, the complaint alleges that, in the advertising and sale of computer peripheral products, proposed respondents offered to deliver rebates within six to eight weeks if they purchased the advertised computer peripheral products and submitted valid rebate requests for proposed respondents-funded rebate offers. After receiving rebate requests in conformance with these offers, proposed respondents unilaterally extended the time period in which it would deliver the rebates to consumers without consumers agreeing to this extension of time. According to the complaint, this constituted an unfair business practice.

The proposed order contains provisions designed to prevent proposed respondents from engaging in similar acts and practices in the future. Specifically, Part I.A. prohibits the proposed respondents from representing the time in which they will mail any rebate, unless they possess competent and reliable evidence substantiating the claim. Part I.B. prohibits proposed respondents from failing to provide any rebate within the time specified, or if no time is specified, within thirty days. Part I.C. requires that proposed respondents not “misrepresent, in any manner, expressly or by implication, any material terms of “any rebate program, including the status of or reasons for any delay in providing any rebate.”

Parts II through V of the proposed order are reporting and compliance provisions. Part VI is a provision “sunsetting” the order after twenty years, with certain exceptions.

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

Complaint

IN THE MATTER OF

COMPUSA INC.

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

Docket C-4137; File No. 0223278

Complaint, June 1, 2005--Decision, June 1, 2005

This consent order, among other things, prohibits the respondent -- in connection with the manufacturing or marketing of any product or service sold to consumers -- from making any unsubstantiated representation about the time in which any CompUSA Rebate will be mailed or otherwise provided to qualifying consumers; from failing to provide any such rebate within the time specified (or within 30 days, if no time is specified); and from misrepresenting any material terms of any such rebate program. The order also prohibits the respondent -- in connection with the manufacturing or marketing of any product or service sold to consumers -- from making any representation about the availability of any manufacturer or other third party rebate without information indicating that the third party will pay the rebates offered in a timely manner. In addition, the order requires the respondent to pay all valid rebate requests to consumers who purchased QPS products at CompUSA.

Participants

For the Commission: *Kerry O'Brien, Linda K. Badger, Matthew D. Gold, Jeffrey A. Klurfeld, Gerard R. Butters, and Paul A. Pautler.*

For the Respondent: *Mark Walker, CompUSA, Inc., and Lee N. Abrams, Mayer, Brown, Rowe and Maw.*

COMPLAINT

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

Complaint

1. Respondent CompUSA Inc. (“CompUSA”) is a Delaware corporation with its principal office or place of business at 14951 North Dallas Parkway, Dallas, TX 75240.
2. Respondent is a major retailer of personal computers, computer-related hardware and software products, and other consumer electronics products. Respondent has advertised, labeled, offered for sale, sold, and distributed all of these products to the public. Among the products that CompUSA has marketed are QPS computer peripheral products, as well as CompUSA-labeled computer peripheral products. In marketing these and other products, respondent has advertised rebates, which it has funded and which third-party manufacturers, such as QPS, have funded.
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.

FALSE SHIPMENT REPRESENTATIONS

4. Respondent was involved with the creation of the rebate program for QPS-funded mail-in rebates for QPS products sold at CompUSA. In addition, respondent has disseminated or has caused to be disseminated advertisements and rebate forms for QPS-funded mail-in rebates, including but not necessarily limited to the attached Exhibits A and B. This advertisement and rebate form contain the following statements:

- A. **“SAVE! \$50
32x10x40 FireWire
CD-RW Drive

\$129⁹⁹ After Savings & Rebate
179.99 - 20 Instant Savings
-30 Mfr. Mail-In Rebate”**

Complaint

(Exhibit A, an excerpt from a typical freestanding newspaper insert that advertised a QPS-funded mail-in rebate (Offer # 8372). Respondent disseminated or caused to be disseminated similar advertisements from September 2001 to July 2002).

B. "\$30 Mail-in Rebate

QPS

32x10x40 FireWire CD-RW Drive

Rebate checks will be mailed in 6-8 weeks. If you have not received your check within 10 weeks, visit www.wheresmyrebate.com or call 800-390-2344."

[The "COMPUSA" logo is printed on the rebate form.]

(Exhibit B, a typical QPS rebate form (Offer # 8372). Respondent disseminated or caused to be disseminated similar forms to consumers from September 2001 to July 2002).

5. Many consumers who submitted valid QPS rebate requests during the time period of September 2001 until December 2001 experienced delays ranging from one to six months in receiving their promised rebates, which ranged from \$15 to \$100 in value. Many consumers who submitted valid rebate requests during the time period of January 2002 through July 2002 experienced similar delays, and thousands of consumers never received their promised rebates from QPS.
6. Despite knowledge of these significant problems, CompUSA continually advertised these QPS rebates until shortly before QPS filed for bankruptcy in August 2002.
7. Through the means described in Paragraph 4, respondent has represented, expressly or by implication, that:

Complaint

- A. Rebate checks will be mailed to purchasers of advertised QPS products within six to eight weeks of receipt of their valid requests; and
- B. Rebate checks will be mailed to purchasers of advertised QPS products within a reasonable period of time of receipt of their valid requests.

8. In truth and in fact, in numerous instances, rebate checks were not mailed to purchasers of advertised QPS products within either six to eight weeks or within a reasonable period of time of receipt of their valid requests. Therefore, the representations set forth in Paragraph 7 were, and are, false or misleading.

9. Respondent has disseminated or has caused to be disseminated advertisements for CompUSA-funded rebates, including but not necessarily limited to the attached Exhibit C. This advertisement contains the following statements:

“SAVE! \$10
3.5" Floppy Disk Drive
\$9.99 After Savings & Rebate
19.99 - 5 Instant Savings
-5 Mail-In Rebate”

(Exhibit C, an excerpt from a typical freestanding newspaper insert that advertised a CompUSA-funded rebate (Offer # 5973). CompUSA disseminated or caused to be disseminated similar advertisements from September 2001 to July 2002)

10. Respondent has disseminated or has caused to be disseminated rebate forms for CompUSA-funded rebates that contain the following statement: “Rebate checks will be mailed in 6-8 weeks. If you have not received your check within 10 weeks, visit www.wheresmyrebate.com or call 800-390-2344.” The “COMPUSA” logo is printed on these rebate forms.

Complaint

11. Through the means described in Paragraphs 9 and 10, respondent has represented, expressly or by implication, that:

- A. Respondent will mail rebate checks to consumers who purchase computer peripheral products at CompUSA within six to eight weeks of its receipt of their valid requests; and
- B. Respondent will mail rebate checks to consumers who purchase computer peripheral products at CompUSA within a reasonable period of time after it receives their valid requests.

12. In truth and in fact, in numerous instances, respondent did not mail rebate checks to consumers who purchased computer peripheral products at CompUSA within six to eight weeks or within a reasonable period of time of respondent's receipt of their valid requests. Between September 2001 and June 2002, many consumers experienced delays ranging from one week to more than three months in receiving their promised rebates. The rebates at issue ranged from \$3 to \$100 in value. Therefore, the representations set forth in Paragraph 11 were, and are, false or misleading.

**UNILATERAL MODIFICATION OF TERMS OR
CONDITIONS OF COMPUSA-FUNDED REBATE
OFFERS: UNFAIR BUSINESS PRACTICE**

13. In the advertising and sale of computer peripheral products, respondent has offered, expressly or by implication, that consumers would receive rebate checks within six to eight weeks if they purchased the advertised computer peripheral products and submitted valid rebate requests for CompUSA-funded rebate offers.

14. After receiving rebate requests for CompUSA-funded rebate offers in conformance with the offers described in Paragraph 13, respondent extended the time period in which it would deliver the

Complaint

rebates to consumers without consumers agreeing to this extension of time. Consumers often learned about this unilateral extension of time when they inquired about the status of a rebate request. Respondent then failed to deliver the rebates to consumers within the originally-promised time period.

15. Respondent's practice set forth in Paragraphs 13 and 14 was not reasonably avoidable by consumers, and caused substantial injury to consumers that was not outweighed by countervailing benefits to consumers or competition. This practice was, and is, an unfair act or practice.

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

THEREFORE, the Federal Trade Commission this first day of June, 2005, has issued this complaint against respondent.

Complaint

**\$30
Mail-in
Rebate**

(CompUSA Sku #289522)

1. Purchase 32x10x40 FireWire CD-RW Drive at CompUSA between 7/13/02 and 7/20/02. Request must be postmarked by 8/3/02.
2. Fill out this form completely. Incomplete forms will not be accepted.
3. Mail this form with a copy of your sales receipt and original UPC code from product package to:

QPS Offer #8372
P. O. Box 821
New Rochelle, NY 10802-0821



0228-087

See Reverse Side for Details

Sku #289522

QPS Offer #8372

THIS REQUEST MUST BE POSTMARKED BY 8/3/02

Name:

Address:

City: State: ZIP:

Telephone: - -

E-mail:

Notification of Rebate Status

Required Signature _____ Date _____

I have complied with the requirements of this offer

TERMS AND CONDITIONS-Offer valid on purchase of specified product(s) only. Submit this rebate form completely filled out with a copy of the sales receipt and the original UPC label from package. Incomplete forms will be denied. Your request must be postmarked prior to deadline. Manufacturer is not responsible for lost or misdirected mail. Limit ONE rebate per person, receipt, household, family or address. Rebate value will not exceed purchase price. Requests from PO Boxes not accepted. Requests with invalid or undeliverable mailing address will be denied. Offer limited to end-users only. Your rebate rights cannot be transferred, and this offer is void where taxed, restricted or prohibited by law. This offer valid in US only. Keep copies of all materials submitted: originals become Manufacturer's property and will not be returned. Warning: Fraudulent submission could result in federal prosecution under mail fraud statutes (Title 18, USC Sections 1341 & 1342). This offer is no longer valid if not fully redeemed within 6 months from last valid purchase date. Rebate checks will be mailed in 6-8 weeks. If you have not received your check within 10 weeks, visit www.wheresmyrebate.com or call 800-390-2344.

Complaint

SAVE!
\$10

FLOPPY DRIVE
3 1/2"

3.5" Floppy Disk Drive

~~260890~~ → **20**

\$9.99 After Savings & Rebate

19.99 - 5 Instant Savings
- 5 Mail-In Rebate

DECISION AND ORDER

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

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

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

1. Respondent, CompUSA Inc., is a Delaware corporation with its principal office or place of business at 14951 North Dallas Parkway, Dallas, TX 75240.

Decision and Order

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

ORDER

DEFINITIONS

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

1. Unless otherwise specified, “respondent” shall mean CompUSA Inc., a corporation, its successors and assigns and its officers, agents, representatives, and employees.
2. “Rebate” shall mean check, cash, credit towards future purchases, or any other consideration offered to consumers who purchase products or services, and which is to be provided subsequent to the purchase.
3. “Receiving a properly completed request” shall mean the time at which the respondent receives from the rebate applicant all documentation, information and other materials required by the express terms of the rebate offer and in compliance with such terms.
4. “CompUSA Rebate” shall mean any consumer rebate that is designed and intended to be funded by CompUSA.
5. “Manufacturer Rebate” shall mean any consumer rebate that is designed and intended to be funded by a manufacturer or third party other than CompUSA.
6. “QPS Rebate” shall mean any rebate offered by QPS to consumers.
7. “Eligible QPS purchaser” shall mean each consumer:

- a. who has provided all documentation, information, and other materials necessary to qualify that consumer for a QPS Rebate under the terms of any QPS Rebate offer and in compliance with such terms; and
- b. whose QPS Rebate is due or past due as of the date of service of this order.

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

I.

IT IS ORDERED that respondent, directly or through any corporation, subsidiary, division, or other device, in connection with the manufacturing, labeling, advertising, promotion, offering for sale, sale, or distribution of any product or service sold to consumers, in or affecting commerce, shall not:

- A. make any representation, in any manner, expressly or by implication, about the time in which any CompUSA Rebate will be mailed, or otherwise provided to qualifying consumers unless, at the time the representation is made, it possesses and relies upon competent and reliable evidence that substantiates the representation;
- B. fail to provide any CompUSA Rebate within the time specified or, if no time is specified, within thirty (30) days of receiving a properly completed request; or
- C. misrepresent, in any manner, expressly or by implication, any material terms of any CompUSA Rebate program.

II.

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

Decision and Order

promotion, offering for sale, sale, or distribution of any product or service sold to consumers, in or affecting commerce, shall not make any representation, in any manner, expressly or by implication, about the availability of any Manufacturer Rebate unless:

- A. Respondent has an established record with the manufacturer demonstrating that the manufacturer has consistently paid rebates in a timely manner; or
- B. If Respondent does not have such an established record with the manufacturer, it has conducted a reasonable financial analysis of the manufacturer and that financial analysis demonstrates the manufacturer's ability to timely pay the rebates being offered.

III.

IT IS FURTHER ORDERED that respondent CompUSA, and its successors and assigns, shall, in accordance with this Part, provide a rebate to each eligible QPS purchaser who purchased products through CompUSA.

- A. Within ten (10) business days from the date of service of this order, respondent shall compile (1) a mailing list or database containing the name and last known mailing address of each eligible QPS purchaser, and (2) the rebate amount(s) each such person is owed. In addition, respondent shall retain a National Change of Address System ("NCOA") licensee to update this list by processing the list through the NCOA database.
- B. Within thirty (30) business days from the date of service of this order, respondent shall mail via first-class mail, postage prepaid, the rebate amount(s) owed to each such eligible QPS purchaser whose name appears on the list or database required by sub part A of this Part.

- C. For a period of seventy-five (75) days from the date of service of this order, respondent shall mail via first-class mail, postage prepaid, the rebate amount(s) owed to each eligible QPS purchaser who has not been provided a rebate pursuant to sub part B of this Part, and who contacts the respondent or the Commission in any manner. Each such rebate shall be mailed within ten (10) business days after the respondent receives such person's name and contact information and confirms that no payment has yet been made to such person.
- D. No information other than a rebate check shall be mailed to each such eligible QPS purchaser. The envelope that contains the rebate check shall contain in the upper left hand corner the following return address: CompUSA Rebate Center, P.O. Box 1974, Addison, Texas 75001-1974.
- E. Within one hundred fifty (150) days from the date of service of this order, respondent shall furnish to Commission staff the following:
1. The mailing list or database required by sub part A of this Part in computer readable form.
 2. In computer readable form, a list of the names and addresses of all consumers who were sent rebate checks pursuant to this Part, and for each name included on the list, the amount, check number and mailing date of every rebate check sent;
 3. In computer readable form, a list of the names and addresses of all consumers who contacted respondent or were referred to respondent by the Commission in accordance with sub part C of this Part;
 4. Copies of all correspondence and other communications to, from, or concerning all consumers who, after the date

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of service of this order, requested a rebate but were refused, and the reason(s) for denying the rebate;

5. In computer readable form, a list of the names and addresses of all consumers whose rebate checks were returned to respondent as undeliverable; and
6. All other documents and records evidencing efforts made and actions taken by respondent to identify, locate, contact and provide funds to consumers requesting a rebate.

IV.

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

- A. Specimen copies of all freestanding newspaper inserts, direct mail advertisements, newspaper advertisements, and all television, video, and radio advertisements containing the representation;
- B. A specimen copy of all rebate forms containing the representation;
- C. All materials that were relied upon in disseminating the representation; and
- D. All written or electronic complaints relating to rebates (whether received directly, indirectly or through any third party) and any responses to those complaints.

V.

IT IS FURTHER ORDERED that respondent CompUSA, and its successors and assigns, shall deliver a copy of this order to all current and future principals, officers, directors, and managers, and to all current and future employees, agents, and representatives whose duties include the exercise of managerial responsibility with respect to the subject matter of this order. Respondent shall deliver this order to current personnel within thirty (30) days after the date of service of this order, and, for a period of three (3) years from the date of service of this order, to future personnel within thirty (30) days after the person assumes such position or responsibilities.

VI.

IT IS FURTHER ORDERED that respondent CompUSA, and its successors and assigns, shall deliver a copy of this order to all current and future manufacturers who offer or will offer a Manufacturer Rebate that consumers can obtain by purchasing products exclusively from CompUSA. Respondent shall deliver this order to such current manufacturers within thirty (30) days after the date of service of this order, and to such future manufacturers within thirty (30) days after the manufacturer enters into a business relationship with respondent.

VII.

IT IS FURTHER ORDERED that respondent CompUSA, and its successors and assigns, shall notify the Commission at least thirty (30) days prior to any change in the corporation that may affect compliance obligations arising under this order, including, but not limited to, a dissolution, assignment, sale, merger, or other action that would result in the emergence of a successor corporation; the creation or dissolution of a subsidiary, parent, or affiliate that engages in any acts or practices subject to this order; the proposed filing of a bankruptcy petition; or a change in the corporate name or address. Provided, however, that,

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with respect to any proposed change in the corporation about which respondent learns less than thirty (30) days prior to the date such action is to take place, respondent shall notify the Commission as soon as is practicable after obtaining such knowledge. All notices required by this Part shall be sent by certified mail to the Associate Director, Division of Enforcement, Bureau of Consumer Protection, Federal Trade Commission, 600 Pennsylvania Avenue, N.W., Washington, D.C. 20580.

VIII.

IT IS FURTHER ORDERED that respondent CompUSA, and its successors and assigns, shall, within sixty (60) days after the date of service of this order, and at such other times as the Federal Trade Commission may require, file with the Commission a report, in writing, setting forth in detail the manner and form in which it has complied with this order.

IX.

This order will terminate on June 1, 2025, or twenty (20) years from the most recent date that the United States or the Federal Trade Commission files a complaint (with or without an accompanying consent decree) in federal court alleging any violation of the order, whichever comes later; provided, however, that the filing of such a complaint will not affect the duration of:

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

Provided, further, that if such complaint is dismissed or a federal court rules that the respondent did not violate any provision of the

order, and the dismissal or ruling is either not appealed or upheld on appeal, then the order will terminate according to this Part as though the complaint had never been filed, except that the order will not terminate between the date such complaint is filed and the later of the deadline for appealing such dismissal or ruling and the date such dismissal or ruling is upheld on appeal.

Analysis

Analysis of Proposed Consent Order to Aid Public Comment

The Federal Trade Commission has accepted an agreement to a proposed consent order with CompUSA Inc. (“CompUSA”). CompUSA is a major retailer of personal computers, computer-related hardware and software products, and other consumer electronics products. CompUSA advertises, labels, offers for sale, sells, and distributes all of these products to the public. The Commission has separately accepted an agreement with the principals of Q.P.S., Inc. (“QPS”), which manufactured computer peripheral products sold by CompUSA.

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

This matter concerns cash rebate offers that CompUSA advertised to consumers. Among the products that CompUSA marketed were QPS computer peripheral products, as well as CompUSA-labeled computer peripheral products. In marketing these and other products, CompUSA advertised mail-in rebates, which it has funded and which third-party manufacturers, such as QPS, have funded.

The complaint alleges that CompUSA engaged in deceptive and unfair practices relating to both the QPS- funded rebates and the CompUSA-funded rebates. First, the complaint alleges that CompUSA falsely represented that QPS-funded rebate checks would be mailed to purchasers of advertised QPS products within six to eight weeks, or within a reasonable period of time. Although these rebates were designed and intended to be funded by QPS, CompUSA was involved in their creation, and disseminated advertisements and rebate forms for these rebates. From September 2001 until December 2001, many consumers

experienced delays ranging from one to six months in receiving their promised rebates, which ranged from \$15 to \$100 in value. From January 2002 through July 2002, many consumers experienced similar delays, and thousands of consumers never received their promised rebates from QPS. Despite knowledge of these significant problems, CompUSA continually advertised these QPS rebates until shortly before QPS filed for bankruptcy in August 2002.

Second, the complaint alleges that CompUSA falsely represented that it would deliver CompUSA-funded rebates to purchasers of its computer peripheral products within six to eight weeks, or within a reasonable period of time. Between September 2001 and June 2002, many consumers experienced delays ranging from one week to more than three months in receiving their promised rebates. The rebates at issue ranged from \$3 to \$100 in value.

Finally, the complaint alleges that, in the advertising and sale of computer peripheral products, CompUSA offered to deliver rebates within six to eight weeks if they purchased the advertised computer peripheral products and submitted valid rebate requests for CompUSA-funded rebate offers. After receiving rebate requests in conformance with these offers, CompUSA unilaterally extended the time period in which it would deliver the rebates to consumers without consumers agreeing to this extension of time. According to the complaint, this constituted an unfair business practice.

The proposed order contains provisions designed to prevent CompUSA from engaging in similar acts and practices in the future. Part I applies to CompUSA Rebates, which are rebates that are designed and intended to be funded by CompUSA. Specifically, Part I.A. prohibits the company from representing the time in which it will mail any CompUSA Rebate, unless it possesses competent and reliable evidence substantiating the claim. Part I.B. prohibits CompUSA from failing to provide any CompUSA rebate within the time specified, or if no time is

Analysis

specified, within thirty days. Part I.C. requires that the company not “misrepresent, in any manner, expressly or by implication, any material terms of any CompUSA Rebate program.”

Part II of the proposed order relates to CompUSA’s advertising of Manufacturer Rebates, which are rebates that are designed and intended to be funded by a manufacturer or third party other than CompUSA. This provision prohibits the company from making any representation about the availability of any Manufacturer Rebate unless (1) it has an established record with the manufacturer demonstrating that the manufacturer has consistently paid rebates in a timely manner; or (2) if it does not have such an established record with the manufacturer, CompUSA has conducted a reasonable financial analysis of the manufacturer and that financial analysis demonstrates the manufacturer’s ability to timely pay the rebates being offered.

Part III of the proposed order is a redress provision which requires CompUSA to pay all valid rebates requests to consumers who purchased QPS products at CompUSA and whose rebates are due or past due. This provision also requires CompUSA to send a rebate to any eligible QPS purchaser who contacts it or the FTC for a period of seventy-five (75) days after service of the order.

Parts IV through VIII of the proposed order are reporting and compliance provisions. Part IX is a provision “sunsetting” the order after twenty years, with certain exceptions.

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

Complaint

IN THE MATTER OF

NEW MILLENNIUM ORTHOPAEDICS, LLC, ET AL.

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

*Docket C-4140; File No. 0310087
Complaint, June 13, 2005--Decision, June 13, 2005*

This consent order, among other things, prohibits the respondents from entering into, participating in, implementing, or otherwise facilitating any combination, conspiracy, agreement, or understanding between or among any physicians (1) to negotiate on behalf of any physician with any payor; (2) to deal, refuse to deal, or threaten to refuse to deal with any payor; (3) regarding any term, condition, or requirement upon which any physician deals, or is willing to deal, with any payor, including, but not limited to, price terms; or (4) not to deal individually with any payor, or not to deal with any payor through any arrangement other than Respondent New Millennium. The order also requires Respondent New Millennium to effect its dissolution within 120 days after the effective date of the order.

Participants

For the Commission: *Gwendolyn Fanger, Sylvia Kundig, Jeffrey A. Klurfeld, Daniel P. Ducore, and Louis Silvia.*

For the Respondents: *Michael DeFrank, Hemmer Spoor Pangburn DeFrank, and William Freedman, Dinsmore & Shohl.*

COMPLAINT

Pursuant to the provisions of the Federal Trade Commission Act, as amended, 15 U.S.C. § 41 *et seq.* (“FTC Act”), and by virtue of the authority vested in it by said Act, the Federal Trade Commission (“Commission”), having reason to believe that New Millennium Orthopaedics, LLC (“NMO”), Orthopaedic Consultants of Cincinnati, Inc., dba Wellington Orthopaedics & Sports Medicine (“Wellington”), and Beacon Orthopaedics & Sports Medicine, Ltd. (“Beacon”), herein sometimes referred to as “Respondents,” have violated Section 5 of the Federal Trade Commission Act, as amended, 15 U.S.C. § 45, and it appearing to

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the Commission that a proceeding by it in respect thereof would be in the public interest, hereby issues this Complaint stating its charges in that respect as follows:

NATURE OF THE CASE

1. This matter concerns horizontal agreements among competing orthopaedic physicians in the Cincinnati, Ohio, area to fix prices charged to health plans and third party payors (“payors”), and to refuse to deal with payors. The orthopaedic physicians orchestrated these price-fixing agreements and concerted refusals to deal through NMO, and their conduct had the purpose and effect of raising the prices for physician services in the Cincinnati area.

RESPONDENTS

2. NMO, a single-specialty independent practice association (“IPA”), is a for-profit limited liability company, organized, existing, and doing business under and by virtue of the laws of the State of Ohio, with its principal place of business located at 4530 Eastgate Blvd., Cincinnati, Ohio, 45245.

3. Wellington, a twenty-two member, orthopaedic physician group, is a for-profit professional corporation, organized, existing, and doing business under and by virtue of the laws of the State of Ohio, with its principal place of business located at 4701 Creek Rd., Suite 110, Cincinnati, Ohio, 45242.

4. Beacon, a ten member, orthopaedic physician group, is a for-profit limited liability company, organized, existing, and doing business under and by virtue of the laws of the State of Ohio, with its principal place of business located at 6350 Glenway Ave., Suite 415, Cincinnati, Ohio, 45211.

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JURISDICTION AND INTERSTATE COMMERCE

5. Respondents' general business practices, including the acts and practices herein alleged, are in or affecting "commerce" as defined in the Federal Trade Commission Act, as amended, 15 U.S.C. § 44.

6. Except to the extent that competition has been restrained as alleged herein, Wellington's and Beacon's physician members have been, and are now, in competition with each other for the provision of orthopaedic services in the Cincinnati area for a fee.

BACKGROUND

7. Physicians often enter into contracts with payors that establish the terms and conditions, including fees and other competitively significant terms, for providing health care services to enrollees of payors. Payors may also develop and sell access to networks of physicians. Such payors include, but are not limited to, health maintenance organizations and preferred provider organizations. Physicians entering into such contracts often agree to reductions in their compensation to obtain access to additional patients made available by the payors' relationship with the enrollees. These contracts may reduce the payors' costs and permit them to lower medical care costs, including the price of health insurance and out-of-pocket medical care expenses, for enrollees.

8. Physicians organize their practices under several models, including but not limited to, sole proprietorships, partnerships, limited liability companies, and professional corporations (collectively "physician entities"). Absent agreements among competing physician entities on the terms on which they will provide services to the enrollees of payors, competing physician entities decide unilaterally whether to enter into contracts with payors to provide services to the payors' enrollees, and on what prices and other terms and conditions they will accept under such contracts.

Complaint

9. Medicare's Resource Based Relative Value Scale ("RBRVS") is a system used by the United States Centers for Medicare and Medicaid Services to determine the amount to pay physicians for the services they render to Medicare patients. The RBRVS approach provides a method to determine fees for specific services. In general, payors in the Cincinnati area make contract offers to individual physicians or groups at a price level specified as some percentage of the RBRVS fees for a particular year (*e.g.*, "110% of 2003 RBRVS").

10. Physician entities often are paid for the services they provide to health plan enrollees either by contracting directly with a health plan or indirectly by participating in IPAs. Some physician entities participating in IPAs share the risk of financial loss with other participants if the total costs of services provided to health plan enrollees exceed anticipated levels ("risk-sharing IPA"). Physicians participating in a risk-sharing IPA also typically agree to follow guidelines relating to quality assurance, utilization review, and administrative efficiency.

NMO'S FORMATION AND PURPOSE

11. In 2002, two orthopaedic physician groups, Wellington and Beacon, formed an IPA, NMO, to act as their negotiating agent with health plans. They each appointed two physicians to serve on NMO's Board of Managers ("Board"). Wellington and Beacon also appointed their own administrators to act as the negotiators on behalf of NMO.

12. Wellington and Beacon, through NMO, agreed on the prices to propose to health plans in negotiating their reimbursement rates. The prices included a guaranteed base fee schedule for all orthopaedic services plus a structure for the payment of bonuses. Under this arrangement, health plans would reimburse participating providers under an RBRVS-based fee schedule for all professional services. In addition to the guaranteed base fee schedule, the arrangement included a bonus

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structure under which all NMO physicians could earn additional reimbursement. All NMO physicians, including non-surgeons, would receive additional percentage points to their reimbursement rates as bonuses, even for office visits and non-surgical procedures, provided that NMO, as a whole, met the established performance targets for increasing the percentage of surgical procedures performed at ambulatory surgery centers (“ASCs”).

13. The ASC bonus scheme solely targeted outpatient surgery, which was only one aspect of the practices of some NMO physicians. Under the ASC bonus scheme, the measured change in the physicians’ behavior was limited to the movement of patients to ASCs. Non-surgeon members of NMO, who accounted for approximately 30% of NMO physicians, lacked the ability to change practice patterns related to ASCs. Thus, the ASC bonus scheme did not act as a substantial incentive for all of the NMO physicians to work together to achieve significant efficiencies for all of their services, which had jointly negotiated rates.

NMO’S HEALTH PLAN NEGOTIATIONS

14. Beginning in August, 2002, representatives of NMO sent letters to representatives of the four (4) major health plans in the Cincinnati area. They proposed an arrangement that would implement the guaranteed base fee schedule and ASC bonus scheme. Only one health plan agreed to NMO’s terms and signed contracts with Wellington and Beacon. Under the jointly negotiated and identical contracts, the health plan paid Wellington and Beacon physicians incentive payments for all of their services if the combined group met targets for diverting surgeries to ASCs and away from hospitals. Under the bonus program, the health plan agreed to pay the physicians an additional 2.5 percentage points to the fee schedules, per benchmark period, if Wellington and Beacon, combined, performed 50%, 60%, 65%, and then 70% of their outpatient procedures at ASCs for each six month period starting from January 1, 2003. The agreement did not require the physicians to reach the initial benchmark before receiving the first

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bonus payment. Rather, the health plan pre-paid the bonus percentage points for each period but could suspend additional increases in the following period if the physicians did not meet the set targets. Accordingly, Wellington and Beacon would retain a minimum 2.5 percentage point increase even if they never met any of their targets.

15. NMO performed no role in enhancing the ability of the physicians to increase the number of procedures performed at ASCs instead of at hospitals. NMO did not implement any enforcement mechanisms to monitor and control the physicians' compliance with the bonus scheme. The bonus scheme, alone, did not affect the NMO physicians' ability to work together to control costs or to improve quality for all jointly negotiated services, including office-based, non-surgical procedures. To a large extent, the scheme was a reward for the physicians' pre-existing practice patterns. Prior to signing the agreement, Wellington physicians performed over 50% of their procedures at ASCs without the incentive of the bonus scheme.

16. NMO continued to attempt to negotiate agreements with the other health plans into 2004. In April, 2004, the health plan that had signed identical agreements, negotiated by NMO, with Wellington and Beacon, also negotiated with NMO for a substitute incentive program for the two groups. The physicians had reached the final target and maximum ASC payout prior to the end of the contract. Instead of receiving bonuses under the ASC scheme, NMO and the health plan agreed that the health plan would pay bonuses to the groups under the health plan's own quality initiative that it had created to enhance preventive care by increasing the number of bone density tests ordered for a target patient population. This bonus program would have been offered to both groups separately, at individually adjusted benchmarks and bonus levels, without NMO's joint negotiation, because the health plan had decided to implement the same incentive plan for all of its contracted orthopaedic physicians in Cincinnati. The health plan alone monitored, measured, and implemented the bone

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density program. NMO played no role in the success of this program.

RESPONDENTS' PRICE FIXING

17. In connection with the formation of NMO, Wellington and Beacon agreed on the base reimbursement rates that they would seek from the health plans through their participation on NMO's Board. In that capacity, they participated in decisions of NMO's Board: (a) to develop the joint ASC bonus scheme proposal for the health plans; (b) to authorize negotiations with payors by NMO representatives aimed at gaining acceptance by the payors of physician fee schedules and prices collectively determined by NMO; and (c) to enter into agreements jointly negotiated by NMO.

18. After NMO collectively negotiated with the health plan on behalf of Wellington and Beacon, both groups agreed to participate in the contract.

RESPONDENTS' HORIZONTAL REFUSAL TO DEAL

19. NMO enforced its joint negotiation efforts with one health plan by a concerted refusal to deal in the absence of contract terms agreeable to NMO. In response to one health plan's refusal to negotiate with NMO during the original negotiations in 2002, NMO's Board agreed that both Wellington and Beacon should terminate their existing, separate agreements with the health plan in order to seek contracts with the health plan through NMO. Both Wellington and Beacon jointly terminated their individual agreements with the health plan at the direction of NMO's Board.

RESPONDENTS' CONDUCT NOT JUSTIFIED

20. Respondents' collective negotiation of fees and other competitively significant contract terms was not reasonably necessary to achieving any efficiency-enhancing integration.

Complaint

ANTICOMPETITIVE EFFECTS

21. Respondents' actions described in Paragraphs 11 through 19 of this Complaint have had, or have tended to have, the effect of restraining trade unreasonably and hindering competition in the provision of orthopaedic physician services in the Cincinnati area in the following ways, among others:

- A. price and other forms of competition among NMO's physician members were unreasonably restrained;
- B. prices for orthopaedic physician services in the Cincinnati area have increased or been maintained at artificially high levels; and
- C. health plans, employers, and individual consumers were deprived of the benefits of competition among orthopaedic physicians.

VIOLATION OF THE FEDERAL TRADE COMMISSION ACT

22. The combination, conspiracy, acts, and practices described above constitute unfair methods of competition in violation of Section 5 of the Federal Trade Commission Act, as amended, 15 U.S.C. § 45. Such combination, conspiracy, acts, and practices, or the effects thereof, are continuing and will continue or recur in the absence of the relief herein requested.

WHEREFORE, THE PREMISES CONSIDERED, the Federal Trade Commission on this thirteenth day of June, 2005, issues its Complaint against Respondents NMO, Wellington, and Beacon.

DECISION AND ORDER

The Federal Trade Commission (“Commission”), having initiated an investigation of certain acts and practices of New Millennium Orthopaedics, LLC (“NMO”), Orthopaedic Consultants of Cincinnati, Inc., dba Wellington Orthopaedics & Sports Medicine (“Wellington”), and Beacon Orthopaedics & Sports Medicine, Ltd. (“Beacon”), herein sometimes referred to as “Respondents,” and Respondents having been furnished thereafter with a copy of the draft of Complaint that counsel for the Commission proposed to present to the Commission for its consideration and which, if issued, would charge Respondents with violations of Section 5 of the Federal Trade Commission Act (“Act”), as amended, 15 U.S.C. § 45; and

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

The Commission having thereafter considered the matter and having determined that it had reason to believe that Respondents have violated the Act, and that a Complaint should issue stating its charges in that respect, and having accepted the executed Consent Agreement and placed such Consent Agreement on the public record for a period of thirty (30) days for the receipt and consideration of public comments, now in further conformity with the procedure described in Commission Rule 2.34, 16 C.F.R. § 2.34, the Commission hereby issues its Complaint, makes the following jurisdictional findings and issues the following Order:

Decision and Order

1. Respondent NMO is a for-profit limited liability company organized, existing, and doing business under and by virtue of the laws of the State of Ohio, with its principal place of business located at 4530 Eastgate Blvd., Cincinnati, Ohio, 45245.
2. Respondent Wellington is a for-profit professional corporation organized, existing, and doing business under and by virtue of the laws of the State of Ohio, with its principal place of business located at 4701 Creek Rd., Suite 110, Cincinnati, Ohio, 45242.
3. Respondent Beacon is a for-profit limited liability company organized, existing, and doing business under and by virtue of the laws of the State of Ohio, with its principal place of business located at 6350 Glenway Ave., Suite 415, Cincinnati, Ohio, 45211.
4. The Federal Trade Commission has jurisdiction of the subject matter of this proceeding and of Respondents, and this proceeding is in the public interest.

ORDER**I.**

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

- A. “Respondent NMO” means New Millennium Orthopaedics, LLC, its officers, directors, employees, agents, attorneys, representatives, successors, and assigns; and the subsidiaries, divisions, groups, and affiliates controlled by New Millennium Orthopaedics, LLC, and the respective officers, directors, employees, agents, attorneys, representatives, successors, and assigns of each.

- B. “ Respondent Wellington” means Orthopaedic Consultants of Cincinnati, Inc., dba Wellington Orthopaedics & Sports Medicine, its officers, directors, employees, agents, attorneys, representatives, successors, and assigns; and the subsidiaries, divisions, groups, and affiliates controlled by Orthopaedic Consultants of Cincinnati, Inc., and the respective officers, directors, employees, agents, attorneys, representatives, successors, and assigns of each.
- C. “ Respondent Beacon” means Beacon Orthopaedics & Sports Medicine, Ltd., its officers, directors, employees, agents, attorneys, representatives, successors, and assigns; and the subsidiaries, divisions, groups, and affiliates controlled by Beacon Orthopaedics & Sports Medicine, Ltd., and the respective officers, directors, employees, agents, attorneys, representatives, successors, and assigns of each.
- D. “Respondents” means Respondent NMO, Respondent Wellington, and Respondent Beacon, individually and collectively.
- E. “Medical group practice” means a bona fide, integrated firm in which physicians practice medicine together as partners, shareholders, owners, members, or employees, or in which only one physician practices medicine.
- F. “NMO payor” means any payor who, at any time since January 1, 2002, has communicated to Respondent NMO, or to whom Respondent NMO has communicated, with regard to any desire, willingness, or interest of such payor in contracting for physician services.
- G. “Participate” in an entity means (1) to be a partner, shareholder, owner, member, or employee of such entity, or (2) to provide services, agree to provide services, or offer to provide services, to a payor through such entity. This

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definition also applies to all tenses and forms of the word “participate,” including, but not limited to, “participating,” “participated,” and “participation.”

- H. “Payor” means any person that pays, or arranges for the payment, for all or any part of any physician services for itself or for any other person. “Payor” includes any person that develops, leases, or sells access to networks of physicians.
- I. “Person” means both natural persons and artificial persons, including, but not limited to, corporations, unincorporated entities, and governments.
- J. “Physician” means a doctor of allopathic medicine (“M.D.”) or a doctor of osteopathic medicine (“D.O.”).
- K. “Preexisting contract” means a contract that was in effect on the date of the receipt by a payor that is a party to such contract of notice sent, pursuant to Paragraph V.A of this Order, of such payor’s right to terminate such contract.
- L. “Principal address” means either (1) the primary business address, if there is a business address, or (2) the primary residential address, if there is no business address.
- M. “Qualified clinically-integrated joint arrangement” means an arrangement to provide physician services in which:
 - 1. all physicians that participate in the arrangement participate in active and ongoing programs of the arrangement to evaluate and modify the practice patterns of, and create a high degree of interdependence and cooperation among, the physicians who participate in the arrangement, in order to control costs and ensure the quality of services provided through the arrangement; and
 - 2. any agreement concerning price or other terms or conditions

of dealing entered into by or within the arrangement is reasonably necessary to obtain significant efficiencies through the joint arrangement.

- N. “Qualified risk-sharing joint arrangement” means an arrangement to provide physician services in which:
1. all physicians who participate in the arrangement share substantial financial risk through their participation in the arrangement and thereby create incentives for the physicians who participate jointly to control costs and improve quality by managing the provision of physician services, such as risk-sharing involving:
 - a. the provision of physician services for a capitated rate from payors;
 - b. the provision of physician services for a predetermined percentage of premium or revenue from payors;
 - c. the use of significant financial incentives (*e.g.*, substantial withholds) for physicians who participate to achieve, as a group, specified cost-containment goals; or
 - d. the provision of a complex or extended course of treatment that requires the substantial coordination of care by physicians in different specialties offering a complementary mix of services, for a fixed, predetermined price, where the costs of that course of treatment for any individual patient can vary greatly due to the individual patient’s condition, the choice, complexity, or length of treatment, or other factors; and
 2. any agreement concerning price or other terms or conditions of dealing entered into by or within the arrangement is reasonably necessary to obtain significant efficiencies through the joint arrangement.

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II.

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

- A. Entering into, adhering to, participating in, maintaining, organizing, implementing, enforcing, or otherwise facilitating any combination, conspiracy, agreement, or understanding between or among any physicians:
 - 1. to negotiate on behalf of any physician with any payor;
 - 2. to deal, refuse to deal, or threaten to refuse to deal with any payor;
 - 3. regarding any term, condition, or requirement upon which any physician deals, or is willing to deal, with any payor, including, but not limited to, price terms; or
 - 4. not to deal individually with any payor, or not to deal with any payor through any arrangement other than Respondent NMO;
- B. Exchanging or facilitating in any manner the exchange or transfer of information among physicians concerning any physician’s willingness to deal with a payor, or the terms or conditions, including price terms, on which the physician is willing to deal;
- C. Attempting to engage in any action prohibited by Paragraph II.A or II.B above; and
- D. Encouraging, suggesting, advising, pressuring, inducing, or attempting to induce any person to engage in any action that would be prohibited by Paragraphs II.A through II.C above.

PROVIDED, HOWEVER, that nothing in Paragraph II of this Order shall prohibit any agreement involving, or conduct by, Respondent Wellington or Respondent Beacon that is reasonably necessary to form, participate in, or take any other action in furtherance of a qualified risk-sharing joint arrangement or a qualified clinically-integrated joint arrangement, or that solely involves providers in the same medical group practice. In any proceeding to enforce this Order, Respondent Wellington or Respondent Beacon shall bear the burden of proof with regard to demonstrating that the challenged agreement or conduct is reasonably necessary to any formation, participation, or action.

III.

IT IS FURTHER ORDERED that Respondent NMO shall:

- A. Within thirty (30) days after the date on which this Order becomes final, cease and desist from all business and all other activities of any nature whatsoever, except those activities that are required in order to comply with the terms of this Order or that are necessary to effect a winding down of Respondent NMO's affairs and its dissolution;
- B. Within thirty (30) days after the date on which this Order becomes final, and prior to the dissolution provided for in Paragraph III.C below, distribute by first-class mail, return receipt requested, a copy of this Order and Complaint to:
 1. each officer, director, manager, and employee of Respondent NMO; and
 2. the chief executive officer of each NMO payor; and
- C. Dissolve itself within one hundred twenty (120) days after the date on which this Order becomes final.

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IV.

IT IS FURTHER ORDERED that Respondent NMO shall:

- A. Within ninety (90) days after the date on which this Order becomes final, and prior to the dissolution provided for in Paragraph III.C above, file with the Commission a verified written report demonstrating how it has complied and is complying with this Order;
- B. Prior to its dissolution, notify the Commission at least thirty (30) days prior to any proposed change in Respondent NMO, such as assignment, sale resulting in the emergence of a successor, or any other change in Respondent NMO that may affect compliance obligations arising out of this Order; and
- C. Upon dissolution, provide the Commission with evidence of that dissolution.

IV.

IT IS FURTHER ORDERED that Respondent Wellington and Respondent Beacon shall each:

- D. Within thirty (30) days after the date this Order becomes final:
 - 1. send by first-class mail, with delivery confirmation, a copy of this Order and the Complaint to each of its own physicians who participates, or has participated in Respondent Wellington or Respondent Beacon since January 1, 2002;
 - 2. send by first-class mail, return receipt requested, a copy of this Order and the Complaint to each of its own officers, directors, managers, and employees who had any responsibility regarding Respondent NMO; and

3. send by first-class mail, return receipt requested, a copy of this Order and the Complaint to the chief executive officer of each NMO payor, and include in such mailing the notice specified in Appendix A to this Order;
- E. Terminate, without penalty or charge, and in compliance with any applicable laws, any preexisting contract with any payor, at the earlier of:
1. receipt by Respondent Wellington or Respondent Beacon of a written request from a payor to terminate such contract; or
 2. the earliest termination date, renewal date (including any automatic renewal date), or anniversary date of such contract, unless the payor provides Respondent Wellington or Respondent Beacon with written affirmation of the contract prior to such termination date, renewal date, or anniversary date, and Respondent Wellington or Respondent Beacon has determined not to exercise any right to terminate under the terms of the contract;
- F. Within ten (10) days from receiving a written request from a payor to terminate, pursuant to Paragraph V.B.1 of this Order, distribute, by first-class mail, return receipt requested, a copy of that request to each of its own physicians who participates in Respondent Wellington or Respondent Beacon, as the case may be;
- G. For a period of three (3) years after the date this Order becomes final, distribute by first-class mail, return receipt requested, a copy of this Order and the Complaint to:
- a. each of its own physicians who begins participating in Respondent Wellington or Respondent Beacon for the provision of physician services, and who did not previously receive a copy of this Order and the Complaint, within thirty (30) days of the time that such participation begins;

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- b. each payor that contacts Respondent Wellington or Respondent Beacon regarding the provision of physician services, and which did not previously receive a copy of this Order and the Complaint from Respondents, within thirty (30) days of such contact; and
 - c. each person who becomes an officer, director, manager, or employee of Respondent Wellington or Respondent Beacon, and who did not previously receive a copy of this Order and the Complaint from Respondent Wellington or Respondent Beacon, within thirty (30) days of the time that he or she assumes such status with Respondent Wellington or Respondent Beacon; and
- H. For a period of three (3) years from the date that this Order becomes final, annually publish a copy of this Order and the Complaint in any official annual report or newsletter sent to all physicians who participate in Respondent Wellington or Respondent Beacon, with such prominence as is given to regularly featured articles.

V.

IT IS FURTHER ORDERED that Respondent Wellington and Respondent Beacon shall each file verified written reports within sixty (60) days after the date this Order becomes final, annually thereafter for three (3) years on the anniversary of the date this Order becomes final, and at such other times as the Commission may by written notice require, which shall include:

- A. A detailed description of the manner and form in which Respondent Wellington and Respondent Beacon have complied and are complying with this Order;
- B. Copies of the delivery confirmations required by Paragraph V.A.1 of this Order; and
- C. Copies of the return receipts required by Paragraphs V.A.2, V.A.3 and V.D.

VI.

IT IS FURTHER ORDERED that Respondent Wellington and Respondent Beacon shall notify the Commission within thirty (30) days prior to any proposed change in Respondent Wellington or Respondent Beacon, such as change of address, assignment, sale resulting in the emergence of a successor, or any other change in Respondent Wellington or Respondent Beacon that may affect compliance obligations arising out of this Order.

VII.

IT IS FURTHER ORDERED that, for the purpose of determining or securing compliance with this Order, Respondent Wellington and Respondent Beacon shall permit any duly authorized representative of the Commission:

- A. Access, during office hours and in the presence of counsel, to all facilities and access to inspect and copy all books, ledgers, accounts, correspondence, memoranda, calendars, and other records and documents in their possession, or under their control, relating to any matter contained in this Order; and
- B. Upon five (5) days' notice to such Respondent, and in the presence of counsel, and without restraint or interference from it, to interview such Respondent or employees of such Respondent.

VIII.

IT IS FURTHER ORDERED that this Order shall terminate on June 13, 2025.

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Appendix A

[Letterhead of Respondent]

[name of payor's CEO]
[address]

Dear _____:

Enclosed is a copy of a complaint, consent order (“Order”), and consent agreement issued by the Federal Trade Commission against New Millennium Orthopaedics, LLC (“NMO”), Orthopaedic Consultants of Cincinnati, Inc., dba Wellington Orthopaedics & Sports Medicine (“Wellington”), and Beacon Orthopaedics & Sports Medicine, Ltd. (“Beacon”).

Pursuant to Paragraph V.B of the Order, you have the right to terminate, without any penalty or charge, any contracts with Wellington or Beacon that were in effect prior to your receipt of this letter. If you do not elect to terminate any contracts with Wellington or Beacon, as set forth above, at the earliest of the termination date, renewal date (including any automatic renewal date), or anniversary date, the contract will terminate UNLESS you elect to affirm the contract in writing. Such affirmation can be provided to Wellington or Beacon at any time prior to the renewal or termination date.

Any request either to terminate or to affirm the contract should be made in writing and sent to me at the following address:
[address]

Sincerely,

[name of Respondent]¹

¹ Neither NMO, Wellington, nor Beacon have admitted any wrongdoing.

Analysis of Agreement Containing Consent Order to Aid Public Comment

The Federal Trade Commission has accepted, subject to final approval, an agreement containing a proposed Consent Order with New Millennium Orthopaedics, LLC (“NMO”), Orthopaedic Consultants of Cincinnati, Inc., dba Wellington Orthopaedics & Sports Medicine (“Wellington”), and Beacon Orthopaedics & Sports Medicine, Ltd. (“Beacon”) (collectively, “Respondents”). The agreement settles charges that Wellington and Beacon, through NMO, violated Section 5 of the Federal Trade Commission Act, 15 U.S.C. § 45, by orchestrating and implementing agreements between competing orthopaedic physician groups to fix prices charged to health plans, and to refuse to deal with such health plans except on collectively-determined terms. The proposed Consent Order has been placed on the public record for 30 days to receive comments from interested persons. Comments received during this period will become part of the public record. After 30 days, the Commission will review the agreement and the comments received, and will decide whether it should withdraw from the agreement or make the proposed Consent Order final.

The purpose of this analysis is to facilitate public comment on the proposed Consent Order. The analysis is not intended to constitute an official interpretation of the agreement and proposed Consent Order or to modify their terms in any way. Further, the proposed Consent Order has been entered into for settlement purposes only and does not constitute an admission by any respondent that said respondent violated the law or that the facts alleged in the Complaint (other than jurisdictional facts) are true.

The Complaint

The allegations of the Complaint are summarized below.

NMO is a single-specialty independent practice association consisting of two orthopaedic physician groups, Wellington and

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Beacon. Both Wellington, a twenty-two member orthopaedic physician group, and Beacon, a ten-member orthopaedic group, provide orthopaedic physician services, including surgical and non-surgical services, in the Cincinnati, Ohio area.

In 2002, Wellington and Beacon formed NMO to act as their negotiating agent with health plans. Through NMO, they agreed on the prices to propose to health plans in negotiating their reimbursement rates. Beginning in August, 2002, representatives of NMO sent letters to representatives of the four major health plans in the Cincinnati area. They proposed an arrangement that would implement a guaranteed base fee schedule and a bonus scheme. Under the bonus scheme, all NMO physicians would receive higher reimbursement rates for all services provided that NMO, as a whole, met established performance targets for increasing the percentage of surgical procedures performed at ambulatory surgery centers (“ASCs”).

The ASC bonus scheme solely targeted outpatient surgery, which was only one aspect of the practices of some NMO physicians. Under the ASC bonus scheme, the measured change in the physicians’ behavior was limited to the movement of patients to ASCs. Non-surgeon members of NMO, who accounted for approximately 30% of NMO physicians, lacked the ability to change practice patterns related to ASCs. Thus, the ASC bonus scheme did not act as a substantial incentive for all of the NMO physicians to work together to achieve significant efficiencies for all of their services, which had jointly negotiated rates.

The Complaint alleges that NMO performed no role in enhancing the ability of the physicians to increase the number of procedures performed at ASCs instead of at hospitals. NMO did not implement any enforcement mechanisms to monitor and control the physicians’ compliance with the bonus scheme. The bonus scheme, alone, did not affect the NMO physicians’ ability to work together to control costs or to improve quality for all jointly negotiated services, including office-based, non-surgical

procedures. To a large extent, the scheme was a reward for the physicians' pre-existing practice patterns. For example, prior to signing the agreement, Wellington physicians performed over 50% of their procedures at ASCs without the incentive of the bonus scheme.

Only one health plan agreed to NMO's terms. Nonetheless, NMO continued to attempt to negotiate agreements with the other health plans into 2004.

NMO also enforced its joint negotiation efforts with one health plan by a concerted refusal to deal in the absence of contract terms agreeable to NMO. In response to one health plan's refusal to negotiate with NMO during the original negotiations in 2002, NMO's Board agreed that both Wellington and Beacon should terminate their existing, separate agreements with the health plan in order to seek contracts with the health plan through NMO. Both groups subsequently jointly terminated their individual agreements with the health plan at the direction of NMO's Board.

Respondents' collective negotiation of fees and other competitively significant contract terms was not reasonably necessary to achieving any efficiency-enhancing integration. Thus, they violated Section 5 of the FTC Act by orchestrating agreements between competing orthopaedic physician groups to fix prices with health plans, and by refusing to deal with one of the health plans that would not meet those terms.

The Proposed Consent Order

The proposed Consent Order is designed to prevent the continuance and recurrence of the illegal conduct alleged in the complaint while, allowing Wellington and Beacon to engage in legitimate, joint conduct.

The proposed Consent Order's specific provisions are summarized below.

Analysis

Paragraph II.A prohibits Respondents from entering into or facilitating agreements between or among any health care providers: (1) to negotiate on behalf of any physician with any payor; (2) to deal, refuse to deal, or threaten to refuse to deal with any payor; (3) regarding any term, condition, or requirement upon which any physician deals, or is willing to deal, with any payor, including, but not limited to price terms; or (4) not to deal individually with any payor, or not to deal with any payor through any arrangement other than Respondent NMO.

The other parts of Paragraph II reinforce these general prohibitions. Paragraph II.B prohibits the Respondents from facilitating exchanges of information between health care providers concerning whether, or on what terms, to contract with a payor. Paragraph II.C bars attempts to engage in any action prohibited by Paragraph II.A or II.B, and Paragraph II.D proscribes encouraging, suggesting, advising, pressuring, inducing, or attempting to induce any person to engage in any action that would be prohibited by Paragraphs II.A. through II.C.

As in other Commission orders addressing health care providers' collective bargaining with health care purchasers, certain kinds of agreements are excluded from the general bar on joint negotiations. Paragraph II does not preclude Wellington and Beacon from engaging in conduct that is reasonably necessary to form or participate in legitimate "qualified risk-sharing" or "qualified clinically-integrated" joint arrangements, as defined in the proposed Consent Order. Also, Paragraph II would not bar agreements that only involve physicians who are part of the same medical group practice, defined in Paragraph I.E, because it is intended to reach agreements among independent competitors.

Paragraph III requires the dissolution of NMO.

Paragraph IV contains filing and notification requirements related to the dissolution of NMO.

Paragraph V applies only to Wellington and Beacon. It contains notification requirements for Wellington and Beacon. Paragraph V.A requires Wellington and Beacon to send a copy of the Complaint and Consent Order to their physician members who participated in NMO, their management and staff who had any responsibility regarding NMO, and any payors who communicated with NMO, or with whom NMO communicated, with regard to any interest in contracting for physician services. Paragraph V.A.3 also requires Wellington and Beacon to send these payors notice of their right to terminate their agreements with Wellington and Beacon.

Paragraph V.B allows for contract termination if a payor voluntarily submits a request to Wellington and Beacon to terminate its contract. Pursuant to such a request, Paragraph V.B requires Wellington and Beacon to terminate, without penalty, any payor contracts that they had entered into during the collusive period. This provision is intended to eliminate the effects of NMO's joint, price setting behavior. Paragraph V.C requires that Wellington and Beacon each send a copy of any payor's request for termination to every physician who participates in each group.

Paragraph V.D contains notification provisions relating to future contact with physicians, payors, management and staff of each group. Paragraph V.D requires Wellington and Beacon to distribute a copy of the Complaint and Consent Order to each physician who begins participating in each group; each payor who contacts each group regarding the provision of physician services; and each person who becomes an officer, director, manager, or employee of each group for three years after the date on which the Consent Order becomes final.

Paragraph V.E requires Wellington and Beacon to publish a copy of the Complaint and Consent Order, for three years, in any official publication that they send to their participating physicians.

Paragraphs VI-VIII impose various obligations on Wellington and Beacon to report or provide access to information to the

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Commission to facilitate monitoring their compliance with the Consent Order.

The proposed Consent Order will expire in 20 years from the date it is issued.

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IN THE MATTER OF

**KENTUCKY HOUSEHOLD GOODS CARRIERS
ASSOCIATION, INC.**OPINION OF THE COMMISSION AND FINAL ORDER IN REGARD TO
ALLEGED VIOLATIONS OF SEC. 5 OF THE
FEDERAL TRADE COMMISSION ACT*Docket 9309; File No. 0210115**Complaint, July 8, 2003—Opinion and Final Order, June 30, 2005*

In a unanimous Opinion, the Commission concluded that respondent's collective ratemaking activities, in preparing and filing collective tariffs for its members violated Section 5 of the Federal Trade Commission Act. The Commission also determined that the state action doctrine did not apply because the state agency responsible for overseeing the respondent's ratemaking did not actively supervise that activity. The Final Order, among other things, prohibits the respondent from entering into, adhering to, or maintaining -- any contract, agreement, understanding, plan, program, combination, or conspiracy to fix, stabilize, raise, maintain, or otherwise interfere or tamper with the rates charged by two or more carriers for the intrastate transportation of property or related services, goods, or equipment ("intrastate transportation"). These prohibited practices include but are not limited to knowingly preparing, developing, disseminating, or filing a proposed or existing tariff that contains collective rates for intrastate transportation, and preparing, developing, disseminating, or filing a proposed or existing tariff containing automatic changes to rates charged by two or more carriers. The Final Order also requires the respondent to cancel and withdraw all tariffs and any supplements thereto on file with the Kentucky Transportation Cabinet's Division of Motor Carriers that establish intrastate transportation rates by common carriers in the Commonwealth of Kentucky, and to amend its by-laws to require its members to observe the provisions of this Order as a condition of membership in KHGCA.

Participants

For the Commission: *Dana C. Abrahamsen, Peggy Bayer Femenella, Harry Schwirck, Ashley Masters, Patrick J. Roach, Geoffrey D. Oliver, Richard B. Dagen, and John Howell.*

For the Respondents: *James C. McMahon and Kevin P. Kelly, McMahon & Kelly.*

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OPINION OF THE COMMISSION

By MAJORAS, Chairman, For A Unanimous Commission:

INTRODUCTION

This case presents the question whether the activities of Respondent Kentucky Household Goods Carriers Association, Inc. in preparing and filing collective rates for its members under color of compliance with state law, are shielded from federal antitrust scrutiny by virtue of the “state action” doctrine. The Administrative Law Judge (ALJ) concluded that Respondent’s ratemaking activities constitute unlawful horizontal price fixing, and that Respondent is not entitled to the state action defense. We agree, and affirm the decision of the ALJ.

The state action doctrine and its jurisprudence are important because the doctrine enables the displacement of the federal antitrust laws. The doctrine, which is based on principles of state sovereignty, allows the states to implement legitimate policies. By enabling the displacement of the antitrust laws, however, the doctrine also can allow the implementation of programs that produce powerful anticompetitive effects, including higher prices and fewer choices for consumers.

The Supreme Court has made clear that the state action doctrine only applies when (1) “the challenged restraint [is] clearly articulated and affirmatively expressed as state policy,” and (2) the “policy [is] actively supervised by the State itself.” *California Retail Liquor Dealers Ass’n v. Midcal Aluminum, Inc.*, 445 U.S. 97, 105 (1980) (internal quotation marks omitted). The principal issue here is whether the state agency responsible for supervising Respondent’s ratemaking engaged in the necessary “active supervision.” Active supervision is essential for the state action doctrine to apply because it ensures that the extent to which the antitrust laws are displaced and responsibility for this displacement is properly laid on the state itself, not merely the

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private actors. For the reasons set forth below, we find that the state has fallen far short of the conduct needed to satisfy the active supervision requirement, and therefore that the state action doctrine does not apply.¹

I. Background

A. Respondent's Activities

The central facts are not in dispute. The Kentucky Household Goods Carriers Association, Inc. ("Respondent" or "Kentucky Association") is an organization with a membership of approximately ninety-three household goods carriers that provide intrastate and local moving services within Kentucky. IDF 7.² One of the Kentucky Association's primary functions is that of a "tariff publishing agent" or so-called "rate bureau" that prepares

¹ This opinion uses the following abbreviations for citations:
ID - Initial Decision of the Administrative Law Judge
IDF - Initial Decision Finding of Fact
CX - Complaint Counsel's Exhibit
RX - Respondent's Exhibit
JX - Joint Exhibit
Dep. - Deposition (+ volume number, if multi-volume deposition)
Tr. - Trial Transcript
RAB - Respondent's Appeal Brief
RRB - Respondent's Reply Brief
CCAB - Complaint Counsel's Answering Brief

We adopt the ALJ's findings of fact to the extent those findings are not inconsistent with this opinion.

² The FTC has jurisdiction to regulate the intrastate moving services at issue here, because such activities affect interstate commerce. JX 1 at ¶ 51; *see Mass. Furniture & Piano Movers Ass'n v. FTC*, 773 F.2d 391, 394 (1st Cir. 1985).

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the initiation, preparation, development, dissemination, and filing of joint tariffs and tariff supplements with the Kentucky Transportation Cabinet (“KTC” or “Intervenor”) on behalf of the Kentucky Association’s members. This function is conducted through the Kentucky Association’s tariff committee. IDF 10. The participating carriers have authorized the Kentucky Association to file rates on their behalf by granting it power of attorney. IDF 24.

The Kentucky Association regularly files supplements to its tariff that contain proposed rate increases for its members. The decision to propose a rate increase can either be agreed to by a voice vote at a general membership meeting or by a vote of the Kentucky Association’s Board of Directors. IDF 25. Before the Kentucky Association files a tariff supplement with the KTC, it notifies its members of the proposed rates. Participating carriers that want to file different rates can submit a request for a tariff change with the Kentucky Association’s tariff committee. IDF 21. If participating carriers do not affirmatively exempt themselves from the terms of the proposed tariff rates, they are covered by the collective rates contained in the Kentucky Association’s tariff. Once tariff rates are filed and approved, every carrier covered by them is obliged to charge the tariff rates. IDF 23. The majority of carriers agree to charge the same rate for many items in the tariff, and there is considerable uniformity among the participating carriers with respect to intrastate rates. IDF 30, 31.

B. State Regulation

Every household goods carrier operating in Kentucky must file a tariff containing its rates with the state. KY. REV. STAT. ANN. § 281.680(1) (Michie 2004). Under Kentucky law, these rates must be “just and reasonable.” KY. REV. STAT. ANN. § 281.675(1) (Michie 2004). It is the policy of the state “to promote safe, adequate, economical and efficient service and foster sound economic conditions in transportation and among the several carriers,” and “to encourage the establishment and

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maintenance of reasonable charges for such transportation service.” KY. REV. STAT. ANN. § 281.590 (Michie 2004). Kentucky law authorizes household goods carriers to become participating parties to a joint tariff published by a tariff-issuing agency. KY. REV. STAT. ANN. § 281.680(1). Carriers must charge the rate set by their tariff – no discounting is permitted. KY. REV. STAT. ANN. § 281.685 (Michie 2004).

The KTC is the state agency authorized to fix or approve the rates charged by household goods carriers. KY. REV. STAT. ANN. § 281.695(1); 601 KY. ADMIN. REGS. 1:050. The KTC is responsible for ensuring that every rate charged by carriers is just and reasonable. 601 KY. ADMIN. REGS. 1:050; IDF 11. The oversight function, however, is assigned to only one person. IDF 54, 55, 61, 62. The KTC is also charged with the responsibility of developing procedures for collective ratemaking, which procedures must “assure that respective revenues and costs of carriers . . . are ascertained.” KY. REV. STAT. ANN. § 281.680(4).

Common carriers must submit a proposed rate change to the KTC thirty days before the rate’s proposed effective date. KY. REV. STAT. ANN. § 281.690(1) (Michie 2004). If the KTC takes no action within thirty days, the proposed rate change becomes effective. IDF 94. Kentucky law provides that the KTC “may, upon its own initiative, and shall, upon protest” filed with the KTC, conduct hearings concerning a proposed rate change. KY. REV. STAT. ANN. § 281.690(2). The law also states that if, after a hearing, the KTC finds a proposed rate change to be “unjust, unreasonable, or unjustly discriminatory,” it must determine the “just and reasonable” rate. *Id.* Another statute provides that if, after a hearing, the KTC finds a proposed rate is “excessive,” it may “determine the just and reasonable rate.” KY. REV. STAT. ANN. § 281.695(1). In addition, the law states that carriers must give notice of a proposed rate change to “interested persons” in the manner directed by the KTC’s administrative regulations. KY. REV. STAT. ANN. § 281.690(1). The KTC’s administrative regulations provide that if a household goods carrier proposes an

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increase to its rates, it must publish a notice of the proposed increase in a newspaper of general circulation, which notice must state that any interested party may file a protest with the KTC. 601 KY. ADMIN. REGS. 1:070(2)(c). Notwithstanding this regulation, the record contains no evidence that the Kentucky Association has ever posted, or the KTC has required, notices of proposed rate increases. IDF 74. The KTC has not held any hearings to examine or analyze the collective rates contained in the Kentucky Association's joint tariff since the late 1950s or early 1960s, when the tariff was first developed. IDF 96.

As noted above, the KTC employs only one person to review and process household goods carrier rates. IDF 54, 61-62. That individual (William Debord) obtains general information about the bases for the Kentucky Association's planned rate increases from discussions with the head of the Kentucky Association's tariff committee or by attending meetings of the Kentucky Association. IDF 70, 76-80. However, the Kentucky Association does not submit, and the KTC does not require submission of, any business records, economic studies or cost justification data. IDF 75. Moreover, the movers do not disclose details about their costs, revenues, or profit margins at Kentucky Association meetings. IDF 70, 71. The KTC used to require household goods carriers to file annual financial reports in the 1970s and '80s, but it no longer requires the submission of this data. IDF 42, 63. The KTC also used to perform uniform cost studies and calculate operating ratios for all household goods carriers in the 1970s, but it no longer does so. IDF 44, 45. The KTC does not have any standard or formula for determining whether a rate increase is appropriate or complies with statutory standards. IDF 88, 89. The KTC does not issue a written decision when it permits a rate increase to go into effect. IDF 95. For years, the KTC has approved these rate increases in their entirety without modification. *See* CX 116 (Debord, Dep. II at 94).

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C. Proceedings Before the Administrative Law Judge

The Commission's complaint in this matter, issued on July 8, 2003, alleged that the Kentucky Association and its members have engaged in a combination to fix prices in violation of Section 5 of the Federal Trade Commission Act, 15 U.S.C. § 45, by taking actions to establish and maintain collective rates for the transportation of household goods within Kentucky. The complaint alleges that Respondent's conduct has had the effect of raising prices in the household goods moving industry and depriving consumers of the benefit of competition.

Respondent denied that its members' collective ratemaking activities constitute a horizontal agreement to fix prices, and asserted as an affirmative defense that the challenged conduct is exempt from the federal antitrust laws under the state action doctrine. Respondent relied on provisions of state law which permit carriers to adhere to joint tariffs. *See* Memorandum of Respondents in Support of Motion for Summary Decision at 24-42. Respondent filed a motion for summary decision on December 19, 2003, which ALJ D. Michael Chappell denied on February 26, 2004. On February 23, 2004, the KTC filed a motion seeking leave to intervene supporting Respondent. On March 10, 2004, the ALJ granted the motion in part and denied it in part, permitting the KTC to offer evidence and testimony at the hearing in this proceeding, subject to certain limitations, and to present an opening statement and closing argument. Trial commenced on March 16, 2004. No witnesses were called to testify. By agreement of Complaint Counsel and Respondent, the deposition transcripts and videotapes of depositions of four witnesses were offered into evidence in lieu of live testimony. Intervenor KTC did not attend the March 16 proceedings, and did not offer any evidence or testimony at the trial.

Following the submission of post-trial briefs, the ALJ found that Respondent and its members engaged in horizontal price

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fixing that is *per se* unlawful. The ALJ also found that Respondent is not exempt from antitrust liability under the state action doctrine, because it failed to establish that the Commonwealth of Kentucky actively supervises its ratemaking activities. Accordingly, the ALJ found violations of Section 5, and recommended entry of an order requiring Respondent to cease and desist from collective ratemaking.

This matter now is before the Commission on Respondent's appeal from the Initial Decision. Respondent's principal contention in this appeal is that its ratemaking activities are exempt from antitrust liability under the state action doctrine. In this regard, Respondent also contends that the ALJ erroneously failed to take into account the KTC's views that it actively supervises Respondent's collectively-set rates and that holding this conduct in violation of the federal antitrust laws would reduce the KTC's ability to enforce the applicable state laws and regulations.

The Commonwealth of Kentucky, represented by its Attorney General, has submitted an *amicus curiae* brief in this appeal asserting that the ALJ's decision does not conflict with Kentucky law or public policy and, thus, does not implicate federalism concerns.

On the day of oral argument, Respondent filed a motion asking the Commission to stay this proceeding pursuant to Section 3.54(c) of the Commission's Rules of Practice, 16 C.F.R. § 3.54(c), pending the Commission's review of recent actions taken by the KTC, which Respondent asserts show that the KTC has instituted procedures consistent with the standards for active supervision set forth in the Initial Decision. As discussed below, we have deferred ruling on Respondent's Rule 3.54(c) motion until issuing our final decision on the merits, and address the issues raised in that motion herein.

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II. State Action Doctrine

A. Overview

The principal issue on appeal is whether the Kentucky Association's ratemaking activities are beyond the purview of the federal antitrust laws by virtue of the state action doctrine. The Supreme Court first articulated this doctrine in *Parker v. Brown*, 317 U.S. 341 (1943), where the Court upheld California's Agricultural Prorate Act against a Sherman Act challenge. The Court determined that federal statutes do not limit the sovereign states' autonomous authority over their own officers, agents, and policies in the absence of clear congressional intent to do so, and it found no such intent in the language or legislative history of the Sherman Act. *Id.* at 350-51. Accordingly, the Court held that when a "state in adopting and enforcing [a] program . . . , as sovereign, imposed the restraint as an act of government," the Sherman Act does not prohibit the restraint. *Id.* at 352.³ The state action doctrine is thus grounded in principles of federalism and state sovereignty.

Although *Parker* involved acts of the state itself, the Supreme Court subsequently confirmed that the state action doctrine also protects certain private conduct from the federal antitrust laws. The Court has articulated a two-part test for determining whether anticompetitive conduct of private entities qualifies as "state action": (1) the challenged conduct must be undertaken pursuant to a "clearly articulated and affirmatively expressed" state policy to displace competition with regulation; and (2) the conduct must be "actively supervised" by the state itself. *Midcal*, 445 U.S. at

³ The state action defense is available in Section 5 cases applying Sherman Act standards. *Ticor Title Ins. Co.*, 112 F.T.C. 344, 424 n.5 (1989).

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105 (internal quotation marks omitted).⁴ Compliance with both parts of the *Midcal* test ensures not only that the federal antitrust laws are displaced only where there is a “deliberate and intended state policy,” but that the state remains politically accountable for the anticompetitive conduct it has sanctioned and overseen. *Ticor Title*, 504 U.S. at 636.

The first part of the *Midcal* test seeks to determine whether the state has intended to depart from the Sherman Act’s competitive model as an act of government to which federalism principles demand deference.⁵ In *Southern Motor Carriers Rate Conference, Inc. v. United States*, 471 U.S. 48 (1985), the Supreme Court applied the “clear articulation” requirement to collective ratemaking by intrastate common carrier rate bureaus operating under a regulatory scheme that was in some ways comparable to the state regulations at issue here. The Court held that collective ratemaking undertaken pursuant to state statutes that explicitly permitted collective rate-making or otherwise “made clear [the state’s] intent that intrastate rates would be determined by a regulatory agency, rather than by the market” established

⁴ Because the state action exception is an affirmative defense, the burden of proof is on Respondent to show that this standard has been met. See *Federal Trade Comm’n v. Ticor Title Ins. Co.*, 504 U.S. 621, 638 (1992) (“[T]he party claiming the immunity must show that state officials have undertaken the necessary steps to determine the specifics of the price-fixing or rate-setting scheme.”). Respondent does not dispute this point. See Memorandum of Respondent in Support of Motion for Summary Decision at 7-8.

⁵ “Even strong regard for state policy would require antitrust immunity *only* if that were the state’s wish – that is, if the state intended in some sense to displace the antitrust laws from a certain area of activity.” I Phillip E. Areeda & Herbert Hovenkamp, *Antitrust Law* § 221d, at 363 (2d ed. 2000) (emphasis in original).

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sufficiently clear articulation of the state's intent to displace competition to satisfy the first part of the *Midcal* test. *Id.* at 63-64.⁶ In this case, nobody disputes that Respondent's challenged conduct – undertaken pursuant to Kentucky law that explicitly permits collective ratemaking – meets the first part of the *Midcal* test.

The issue in contention here is the application of the second part of the *Midcal* test. While a state may substitute its own regulatory program in place of the competitive market, principles of federalism and state sovereignty do not empower a state simply to displace the federal antitrust laws and then abandon the market at issue to the discretion of non-governmental actors.⁷ Accordingly, to qualify for the state action exemption from the antitrust laws, a challenged restraint effectuated by such actors not only must accord with a clearly articulated state policy to displace competition, but also must be actively supervised by the state. *Midcal*, 445 U.S. at 105. This requirement “stems from the recognition that ‘[w]here a private party is engaging in the anticompetitive activity, there is a real danger that he is acting to further his own interests, rather than the governmental interests of the State.’” *Patrick v. Burget*, 486 U.S. 94, 100 (1988) (quoting *Town of Hallie v. City of Eau Claire*, 471 U.S. 34, 47 (1985)). As the Supreme Court explained in *Federal Trade Comm'n v. Ticor Title Ins. Co.*:

[W]hile a State may not confer antitrust immunity on private persons by fiat, it may displace competition with active state supervision if the displacement is

⁶ The Court did not examine whether the state's involvement satisfied the second part of the *Midcal* test, because the government had conceded that the relevant state agencies actively supervised the rate bureaus' collective ratemaking activities. *Southern Motor Carriers Rate Conference*, 471 U.S. at 62.

⁷ See I Areeda & Hovenkamp, § 226a, at 464.

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both intended by the State and *implemented in its specific details*. Actual state involvement, not deference to private price-fixing arrangements under the general auspices of state law, is the precondition for immunity from federal law.

504 U.S. 621, 633 (1992) (emphasis added). The purpose of the active supervision requirement is not to impose normative standards on state regulatory practices, but rather to ensure that a state, in displacing federal law, takes appropriate steps to ensure that its own stated standards are met. *Id.* at 634-35.

The Supreme Court has made clear that the standard for active state supervision is a rigorous one. It is not enough that the state approves private pricing agreements with little review. As the Court held in *Midcal*, “[t]he national policy in favor of competition cannot be thwarted by casting such a gauzy cloak of state involvement over what is essentially a private price-fixing arrangement.” *Midcal*, 445 U.S. at 106. Active supervision “requires that state officials have *and exercise* power to review particular anticompetitive acts of private parties and *disapprove those that fail to accord with state policy*.” *Patrick*, 486 U.S. at 101 (emphasis added). State officials must engage in a “pointed reexamination” of the private conduct. *Midcal*, 445 U.S. at 106 (internal quotation marks omitted). They must exercise “sufficient independent judgment and control so that the details of the rates or prices have been established as a product of deliberate state intervention.” *Ticor*, 504 U.S. at 634.

In *Ticor*, the Supreme Court confirmed the Commission’s application of the active state supervision requirement to collective ratemaking activities. The Court disagreed with lower court decisions holding that the active supervision requirement is met merely where the state regulatory program is “staffed and funded,” grants state officials “power and the duty to regulate pursuant to declared standards of state policy, is enforceable in the state’s courts, and demonstrates some basic level of activity

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directed towards seeing that the private actors carry out the state's policy." *Id.* at 637 (quotation omitted). The Court stated that these criteria might be a "beginning point," but were "insufficient to establish the requisite level of active supervision." *Id.* at 637-38. The Court held:

Where prices or rates are set as an initial matter by private parties, subject only to a veto if the State chooses to exercise it, the party claiming the immunity must show that state officials have undertaken the necessary steps to determine the specifics of the price-fixing or ratesetting scheme. The mere potential for

state supervision is not an adequate substitute for a decision by the State.

Id., at 638. Applying this standard, the Court found supervision inadequate in states where private rate filings routinely went into effect without further activity by the state regulatory agency – sometimes checked only for mathematical accuracy, and sometimes not even checked to that extent.⁸

The Supreme Court's decisions in *Ticor*, *Patrick*, and *Midcal* thus make clear that a state official or agency must have ascertained the relevant facts, examined the substantive merits of the private action, and assessed whether the private action comports with the underlying statutory criteria established by the state legislature in a way sufficient to establish the challenged conduct as a product of deliberate state intervention rather than

⁸ Although *Ticor* involved a "negative option" regulatory scheme (*i.e.*, where proposed rates go into effect automatically within a specified time period, unless the regulatory agency raises an objection), the Court's holding that active supervision requires the state actually to exercise "independent judgment and control" over the "details" of the ratesetting scheme is not limited to a negative option system. *Ticor*, 504 U.S. at 634-35.

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private choice. Although the Supreme Court has not prescribed specific state supervisory activities that must exist to meet the active supervision standard, *Ticor* does suggest some steps that may be indicative of active supervision. The Court noted that the government's concession of active supervision in *Southern Motor Carriers* was against a background that "the State had ordered and held ratemaking hearings on a consistent basis." *Ticor*, 504 U.S. at 639. The *Ticor* Court also indicated that a state regulatory agency might properly use "sampling techniques" to investigate filed supporting data, or use a "specified rate of return" formula to determine whether a rate increase was justified. *Id.* at 640.

The courts that have addressed the active supervision requirement, and the Commission's previous decisions involving collective ratemaking, have identified a number of state supervisory activities that support a determination of active state supervision. These factors include where the state: collects business data (including revenues and expenses); conducts economic studies; reviews profit levels and develops standards or measures such as operating ratios; disapproves rates that fail to meet the state's standards; conducts hearings; and issues a written decision. For example, in *Yeager's Fuel, Inc. v. Pennsylvania Power & Light Co.*, 22 F.3d 1260, 1270-72 (3rd Cir. 1994), the court found active state supervision of a utility's special electric rates and other incentives for use of high-efficiency electric heating systems, where state officials: approved the rate after a hearing in a contested tariff proceeding; required the utility to submit an annual report regarding its rebate and rate program; promulgated regulations detailing the methodology to be used in assessing whether such programs and their associated costs were just and reasonable; conducted an investigation of the programs in response to inquiries from the legislature and complaints by non-participants; and issued a written report concluding that the

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programs were cost effective and did not adversely affect non-participants.⁹

Other circuit court decisions have pointed to similar indicia of state supervision. In *Lease Lights, Inc. v. Public Service Co. of Oklahoma*, 849 F.2d 1330, 1334 (10th Cir. 1988), the court found active state supervision of a utility's rates where, in response to the utility's request for a rate adjustment, the regulatory agency conducted public hearings involving extensive testimony and documentary evidence, and subsequently authorized a different rate adjustment than the utility had proposed. In *DFW Metro Line Services v. Southwestern Bell Tel. Corp.*, 988 F.2d 601, 606-07 (5th Cir. 1993), the court found active supervision of telephone rates where the state agency's numerous published decisions ruling on petitions for a rate change showed that the agency examined the reasonableness of the rates and provided a forum for complaints regarding application of the tariffs. And, in *TEC Cogeneration, Inc. v. Florida Power & Light Co.*, 76 F.3d 1560 (11th Cir.), *modified on reh'g*, 86 F.3d 1028, 1029 (11th Cir. 1998), the court held that the state "exercised sufficient independent judgment and control" to satisfy the active supervision requirement where state regulators approved a utility's rates and its other challenged conduct after conducting extensive, contested administrative proceedings.¹⁰

⁹ The state's supervisory activities are described in further detail in the district court's opinion. *Yeager's Fuel, Inc. v. Pennsylvania Power & Light Co.*, 804 F. Supp. 700, 712-13 (E.D. Pa. 1992), *aff'd in relevant part and rev'd in part*, 22 F.3d 1260 (3rd Cir. 1994).

¹⁰ See also *Green v. Peoples Energy Corp.*, No. 02 C 4117, 2003 WL 1712566, at *6-7 (N.D. Ill. Mar. 28, 2003) (finding active supervision where the state agency conducted "elaborate hearings" and issued "lengthy orders" approving the tariffs at issue); *Destec Energy, Inc. v. Southern California Gas Co.*, 5 F. Supp. 2d 433, 455-58 (S.D. Tex. 1997) (finding active supervision

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The Commission's previous decisions finding active supervision of collective ratemaking are also instructive. In *Motor Transport Ass'n of Connecticut, Inc.*, 112 F.T.C. 309, 341-42 (1989), the Commission held that the active supervision requirement was satisfied where the regulatory agency required that a proposed rate increase of more than 5% be accompanied by financial information – including operating revenues and expenses – to justify the reasonableness of the increase; applied a specified operating ratio to evaluate the proposed rate's reasonableness; and held several public hearings and issued written decisions regarding proposed rates. In *New England Motor Rate Bureau, Inc.*, 112 F.T.C. 200, 282-83 (1989), *rev'd on other grounds sub nom New England Motor Rate Bureau, Inc. v. Federal Trade Comm'n*, 908 F.2d 1064 (1st Cir. 1990), the Commission concluded that the active supervision requirement was met where

where the state agency held contested public hearings regarding contracts at issue, circulated its proposed resolutions for public notice and comment, and issued a written decision that addressed the reasonableness of the challenged provisions); *County of Stanislaus v. Pacific Gas & Elec. Co.*, No. CV-F-93-5866-OWW, 1994 WL 706711, at *26-27 (E.D. Cal. Aug. 25, 1994) (finding active supervision where the state agency conducted a “searching and thorough” annual review of the reasonableness of utility's rates that included the agency's “application of criteria to consider competitive concerns”); *City of Vernon v. Southern California Gas Co.*, No. CV 92-3435-SVW(CTx), 1994 WL 896057, at *2 (C.D. Cal. Aug. 4, 1994) (finding active supervision where the state agency conducted extensive proceedings regarding utility's rates and issued written orders which contained detailed explanations of the agency's reasons for its decision and indicated that the agency considered the competitive effects of its decision); *Gulf Marine Repair Corp. v. Liberty Mutual Ins. Co.*, No. 92-1576-CIV-T-21A, 1994 WL 805208, at *10-11 (M.D. Fla. Jan. 13, 1994) (finding active supervision where state agency routinely held public hearings on rates and only once approved rates as initially filed).

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state regulators analyzed proposed collective rates to determine whether they fell within a “zone of reasonableness” based on the minimum and maximum industry averages of previously approved rates, had suspended tariffs determined to be unreasonable pending a formal public hearing, and issued written orders.

Finally, in 2003, the Commission issued a complaint against the Indiana Household Goods and Warehousemen, Inc., and an accompanying Agreement Containing Consent Order. The complaint alleged that the respondent, an association consisting of 70 household goods movers, took collective actions to establish and maintain moving rates, in violation of Section 5 of the FTC Act. Complaint, ¶¶ 7-9, *Indiana Household Movers and Warehousemen, Inc.*, Dkt. No. C-4077 (April 25, 2003). The Consent Order, among other things, required the respondent to cease and desist from the unlawful conduct, barred the respondent from filing collective rates, and required cancellation of all existing tariffs. Consent Order, *Indiana Household Movers and Warehousemen, Inc.*, Dkt. No. C-4077 (April 25, 2003). An accompanying Analysis of Proposed Order to Aid Public Comment, *Indiana Household Movers and Warehousemen, Inc.*, Dkt. No. C-4077 (April 25, 2003) (“Analysis”), discussed the Commission’s views about the parameters and requirements of the state action doctrine. The Analysis stated that the Commission would consider the following elements in its analysis of the active supervision prong:

- (1) the development of an adequate factual record supporting the proposed rate increase, including notice and opportunity to be heard;
- (2) a written decision on the merits;
- and (3) a specific assessment – both quantitative and qualitative – of how the private action comports with the standards established by the state legislature.

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Analysis at 5, *Indiana Household Movers and Warehousemen, Inc.*, Dkt. No. C-4077 (April 25, 2003).¹¹

The ALJ concluded, and we agree, that no single measure identified above by the courts or the Commission is necessarily a prerequisite for active supervision in this case. We recognize, for example, that the financial information required for a small number of utilities may differ markedly from the information required of a large number of small movers. However, the ALJ's finding that the state of Kentucky has taken none of the measures identified by the courts and the Commission plainly supports a conclusion that the level of state supervision of the challenged private activity does not meet the active supervision standard. ID 36.

We now turn to an examination of the KTC's supervision of the conduct at issue.

B. State Supervision in Kentucky

We find that the Commonwealth of Kentucky does not actively supervise the Kentucky Association's collective ratemaking. Although the KTC has the authority – indeed the responsibility – to ensure that household goods carrier rates are “just and reasonable” and not “excessive,” *see* KY. REV. STAT. ANN. §§ 281.675, 281.590, and 281.695(1), the record shows that, in practice, the KTC's review of the appropriateness of the rates in the Kentucky Association's tariff has been exceedingly limited.

As discussed in the preceding section, the active supervision standard requires Respondent to demonstrate that the state, having chosen to substitute regulation for the economic constraints of the

¹¹ *See also* Office of Policy Planning, *Report of the State Action Task Force 55* (September 2003), available at <http://www.ftc.gov/os/2003/09/stateactionreport.pdf> (identifying same factors as indicia of active supervision).

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competitive market, actually undertakes a substantive review of Respondent's collective rates to ensure that the rates comport with the state's articulated policy objectives. While there are a range of ways a state may undertake this review, the normal starting point for such a program of regulatory oversight is for the state to establish some methodology for evaluating the appropriateness of proposed rates. Usually, such an evaluation involves some analysis of the relevant firms' costs and revenues, profit margins, operating ratios, or other such measures. *See, e.g., Motor Transport Ass'n of Connecticut*, 112 F.T.C. at 320-22, 341 (state regulators reviewed carriers' operating revenues and expenses); *Yeager's Fuel*, 804 F. Supp. at 713 (agency's regulations set forth in detail the methodology to be used in assessing the cost effectiveness of utility's programs); *United States v. Southern Motor Carriers Rate Conference, Inc.*, 467 F. Supp. 471, 477 (N.D. Ga. 1979) (regulators used carriers' cost data to arrive at an operating ratio).¹²

In this case, the statute that authorizes the KTC to establish procedures for collective ratemaking expressly provides that these procedures must "assure that respective revenues and costs of carriers . . . are ascertained." KY. REV. STAT. ANN. § 281.680(4). It is thus evident that the state legislature has contemplated that the agency should undertake some cost-based analysis of collective rates. The KTC, however, has no formula or methodology for determining whether the Kentucky Association's collective rates comply with the statutory standards. IDF 88, 89. Although, at one time, the KTC performed "uniform cost studies" and calculated operating ratios for household goods carriers, it has not done so for over two decades. IDF 44, 45. As the KTC employee responsible for reviewing household goods carrier tariffs explained, "I didn't see it necessary to make – spend the time and expense of going into that in depth study when I felt

¹² As we noted above, the government in *Southern Motor Carriers* conceded active state supervision.

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common sense provided me that judgment.” CX 116 (Debord, Dep. II at 90).

Not only has the KTC failed to establish any methodology for analyzing rates, it does not even obtain data – including the cost and revenue data specified in the statute – that would enable it to assess the reasonableness of the Kentucky Association’s rates. Over the years, the Kentucky Association has proposed numerous rate increases to its tariff. In the ten-year period from 1992 to 2002 alone, the Kentucky Association proposed nine general rate increases. IDF 27 (increase of 4.5% in 1992, 8% in 1994, 5% in 1996, 8% in 1998, 5% in 1999, 10% in 2000, 8% in 2001, 5% in 2002). The Kentucky Association also has filed tariff supplements adding new categories of rates – including, for example, higher peak season rates (to which all but two of its members adhere). IDF 29, 35. Year after year, the KTC has nearly always approved these rate increases in their entirety without any modification. *See* CX 116 (Debord, Dep. II at 94-95) (KTC employee identified only one instance in which KTC rejected a proposed increase to the collective tariff rates). Yet the record shows that the KTC has obtained little, if any, business data from the Kentucky Association or its members to verify the reasonableness of these numerous rate increases. IDF 75.

The KTC employee generally learns about the bases for proposed rate increases by attending meetings of the Kentucky Association membership or through informal discussions with Kentucky Association representatives. IDF 70, 76. The type of information the KTC obtains in this way is only of a very general nature – for example, “the general membership felt they needed an increase in their charges in order to offset the increase, whether it be in operation cost or whether it be in insurance, whichever the case may be.” IDF 79. The KTC does not request or obtain information about the carriers’ actual costs, revenues, or profit margins to verify the Kentucky Association’s asserted

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justifications for its proposed rate increases. IDF 70, 79.¹³ Although the KTC formerly required household goods carriers to file annual financial reports in the 1970s and '80s, it no longer requires carriers to submit that information and does not examine such materials in its review of proposed rates. IDF 42.¹⁴ Instead, the KTC employee testified that he relies on his experience in the industry, conversations with truckers regarding their costs, and his review of publications such as the *Wall Street Journal*. IDF 67.

One justification that the Kentucky Association has given, and the KTC has accepted, for proposed increases to its *intrastate* tariff is that *interstate* tariff rates have increased. For example, in December 1999, the Kentucky Association informed the KTC that it was seeking a 10% increase to its tariff rates because interstate tariff rates had increased by 5%. The following December, the Kentucky Association proposed an 8% rate increase because the interstate tariff rates had increased by 5%. The KTC allowed these rate increases to go into effect. IDF 83, 84. The KTC employee explained that “[i]t was very common for [the Kentucky Association] to state to me that their costs for doing intrastate work was equal to that of interstate work. And, if interstate went up eight percent, then it should be logical to assume that intrastate should be increased by an equal amount.” CX 116 (Debord, Dep. II at 102). The KTC employee indicated, however, that he did not

¹³ The KTC employee reviews records that movers keep on individual moves while conducting household goods compliance audits to ensure that movers are adhering to the filed rates, but he does not routinely look at balance sheets, income statements, payroll documents, or business records that would allow him to analyze the movers' profitability. IDF 72.

¹⁴ A limited number of carriers still submit financial statements to the KTC on a voluntary basis, but they are not audited, and the KTC does not consider them reliable sources of information regarding the industry's economic conditions. IDF 63.

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really know how the interstate rates – which are developed by a private rate publishing agency and published pursuant to federal law – are established. IDF 98. He also acknowledged that, because movers are permitted to discount from the interstate tariff rates, and routinely do discount from those rates, it would be difficult to compare the rates in the Kentucky Association’s tariff rates with the rates in the interstate tariff. IDF 99-101. Indeed, the KTC employee stated that, in his view, the federal standards for the interstate tariff differ significantly from Kentucky’s standards for intrastate rates, because in “my understanding, their goal [for interstate rates] is to let the industry charge as they wish, charge whoever they wish, whatever they wish and discriminate as they see fit.” IDF 102 (quotation omitted). Under these circumstances, we find that the KTC could not reasonably make an assessment of the appropriateness of the intrastate tariff rates based on an increase in the interstate tariff rates. In particular, it is difficult to see any reasonable basis for using an interstate increase as a justification for a *larger* percentage increase in intrastate rates, as has occurred at least twice.

In *Ticor*, the Commission found active supervision lacking where the state agency “suffered from a dearth of information that would have enabled it to assess the appropriateness of the filed rates.” *Ticor*, 112 F.T.C. at 432. On remand from the Supreme Court, the circuit court affirmed the Commission’s decision, finding that the state “could not meaningfully examine the rates proposed because it never obtained the information necessary for a proper evaluation.” *Ticor Title Ins. Co. v. Federal Trade Comm’n*, 998 F.2d 1129, 1140 (3rd Cir. 1993). The same is true here. We do not mean to suggest that there is a specific factual inquiry that a state necessarily must undertake as part of its regulatory program. The factual record that will suffice for a meaningful review of the private conduct at issue depends at least in part on the substantive norms that the state has provided. In this case, it is of significant consequence that the state legislature itself has provided that the KTC must “assure that respective revenues and costs of carriers . . . are ascertained,” KY. REV.

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STAT. ANN. § 281.680(4), and that the KTC does not obtain this data.

Furthermore, the state's regulatory program lacks the procedural elements – such as public input, hearings, and written decisions – that courts have found to be important indicators of active state supervision. *See, e.g., Yeager's Fuel*, 22 F.3d at 1270-72; *Lease Lights*, 849 F.2d at 1334; *Destec Energy, Inc. v. Southern California Gas Co.*, 5 F. Supp. 2d 433, 455-58 (S.D. Tex. 1997); *City of Vernon v. Southern California Gas Co.*, No. CV 92-3435-SVW(CTx), 1994 WL 896057, at *2 (C.D. Cal. Aug. 4, 1994) These procedural elements are powerful tools for ensuring that relevant facts – especially those that might contradict the proponent's contentions – are brought to the state decision-maker's attention. Although the state legislature has identified public hearings as procedures state regulators may – and, upon receipt of a protest, must – use in reviewing rates, the state has not conducted hearings regarding the Kentucky Association's collective tariff since the late 1950s or early 1960s, when the tariff was first developed. IDF 96.¹⁵ Moreover, although a state statute and the KTC's own administrative regulations require that household goods carriers give public notice of proposed rate increases, the KTC does not appear to enforce this requirement. IDF 74. The KTC receives no input from groups advocating on behalf of consumers. IDF 73. The KTC does not issue written decisions when it permits rate increases to go into effect, nor does it set forth in writing any

¹⁵ Respondent argues that it has not been necessary for the KTC to hold hearings or suspend the Kentucky Association's proposed rates because the Kentucky Association's formal tariff filings already reflect input from KTC employee Debord regarding which proposals he would accept or reject. As we have already discussed, however, Debord did not obtain or review the type of information that would support a substantive assessment of the merits of the Kentucky Association's proposed rates.

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analysis of the collective rates contained in the Kentucky Association's tariff. IDF 95.

We agree with the ALJ that this minimal level of state activity falls far short of the active supervision required by *Ticor*, *Patrick*, *Midcal*, and other relevant cases. ID 46.¹⁶ This is not a difficult case in which we are called upon to decide whether a state's implementation of certain supervisory steps but not of others satisfies the active state supervision requirement. Where, as here, the relevant state agency has not taken any of the steps that courts have identified as indicia of active supervision, it is clear that the state has not exercised "sufficient independent judgment and control so that the details of the rates or prices have been established as a product of deliberate state intervention." *Ticor*, 504 U.S. at 634-35. This conclusion is all the more compelling when the state agency has not taken the steps that the state legislature itself has identified as important for a determination of whether rates are reasonable.

Respondent argues that this case is different than *Ticor*, because *Ticor* involved a negative option system, whereas the record here demonstrates KTC "activity" with regard to the Kentucky Association's tariff filings. RAB at 29. The Supreme Court in *Ticor*, however, never said that the need for a state to exercise "independent judgment and control" over the "details" of proposed rates is satisfied simply because a state avoids use of a negative option system. *Ticor*, 504 U.S. at 634-35. Moreover, the record evidence in the present case demonstrates the spurious nature of the distinction Respondent would have us draw. The record shows that when the Kentucky Association wants to increase rates, it informs the KTC employee of the proposed

¹⁶ The ALJ also found that the minimal level of staffing for the KTC's regulatory program weighs against a finding of active supervision. ID at 37-38. We believe that the evidence in this regard is inconclusive; thus, this finding does not factor into our analysis.

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change to the tariff, and the employee often says merely “file the tariff and we’ll take it from there.” IDF 79 (citing CX 117 (Mirus, Dep. At 153)). Then, when the document requesting the change is filed, the KTC stamps the document, and, in the absence of further action by the KTC, this is deemed the KTC’s approval of the proposed change. IDF 94. When Respondent submitted a price increase in 1994, for example, the Association’s notes of the filing stated bluntly: “Take to Bill Debord [the KTC employee] for acceptance stamp.” *Id.* (quoting RX 102). Regardless of whether this is properly deemed a negative option system, based on these facts we cannot say that the regulatory scheme here is significantly different than the one at issue in *Ticor*.

Respondent also argues that a requirement for notice and a hearing would add nothing to the regulatory process here because, given the sporadic and occasional nature of household moving, individual consumers shipping goods would have no interest in any rate proceeding and would therefore be unlikely to participate. RAB at 34. Respondent further argues that such procedural requirements are inappropriate, because the state’s system of tariff “publication” (*i.e.*, making tariffs available for inspection by shippers) is consistent with the manner of tariff publication prescribed by the federal government for interstate tariffs, and identical to rules that have traditionally governed tariff rate filings. *Id.* at 35. These arguments are ill-founded. Even assuming, for the sake of argument, that individuals who only occasionally use moving services would not be inclined to complain about rates, there are other groups that may well have an interest in providing input to the ratemaking process. *See* CX 116 (Debord, Dep. II at 94) (KTC employee testified that businesses that paid for their employees’ moving expenses had complained about proposed rate increases). Furthermore, Respondent fails to explain how publication of tariffs by itself can meet the basic requirement for active supervision – *i.e.*, ensuring that “the details of the rates or prices have been established as a product of deliberate state intervention.” *Ticor*, 504 U.S. at 634.

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More fundamentally, these arguments misapprehend the significance of the ALJ's observations about the lack of hearing procedures. As we already have made clear, neither we nor the ALJ have held that notice and a hearing are absolute requirements for a state's program of active supervision.¹⁷ Nonetheless, while there are many ways a state may structure its supervision of private anticompetitive conduct, it is essential that the state's chosen procedures allow for meaningful review of the merits of the conduct at issue to ensure that it comports with the state's own normative standards.

Respondent also argues that it is improper to compare the KTC's current level of supervision with the KTC's supervisory activities in the past, because the state's regulatory needs have diminished as a result of federal deregulation of other non-household goods carrier rates in 1995. RAB at 40. We do not hold that the KTC must adhere to its supervisory activities of the past; rather, we merely look to these prior activities as an indicator of what supervisory activities are possible in this context.¹⁸ Changing circumstances may indeed cause the state to alter its regulatory activities, but that does not relieve the state of its obligation to exercise "independent judgment and control" over the regulated rates. *Ticor*, 504 U.S. at 634. At any time, the state has a choice: it can choose to return to a freely competitive

¹⁷ See *Motor Transport Ass'n of Connecticut*, 112 F.T.C. at 342 (rejecting argument that notice and a hearing are essential for active supervision).

¹⁸ Complaint Counsel also invites the Commission to consider documents (excluded by the ALJ) showing the extensive supervision of collective rates undertaken by the state of Oregon to assess how Kentucky's supervision fares by comparison. CCAB at 39-43. In a closer case, we might find the material helpful as an example of the level of supervision that is possible in this industry. However, because we find that this is not a close case, consideration of these materials is not necessary here.

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system, or it can allocate the resources necessary to ensure that the regulated activity accords with state policy.

Last, Respondent argues that the Initial Decision does not give proper deference to the KTC's determination that its procedures for overseeing collective rates are appropriate and effective, or the fact that the KTC intervened in this matter, and that the ALJ erred in excluding a declaration by the KTC expressing its views that it actively supervises Respondent's collective rates. RAB at 15-18, 40-41. As the ALJ correctly found, the KTC declaration adds nothing to this case.¹⁹ Whether a state agency is satisfied with its level of regulatory oversight does not determine whether the state in fact actively supervises private anticompetitive conduct.²⁰ As the Supreme Court has made clear, states do not have unfettered discretion to determine the level of regulatory oversight that is adequate when competition has been displaced. *Midcal*, 445 U.S. at 106. Protection from the federal antitrust laws will be granted only when the state has substituted a program of active supervision for the economic constraints of the competitive market.

¹⁹ For this reason, we hold that the ALJ did not err in excluding the KTC's declaration. Even if we take this declaration into account, however, it does not change our analysis, for the reasons stated above.

²⁰ We note that the Commonwealth of Kentucky – represented by the Kentucky Attorney General – has submitted an *amicus* brief in this appeal expressing its view that the ALJ's decision does not conflict with state law or public policy. Although the objective facts – rather than the state's opinion – determine whether the active supervision standard is met, the submission further undercuts Respondent's argument.

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III. Price Fixing

We next address whether the Kentucky Association's rate-making conduct, if not shielded by the state action doctrine, violates the antitrust laws. The household goods carriers that participate in the Kentucky Association are competitors. IDF 8. On behalf of its members, the Kentucky Association prepares and files with the KTC joint tariffs and tariff supplements containing proposed rates, which, after nearly automatic approval by the KTC, establish the prices its members agree to charge, unless they file an exemption. IDF 10, 23.²¹ This activity is collective ratemaking – concerted activity to fix or stabilize prices that historically has been condemned as *per se* illegal price-fixing.²² See *Ticor*, 504 U.S. at 639 (“This case involves horizontal price fixing No antitrust offense is more pernicious than price fixing.”); *Motor Transport Ass’n of Connecticut*, 112 F.T.C. 336 (collective ratemaking “easily fits the classic description of a ‘naked price restraint’”) (internal quotation marks omitted); *Massachusetts Furniture & Piano Movers Ass’n, Inc.*, 102 F.T.C.

²¹ The ALJ found that the Kentucky Association sometimes pressured its members to drop requests to charge rates lower than those in the tariff. IDF 36-40. Although there is some evidence in the record to support this finding, we do not believe that it is dispositive to the issues of whether the Kentucky Association's collective ratemaking violates the federal antitrust laws and whether its activities are exempt from these laws under the state action doctrine. Whether or not such pressure was imposed, the fact remains that the majority of Respondent's members voluntarily engaged in collective tariff filings, which amply demonstrates price-fixing.

²² “So called ‘rate bureaus’ are really cartels of common carriers, utilities, insurers, or other price-regulated firms that submit rates jointly. While joint submissions greatly simplify the rate approval process . . . , they pose obvious dangers of price fixing.” *I Areeda & Hovenkamp*, § 221a, at 356.

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1176, 1224 (1983) (“it is clear beyond cavil that agreements among competitors to set price levels or price ranges are *per se* illegal under the antitrust laws”) (citation omitted), *rev’d on other grounds sub nom Massachusetts Furniture & Piano Movers Ass’n, Inc. v. Federal Trade Comm’n*, 773 F.2d 391 (1st Cir. 1985).²³

Respondent does not seriously dispute that, unless the state action exemption applies, collective ratemaking violates the federal antitrust laws. *See* Tr. at 23-24. Although Respondent asserts that its members do not agree to prices but merely agree to submit tariff proposals for the KTC’s consideration (RAB 5), it does not contend that a “mere” agreement on *proposed* rates alters the illegal character of the challenged conduct.²⁴ Lest there be any doubt on the subject, we find that the need for formal KTC approval of proposed tariff filings (which can be effected simply by agency inaction, IDF 94) does not change the fact that the

²³ In *PolyGram Holding Inc.*, Dkt. No. 9298, op. 49 n. 66 (FTC July 24, 2003), *review pending*, No. 03-1293 (D.C. Cir.), the Commission recognized that, although the Supreme Court has abandoned the view of a sharp *per se* rule of reason dichotomy for most types of collective activity, a traditional *per se* approach remains appropriate in cases with no possible arguments that restraints are needed to achieve procompetitive results. The collective ratemaking at issue clearly falls into the latter category.

²⁴ Respondent maintained during the oral argument before the Commission that its members sometimes charged old rates. Although the degree of uniformity could be potentially relevant in a damages action, we can find that Respondent’s conduct constitutes *per se* unlawful price fixing, even if Respondent’s rates were not adhered to uniformly. *United States v. Socony-Vacuum Oil Co.*, 310 U.S. 150, 222 (1990) (“Nor is it important that the prices paid by the combination were not fixed in the sense that they were uniform and inflexible. Price fixing . . . has no such limited meaning.”).

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participating carriers agree on rates that they will charge. Furthermore, as the Commission has previously recognized, the Kentucky Association and its members “need not agree to a single price level in order to fix prices.” *Motor Transport Assoc. of Connecticut*, 112 F.T.C. at 336. Respondent effectively conceded this point as well. Tr. at 33. As noted earlier, the vast majority of carriers agree to charge the same rate for many items in the tariff.

Although we agree with the Initial Decision that Respondent’s challenged conduct constitutes horizontal price-fixing that is *per se* unlawful, we disagree that relevant markets must be defined in a *per se* case. ID 28-29. It is obviously necessary to identify the goods or services that are subject to the price-fixing or other anticompetitive restraint, and that has been done here. It is not necessary, however, to show that these goods or services constitute a relevant antitrust product market, as described, for example, in the *Horizontal Merger Guidelines*. See U.S. DEPARTMENT OF JUSTICE & FEDERAL TRADE COMMISSION, HORIZONTAL MERGER GUIDELINES § 1.1 (rev’d 1997). As the Supreme Court has long recognized, an analysis of market power – of which market definition is the typical starting point – is unnecessary in a *per se* price-fixing case:

Even [if] the members of the price fixing group were in no position to control the market, to the extent that they raised, lowered, or stabilized prices they would be directly interfering with the free play of market forces. The [Sherman] Act places all such schemes beyond the pale and protects that vital part of our economy against any degree of interference.

United States v. Socony-Vacuum Oil Co., 310 U.S. 150, 221 (1940). See *PolyGram Holding Inc.*, Dkt. No. 9298, op. 29 (FTC July 24, 2003) (in a small “but significant category of cases, scrutiny of the restraint itself is sufficient to find liability without consideration of market power”). Accordingly, we conclude that, the collective ratemaking at issue here is *per se* unlawful, without need for any inquiry into relevant market or market power.

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We acknowledge that the Kentucky Association's liability in this matter is due in part to the KTC's sustained failure to provide proper supervision to Respondent's rate-making activities. This fact, however, does not warrant a different result. Private interests can assess whether a state is in compliance with the requirements of the state action doctrine, and can urge the state to adopt the necessary practices. If a state, for whatever reason, declines to follow the requirements of the state action doctrine, then private interests can alter their behavior to comply with the antitrust laws.

IV. Remedy

The ALJ proposed an order that would require Respondent to cease and desist from collective ratemaking. The order would require Respondent to cancel and withdraw all existing tariffs and tariff supplements on file with the KTC and to cease and desist from developing future tariffs that contain collective rates. ID at 51-52. Pursuant to paragraph VII, the order would remain in effect until active supervision is demonstrated to the Commission. *Id.* at 54. We believe that these provisions are warranted with two exceptions discussed below.

The Commission has issued orders with similar provisions in prior cases involving motor carriers' collective tariffs. *New England Motor Rate Bureau*, 112 F.T.C. at 300; *Massachusetts Furniture & Piano Movers*, 102 F.T.C. at 1228. The provisions in the order are also similar to terms contained in a recent series of consent orders accepted by the Commission. *Indiana Household Movers and Warehousemen, Inc.*, Dkt. No. C-4077 (April 25, 2003); *Iowa Movers and Warehousemen's Ass'n*, Dkt. No. C-4096 (Sept. 10, 2003); *Minnesota Transportation Services Ass'n*, Dkt. No. C-4097 (Sept. 15, 2003); *Alabama Trucking Ass'n, Inc.* Dkt., Inc. No. D-9307 (Dec. 4, 2003); *Movers Conference of Mississippi, Inc.*, Dkt. No. D-9308 (Dec. 4, 2003). As Complaint Counsel points out, paragraph VII of the proposed order differs from the recent consent orders in two significant respects: it does not contain the 20-year "sunset" provision common to most of the Commission's orders, and it explicitly provides that respondent

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may seek to modify the order if, in the future, the KTC engages in active supervision as determined by the Commission. Complaint Counsel argues that Section 5(b) of the FTC Act, as implemented by Section 2.51 of the Commission's Rules of Practice, 16 C.F.R. § 2.51, sets forth the standards for modifying a Commission order, and that including this provision in the order might create an impression that some showing other than that established under Section 5(b) and Rule 2.51 will be either sufficient or necessary. Complaint Counsel also asserts that a 20-year sunset provision is appropriate in this case. We agree with Complaint Counsel on both counts and have modified our order accordingly.

Respondent argues that the better course of action would be for the Commission to stay entry of a remedial order altogether to allow the state to develop a program that will satisfy the active supervision requirement. Respondent argues, among other things, that a stay would allow the KTC to continue to protect the public interest by regulating household goods carriers, and would avoid exposing the KTC, Respondent and its members to unjustified private litigation. RAB at 45; RRB at 11-13. Respondent has separately moved the Commission to stay this proceeding pursuant to Commission Rule 3.54(c), 16 C.F.R. § 3.54(c), pending the Commission's review of actions taken by the KTC after the Initial Decision, which Respondent asserts show that the KTC has recently instituted procedures that satisfy the active supervision requirement.

Having found a violation of Section 5 of the FTC Act, the Commission has wide discretion in its choice of a remedy. *Federal Trade Comm'n v. Colgate-Palmolive Co.*, 380 U.S. 374, 392 (1965); *Jacob Siegel Co. v. Federal Trade Comm'n*, 327 U.S. 608, 611-13 (1946). The record in this case shows that, year after year, the KTC has allowed the Kentucky Association and its members to raise rates with virtually no examination of the merits of these rates. The brunt of these anticompetitive practices is being borne by consumers in Kentucky, and until the Kentucky Association can demonstrate that the state has in place a tested program of active supervision to ensure the reasonableness of

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collective rates, a cease and desist order is necessary to protect the interests of consumers, notwithstanding any hardship to Respondent and its members.

Contrary to Respondent's contention, entry of a cease and desist order would not expose the KTC to litigation or dismantle the state's entire system for regulating household goods carrier rates. By its terms, the order applies only to the Kentucky Association; it does not run against the KTC. Only joint tariff filings are prohibited. The KTC retains its power to review individual tariff filings to ensure that household goods carrier rates in Kentucky are reasonable and not discriminatory. If the state prefers a system of joint tariffs and is willing to devote the appropriate resources to it, the state is free to modify this regulatory program to ensure a substantive review of joint tariff filings. In the intervening time, however, there is no reason to believe that either the state's entire system for regulating movers' rates or the interests of the moving public will be in jeopardy.

Moreover, we do not believe that a stay is warranted under Rule 3.54(c). That rule provides that the Commission may withhold final action in an appeal pending the receipt of additional information or views "as to the form and content of the rule or order to be issued." This rule is not a mechanism for avoiding a Commission decision on liability or entry of a cease and desist order prohibiting conduct found to be unlawful. Instead, the Commission has applied this rule to consider additional information that could affect the specific remedy provided in a final order.²⁵ Although the materials submitted by Respondent in

²⁵ For example, in *Holiday Magic, Inc.*, 83 F.T.C. 1590 (Apr. 29, 1974), the Commission granted a 30-day extension of time for respondents to submit additional information regarding orders entered in a federal district court proceeding, which apparently provided some of the same relief – the refund of money – contemplated in the Commission's prospective order. In granting the motion, the Commission noted that this time extension would

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support of its motion indicate that the KTC has taken some initial steps to augment the level of supervision it exercises over the Kentucky Association's collective rate-making (such as requiring some sort of financial reports and written findings), these materials fall significantly short of demonstrating that the KTC's new procedures satisfy the "active supervision" requirement articulated by the Supreme Court in *Ticor*, and other relevant decisions. Most important, Respondent has not shown with precision what information the KTC will require to support proposed rate adjustments and what criteria the KTC will apply to assess the reasonableness of proposed rate adjustments. These are not questions that are likely to be answered satisfactorily merely by awaiting the KTC's action with regard to the Kentucky Association's most recent tariff filing. Rather, as Respondent itself has acknowledged, development of a new program of supervision will take some time. RRB at 11.

Under these circumstances, there is no good reason to delay entry of a cease and desist order in this case. If and when the KTC implements a program to exercise greater supervision over household goods carrier rates, Respondent can apprise the Commission of these changed circumstances in a petition to reopen the proceeding and modify or set aside the Commission order, pursuant to Commission Rule 2.51, and the Commission will then consider whether the new evidence sufficiently demonstrates active state supervision.

not delay final disposition of the case and directed respondents to assume that the ALJ's finding of liability would be affirmed. The Commission subsequently issued an opinion and final order upholding the ALJ's findings of liability, enjoining the respondents' unlawful practices, and ordering the refund of money, but staying the latter provision so long as respondents remained in compliance with the federal district court order. *Holiday Magic, Inc.*, 84 F.T.C. 748 (Oct. 15, 1974).

FINAL ORDER

This matter having been heard by the Commission upon the appeal of Respondent, and upon briefs and oral argument in support thereof and opposition thereto, and the Commission for the reasons stated in the accompanying Opinion having determined to sustain the Initial Decision with certain modifications:

IT IS ORDERED THAT the Initial Decision of the administrative law judge be, and it hereby is, adopted as the Findings of Fact and Conclusions of Law of the Commission, to the extent not inconsistent with the findings of fact and conclusions of law contained in the accompanying Opinion.

Other findings of fact and conclusions of law of the Commission are contained in the accompanying Opinion.

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

ORDER**I.**

IT IS ORDERED THAT, for the purposes of this Order, the following definitions shall apply:

- A. “Respondent” or “KHGCA” means the Kentucky Household Goods Carriers Association, Inc., its officers, executive board, committees, parents, representatives, agents, employees, successors, and assigns;
- B. “Carrier” means a common carrier of property by motor vehicle;
- C. “Intrastate transportation” means the pickup or receipt, transportation, and delivery of property hauled between

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points within the Commonwealth of Kentucky for compensation by a carrier authorized by the Kentucky Transportation Cabinet's Division of Motor Carriers to engage therein;

- D. "Member" means any carrier or other person that pays dues or belongs to KHGCA or to any successor corporation;
- E. "Tariff" means the publication stating the rates of a carrier for the transportation of property between points within the Commonwealth of Kentucky, including updates, revisions, and/or amendments, including general rules and regulations;
- F. "Rate" means a charge, payment, or price fixed according to a ratio, scale, or standard for direct or indirect transportation service;
- G. "Collective rates" means any rate or charge established under any contract, agreement, understanding, plan, program, combination, or conspiracy between two or more competing carriers, or between any two or more carriers and Respondent; and
- H. "Person" means both natural persons and artificial persons, including, but not limited to, corporations, unincorporated entities, and governments.

II.

IT IS FURTHER ORDERED THAT Respondent, its successors and assigns, and its officers, agents, representatives, directors, and employees, directly or through any corporation, subsidiary, division, or other device, shall immediately cease and desist from entering into, and shall, within 120 days after this Order becomes final, cease and desist from adhering to or maintaining, directly or indirectly, any contract, agreement,

understanding, plan, program, combination, or conspiracy to fix, stabilize, raise, maintain, or otherwise interfere or tamper with the rates charged by two or more carriers for the intrastate transportation of property or related services, goods, or equipment, including, but not limited to:

- A. Knowingly preparing, developing, disseminating, or filing a proposed or existing tariff that contains collective rates for the intrastate transportation of property or other related services, goods, or equipment;
- B. Providing information to any carrier about rate changes considered or made by any other carrier employing the publishing services of Respondent prior to the time at which such rate change becomes a matter of public record;
- C. Inviting, coordinating, or providing a forum (including publication of an informational bulletin) for any discussion or agreement between or among competing carriers concerning rates charged or proposed to be charged by carriers for the intrastate transportation of property or related services, goods, or equipment;
- D. Suggesting, urging, encouraging, persuading, or in any way influencing members to charge, file, or adhere to any existing or proposed tariff provision which affects rates, or otherwise to charge or refrain from charging any particular price for any services rendered or goods or equipment provided;
- E. Maintaining any rate or tariff committee or other entity to consider, pass upon, or discuss intrastate rates or rate proposals; and
- F. Preparing, developing, disseminating, or filing a proposed or existing tariff containing automatic changes to rates charged by two or more carriers.

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III.

IT IS FURTHER ORDERED THAT Respondent shall, within 120 days after this Order becomes final:

- A. Take such action pursuant to the laws of the Commonwealth of Kentucky as may be necessary to effectuate the cancellation and withdrawal of all tariffs and any supplements thereto on file with the Kentucky Transportation Cabinet's Division of Motor Carriers that establish rates for transportation of property or related services, goods, or equipment by common carriers in the Commonwealth of Kentucky;
- B. Terminate all previously executed powers of attorney and rate and tariff service agreements, between it and any carrier utilizing its services, authorizing the publication and/or filing of intrastate collective rates within the Commonwealth of Kentucky;
- C. Take action pursuant to the laws of the Commonwealth of Kentucky to cancel those provisions of its articles of incorporation, by-laws, and procedures and every other rule, opinion, resolution, contract, or statement of policy that has the purpose or effect of permitting, announcing, stating, explaining, or agreeing to any business practice enjoined by the terms of this Order; and
- D. Take action pursuant to the laws of the Commonwealth of Kentucky to amend its by-laws to require members of KHGCA to observe the provisions of this Order as a condition of membership in KHGCA.

IV.

IT IS FURTHER ORDERED THAT Respondent shall mail or deliver a copy of this Order (A) to each current member of Respondent engaged in the transportation of household goods

within 75 days after this Order becomes final, and (B) to each new member engaged in the transportation of household goods within ten (10) days after each such member's acceptance by Respondent.

V.

IT IS FURTHER ORDERED THAT Respondent shall notify the Commission at least thirty (30) days prior to any proposed change in Respondent, such as dissolution, assignment, or sale resulting in the emergence of a successor corporation, or any other proposed change in the corporation which may affect compliance obligations arising out of this Order.

VI.

IT IS FURTHER ORDERED THAT Respondent shall file a written report within 180 days after this Order becomes final, and annually on the anniversary date of the original report, and at such other times as the Commission may require by written notice to Respondent, setting forth in detail the manner and form in which Respondent has complied with this Order.

VII.

IT IS FURTHER ORDERED THAT this Order shall terminate twenty (20) years after the date on which this Order becomes final.

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COMPLAINT

Pursuant to the provisions of the Federal Trade Commission Act (15 U.S.C. § 41, et seq.) and by virtue of the authority vested in it by said Act, the Federal Trade Commission, having reason to believe that Kentucky Household Goods Carriers Association, Inc. (hereinafter sometimes referred to as “respondent” or “KHGCA”), a corporation, has violated and is now violating the provisions of Section 5 of said Act, and it appearing to the Commission that a proceeding by it in respect thereof would be in the public interest, hereby issues its complaint stating its charges as follows:

NATURE OF THE CASE

This matter concerns horizontal agreements among competing household goods movers that, through respondent, file tariffs for intrastate moving services in Kentucky. The tariffs contain collective rates that participating movers charge consumers for moving services. Through these tariffs, the participating movers engage in a horizontal agreement to fix prices for their services.

RESPONDENT AND ITS MEMBERS

PARAGRAPH 1. Respondent Kentucky Household Goods Carriers Association, Inc. is a corporation organized, existing, and doing business under and by virtue of the laws of Kentucky, with its office and principal place of business located at P.O. Box 22204, Louisville, Kentucky 40252.

PARAGRAPH 2. Respondent is an association organized for and serving its members' interests, including their economic interests, by promoting, fostering, and advancing the household goods moving industry in Kentucky. One of the primary functions of respondent is the initiation, preparation, development, dissemination, and filing with the Kentucky Transportation Cabinet's Division of Motor Carriers of tariffs and supplements thereto on behalf of and as agent for its members. Said tariffs and supplements contain rates and charges for the intrastate and local

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transportation of household goods and for related services, including, among other things, transporting bulky articles; packing cartons and crates; and extra charges for elevator, stair, and long distance carrying of items. (For purposes of this complaint, the term "tariff" means the publication stating the rates of a carrier for the transportation of property between points within Kentucky, including updates, revisions, and/or amendments, including general rules and regulations.)

PARAGRAPH 3. Pursuant to Kentucky state law, each household goods mover is required to file a tariff with the Division of Motor Carriers containing the carrier's rates, fares, or charges for the intrastate transportation of household goods. By Kentucky law, a household goods mover is not permitted to charge a rate, fare, or charge different from those contained in its tariff or supplements thereto once the Division of Motor Carriers has accepted it.

PARAGRAPH 4. Members of respondent are engaged, among other things, in the business of providing transportation and other services for compensation as household goods movers between points within Kentucky. Except to the extent that competition has been restrained as herein alleged, members of respondent have been and are now in competition among themselves and with other household goods movers.

PARAGRAPH 5. The membership of KHGCA consists of approximately 93 household goods movers that conduct business within Kentucky. KHGCA members receive compensation for intrastate and local moves. KHGCA's Tariff Committee conducts KHGCA's tariff-related activities. The control, direction and management of KHGCA are vested in the directors and the President, the Vice President, the Secretary, and the Treasurer.

JURISDICTION

PARAGRAPH 6. The acts and practices of respondent set forth in Paragraph 7 have been and are now in or affecting

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commerce as “commerce” is defined in the Federal Trade Commission Act, as amended, and respondent is subject to the jurisdiction of the Federal Trade Commission. Among other things, the aforesaid acts and practices:

- (A) Affect the flow of substantial sums of money from the federal government, business, and other private parties to the respondent's members for rendering transportation services, which money flows across state lines;
- (B) Affect the purchase and use of equipment and other goods and services by respondent's members that are shipped in interstate commerce;
- (C) Include the use of the United States mail and other instruments of interstate commerce in furthering the agreements described below; and
- (D) Are supported by the receipt of dues and fees for publications and services from out-of-state members and others.

THE CHALLENGED CONDUCT

PARAGRAPH 7. For many years and continuing up to and including the date of the filing of this complaint, respondent, its members, its officers and directors, and others have agreed to engage, and have engaged, in a combination and conspiracy, an agreement, concerted action or unfair and unlawful acts, policies and practices, the purpose or effect of which is, was, or may be to unlawfully hinder, restrain, restrict, suppress or eliminate competition among household goods movers in the intrastate Kentucky household goods moving industry.

Pursuant to, and in furtherance of, said agreement and concert of action, respondent, its members and others have engaged and continue to engage in the following acts, policies, and practices, among others:

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- (A) Initiating, preparing, developing, disseminating, and taking other actions to establish and maintain collective rates, with the purpose or effect of fixing, establishing, stabilizing or otherwise tampering with rates and charges for the transportation of household goods between points within Kentucky;
- (B) Participating in and continuing to participate in the collectively set rates;
- (C) Filing collectively set rates with the Division of Motor Carriers; and
- (D) Initiating, organizing, coordinating, and conducting meetings or providing a forum for any discussion or agreement among competing carriers concerning or affecting rates charged or proposed to be charged for the intrastate transportation of household goods; or otherwise influencing its members to raise their rates, charge the same or uniform rates, or participate or continue to participate in the collectively set rates.

PARAGRAPH 8. The acts and practices of respondent, its members and others, as alleged in Paragraph 7, have had and are now having the effects, among others, of:

- (A) Raising, fixing, stabilizing, pegging, maintaining, or otherwise interfering or tampering with the prices of household goods moves;
- (B) Restricting, restraining, hindering, preventing, or frustrating price competition in the household goods moving industry; and
- (C) Depriving consumers of the benefits of competition.

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THE VIOLATION CHARGED

PARAGRAPH 9. The acts, policies and practices of respondent, its members and others, as herein alleged, were and are to the prejudice and injury of the public and constituted and constitute unfair methods of competition in or affecting commerce in violation of Section 5 of the Federal Trade Commission Act, as amended. The acts and practices, as herein alleged, are continuing and will continue in the absence of the relief herein requested.

NOTICE

Notice is hereby given to the Respondent that the eighth day of October, 2003, at 10:00 a.m., or such later date as determined by an Administrative Law Judge of the Federal Trade Commission, is hereby fixed as the time and Federal Trade Commission offices, 600 Pennsylvania Avenue, N.W., Washington, D.C. 20580, as the place when and where a hearing will be had before an Administrative Law Judge of the Federal Trade Commission, on the charges set forth in this complaint, at which time and place you will have the right under the FTC Act to appear and show cause why an order should not be entered requiring you to cease and desist from the violations of law charged in the complaint.

You are notified that the opportunity is afforded to you to file with the Commission an answer to this complaint on or before the twentieth (20th) day after service of it upon you. An answer in which the allegations of the complaint are contested shall contain a concise statement of the facts constituting each ground of defense; and specific admission, denial, or explanation of each fact alleged in the complaint or, if you are without knowledge thereof, a statement to that effect. Allegations of the complaint not thus answered shall be deemed to have been admitted.

If you elect not to contest the allegations of fact set forth in the complaint, the answer shall consist of a statement that you admit all of the material facts to be true. Such an answer shall constitute a waiver of hearings as to the facts alleged in the complaint and,

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

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

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

NOTICE OF CONTEMPLATED RELIEF

Should the Commission conclude from the record developed in any adjudicative proceedings in this matter that respondent's conduct violated Section 5 of the Federal Trade Commission Act as alleged in the complaint, the Commission may order such relief as is supported by the record and is necessary and appropriate, including but not limited to:

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1. Requiring respondent to cease and desist from preparing, developing, disseminating or filing a proposed or existing tariff that contains collective rates for the intrastate transportation of property or other related services, goods or equipment.
2. Requiring respondent to cease and desist from providing information to any carrier about rate changes considered or made by any other carrier employing the publishing services of respondent prior to the time at which such rate changes become a matter of public record.
3. Requiring respondent to cease and desist from inviting, coordinating or providing a forum (including maintaining any rate or tariff committee) for any discussion or agreement between or among competing carriers concerning rates charged or proposed to be charged by carriers for the intrastate transportation of property or related services, goods or equipment.
4. Requiring respondent to cease and desist from suggesting, urging, persuading or in any way influencing members to charge, file or adhere to any existing or proposed tariff provision which affects rates, or otherwise to charge or refrain from charging any particular price for any services rendered or goods or equipment provided.
5. Requiring respondent to cease and desist from preparing, developing, disseminating or filing a proposed or existing tariff containing automatic changes to rates charged by two or more carriers.
6. Requiring respondent to cancel all tariffs and any supplements thereto on file with the state that establish rates for transportation of property or related services, goods or equipment.

Complaint

7. Requiring respondent to cancel those provisions of its articles of incorporation, by-laws and procedures, tariff service agreements and every other rule that has the purpose or effect of permitting, announcing, explaining or agreeing to any business practice enjoined by the terms of any order, and to amend its by-laws to require members to observe the provisions of any order.
8. Requiring respondent to make public, in a manner likely to reach as many members as possible, the nature of the relief ordered by the Commission.
9. Such additional relief as is necessary to correct or remedy the violations alleged in the complaint.

WHEREFORE, THE PREMISES CONSIDERED, the Federal Trade Commission on this eighth day of July, 2003, issues its complaint against KHGCA.

Initial Decision

INITIAL DECISION

By D. Michael Chappell, Administrative Law Judge

I. INTRODUCTION

A. Overview and Summary of Decision

The primary question presented in this case is whether the state action doctrine, developed in the line of cases beginning with *Parker v. Brown*, 317 U.S. 341 (1943), protects Respondent from federal antitrust liability for its activities in preparing and filing tariff rates for the transportation of household goods in the Commonwealth of Kentucky.

Respondent Kentucky Household Goods Carriers Association, Inc. ("Respondent") is an Association consisting of approximately ninety-three household goods moving companies, competitors that provide intrastate and local moving services. Respondent's functions include the initiation, preparation, development, dissemination, and filing of tariffs and supplements thereto with the Kentucky Transportation Cabinet ("KTC"). The Complaint in this proceeding alleges that the conduct of Respondent in submitting proposed tariff rates for the transportation of household goods to the KTC constitutes unlawful price fixing. Respondent's defense is that its conduct is immune from liability under the federal antitrust laws pursuant to the state action doctrine established by the United States Supreme Court in *Parker* and its progeny. Specifically, Respondent asserts that the challenged conduct was undertaken as part of a state initiated and sponsored activity, adopted by the state pursuant to a clearly articulated and affirmatively expressed state policy, and that its conduct was actively supervised by the state.

As set forth in this Initial Decision, Complaint Counsel has established that Respondent engaged in horizontal price fixing. Respondent has established that the collective ratemaking it engaged in was undertaken pursuant to a policy that has been clearly articulated and affirmatively expressed by the State. Although the Commonwealth of Kentucky has a statutory and regulatory program in place to regulate rates for local and

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intrastate moving services, it has not taken adequate measures to supervise the collective ratemaking process. Failure to verify statutory compliance is tantamount to unregulated collective ratemaking. Thus, Respondent has not established that the State has actively supervised Respondent's activities or the ratemaking process. Accordingly, Respondent is not entitled to the state action defense. The appropriate remedy is a cease and desist order barring price fixing by Respondent.

B. Summary of Complaint and Answer

The Federal Trade Commission ("FTC") issued its Complaint in this matter on July 9, 2003. The Complaint charges that Respondent and its members have taken actions to establish and maintain collective rates and charges for the transportation of household goods between points within Kentucky. Complaint P7. The Complaint further alleges that the acts of Respondent have had the effects of raising prices, restricting price competition, and depriving consumers of the benefits of competition. Complaint P8. The Complaint charges one violation: that the acts of Respondent constitute unfair methods of competition in or affecting commerce in violation of Section 5 of the Federal Trade Commission Act, as amended. Complaint P9.

In its Answer, filed on August 20, 2003, Respondent admitted that it causes documents containing proposed rates to be filed with the KTC and that these documents become tariffs. Answer introduction, P2. Respondent further admitted that the tariffs contain rates which are charged by household goods movers to consumers for household goods transportation services. Answer P2. Respondent denied that household goods movers engage in a horizontal agreement to fix prices for their services. Answer P7.

C. Procedural Background

Respondent filed a motion for summary decision on December 19, 2003. By Order dated February 26, 2004, Respondent's motion was denied on the basis that the issue of whether the challenged policy is actively supervised by the Commonwealth of Kentucky raised a genuine issue of material fact.

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By Joint Motion, filed on February 27, 2004, both parties requested to use deposition transcripts and videotapes of depositions in lieu of live testimony. By Order dated March 4, 2004, the parties were instructed that properly admitted deposition testimony is part of the record and that the parties could offer it into evidence at the final pre-hearing conference.

On February 23, 2004, the KTC filed a motion seeking an Order granting it leave to intervene in this proceeding. By Order dated March 10, 2004, the motion was granted in part and denied in part. Intervenor KTC was permitted to offer evidence and testimony at the hearing in this proceeding, subject to limitations, and to present an opening statement and a closing argument. March 10, 2004 Order at 3-4 (www.ftc.gov/os/adjpro/d9309). Intervenor KTC was aware of the final prehearing conference and the trial date and chose not to attend either. Transcript of Final Pretrial Hearing, March 16, 2004 at 4-5. In failing to appear, the KTC waived any right to object at the hearing. *Id.*

The final prehearing conference was held on March 16, 2004. Trial commenced immediately following the prehearing conference. Complaint Counsel and Respondent's Counsel presented opening statements. No witnesses were called to testify during the trial. Complaint Counsel and Respondent stipulated that the deposition transcripts of Dennis Tolson, Denise King, William Debord, and A.F. Mirus were offered into evidence to be used in lieu of live testimony at the hearing. JX 1, Stipulations of Law, Fact and Authenticity ("Stipulation") P3.

On April 2, 2004, Complaint Counsel and Respondent filed and served Proposed Findings of Fact, Post Trial Briefs, and Conclusions of Law. On April 6, 2004, Intervenor KTC served a Post Trial Brief. The KTC's Post Trial Brief was filed with the Office of the Secretary on June 17, 2004. Complaint Counsel and Respondent filed and served replies to each other's Post Trial Briefs and Proposed Facts on April 17, 2004. Closing arguments were heard on May 19, 2004.

The hearing record was closed pursuant to Commission Rule 3.44(c) by Order dated March 23, 2004. This Initial Decision is

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filed within one year of the issuance of the Complaint and within ninety days of the close of the record, pursuant to Commission Rule 3.51(a).

D. Evidence

This Initial Decision is based on the exhibits properly admitted in evidence and the proposed findings of fact and conclusions of law and replies thereto submitted by the parties. Citations to specific numbered Findings of Fact in this Initial Decision are designated by "F."

This Initial Decision addresses only material issues of fact and law. Proposed findings of fact not included in this Initial Decision were rejected, either because they were not supported by the evidence or because they were not dispositive or material to the determination of the allegations of the Complaint or the defenses thereto. The Commission has held that Administrative Law Judges are not required to discuss the testimony of each witness or all exhibits that are presented during the administrative adjudication. *In re Amrep Corp.*, 102 F.T.C. 1362, 1670 (1983). Further, administrative adjudicators are "not required to make subordinate findings on every collateral contention advanced, but only upon those issues of fact, law, or discretion which are 'material.'" *Minneapolis & St. Louis Ry. Co. v. United States*, 361 U.S. 173, 193-94 (1959).

II. FINDINGS OF FACT**A. Definitions**

1. A "household goods carrier" or a "mover" is a company that receives compensation for moving property from one location to another. (Answer P5; JX 1 P10).

2. A "participating carrier" or a "member" is a member of the Kentucky Household Goods Carriers Association, Inc. (See CX 1; CX 2; Respondent's Admission P18; JX 1 P10).

3. A "tariff" contains a schedule of rates, fares, and prices that carriers charge. (CX 2; JX 1 P4). A tariff also sets forth rules that carriers impose on their transportation processes, such as how to

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handle claims and compute time. (CX 116 (Debord, Dep. I at 42-43)).

4. A "tariff publishing agent" is an agent that may file a tariff on behalf of one or more household goods carriers. (JX 1 P8; see also CX 116 (Debord, Dep. I at 35); RX 95 (601 KY. ADMIN. REG. ("KAR") 1:060)).

5. "Collective ratemaking" means that rates are collectively filed through a joint tariff publishing agency representing rates of more than one carrier or group of carriers. (CX 116 (Debord, Dep. I at 37-38); JX 1 P6).

B. Respondents**1. The Kentucky Household Goods Carriers Association, Inc.**

6. Respondent is the Kentucky Household Goods Carriers Association, Inc. (Respondent or "Kentucky Association"). (CX 3; JX 1 P9).

7. The membership of the Kentucky Association consists of approximately ninety-three household goods moving companies that conduct business within Kentucky, receiving compensation for intrastate and local moves. (Answer P5; JX 1 P10).

8. Participating Carriers of Respondent are competitors with one another. (CX 129 (Tolson, Dep. at 133)).

9. Every household goods carrier operating in the Commonwealth of Kentucky is required to file a tariff, or have a tariff publishing agent file a tariff containing its rates, charges, and rules with the Kentucky Transportation Cabinet ("KTC"). (CX 2; JX 1 PP5, 8; see also RX 80 (KY. REV. STAT. ANN. ("KRS") § 281.680); RX 95 (601 KY. ADMIN. REG. 1:060)).

10. Respondent is a tariff publishing agent. One of its primary functions is the initiation, preparation, development, and dissemination of, and filing with the KTC's Division of Motor Carriers tariffs and supplements thereto on behalf of and as agent for its members. (Answer P2; Respondent's November 28, 2003 Response to P13 of Complaint Counsel's Request for Admission issued October 31, 2003 ("Respondent's Admission"); JX 1 P11).

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This function is conducted through the Kentucky Association's tariff committee. (Answer P5).

2. Intervenor Kentucky Transportation Cabinet

11. The Kentucky Transportation Cabinet ("KTC") is the state agency with the responsibility to insure that every rate charged by household goods carriers for regulated transportation is just and reasonable. (CX 116 (Debord, Dep. I at 33)).

12. The KTC has promulgated administrative regulations relating to rate filings by household goods carriers pursuant to KRS 281.680. (CX 116 (Debord, Dep. I at 34)).

13. The KTC filed a motion seeking to intervene as respondent in this proceeding on February 23, 2004. By Order dated March 10, 2004, the KTC's motion was granted in part and denied in part. The KTC was permitted to offer evidence and testimony at the hearing in this proceeding to the extent that the exhibits or witnesses from whom it might seek to elicit testimony had previously been disclosed by the deadlines established in the Scheduling Orders. The KTC was permitted to call as a witness the declarant in support of the KTC's motion for intervention. In addition, the KTC was permitted to submit post trial briefing. (March 10, 2004 Order) (www.ftc.gov/os/adjpro/d9309).

C. The Kentucky Association Engaged in Collective Ratemaking**1. The Tariff Establishes the Rates for Household Goods Moving Services**

14. Respondent files collective rates with the KTC. (CX 116 (Debord, Dep. I at 38)).

15. KYDVR TARIFF NO. 5 is the Kentucky Association's tariff which is applicable to Kentucky intrastate traffic. (Respondent's Admission P9; CX 1; CX 2).

16. Participating Carriers are required to charge the rates contained in KYDVR TARIFF NO. 5. (CX 1; CX 2; Respondent's Admission P18; see also JX 1 P10). A carrier cannot charge any more or less than the rates contained in the tariff. (CX 116 (Debord, Dep. I at 41-42)).

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17. Respondent causes KYDVR TARIFF NO. 5 to be prepared and published. The tariff was issued 3-1-88 with an effective date of 4-1-88, and includes all subsequent supplements. (CX 2; Respondent's Admission PP10, 11, and 14; JX 1 P12).

18. The tariff contains the rates movers must charge for local moves, which are those moves within twenty-five miles of the city limits of the carriers' situs. Local rates are either charged at a flat rate per room or determined by hourly fees for labor and equipment. The tariff also specifies the rates movers must charge for intrastate moves of more than twenty-five miles ("intrastate rates"). Intrastate rates are established as a function of the distance traveled and the total weight of the shipment. (CX 1; CX 2; Respondent's Admission P16; JX 1 P14).

19. Another part of the tariff lists the rates for additional services, such as packing, moving particular bulky or heavy items, and moves involving flights of stairs. (JX 1 P15). The tariff also establishes higher charges for work performed on "overtime": any packing or unpacking performed on the weekends or after 5:00 p.m. during weekdays. (CX 2 at KHGCA 7007). For example, packing a "Drum, Dish-Pack" costs \$ 14.60 on regular time and \$ 20.40 on overtime. Unpacking a "Drum, Dish-Pack" costs \$ 5.35 on regular time and \$ 7.50 on overtime. (CX 2 at KHGCA 6977; JX 1 P16).

20. Packing a wardrobe carton costs \$ 3.60 on regular time and \$ 4.95 on overtime. Unpacking a wardrobe carton costs \$ 1.35 on regular time and \$ 1.95 on overtime. (CX 1 at KTC 2001; CX 2 at KHGCA 6977; Respondent's Admission P16; JX 1 P16).

21. Respondent provides a copy of proposed supplements to KYDVR TARIFF NO. 5 to all of the Participating Carriers. This provides the Participating Carriers the opportunity to request rates different than those contained in the supplement. This is done prior to the time the Kentucky Association submits that supplement to the KTC. (CX 11; CX 29; CX 117 (Mirus, Dep. at 54-58)).

22. Participating Carriers that want to file different rates do so by filing a Form 4286 with the Kentucky Association's tariff

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committee. (CX 12; JX 1 P27). Information about any such different rates is then sent to all Participating Carriers. When the Kentucky Association circulates proposed rates and proposed rate changes to Participating Carriers, members are permitted to protest any rates or rate changes that they find objectionable. (CX 11; CX 29; CX 117 (Mirus, Dep. at 54-58)).

23. Movers know that if they do not affirmatively exempt themselves from the terms of the proposed tariff rates, their firms will be obligated to charge the collective rates contained in the tariff. (See, e.g., CX 12; CX 13; CX 22; CX 57; Respondent's Admission PP12, 20; CX 117 (Mirus, Dep. at 53-54); CX 116 (Debord, Dep. II at 60-61); JX 1 P27).

24. The Participating Carriers enable Respondent to file with the KTC the rates contained in the Kentucky Association's KYDVR TARIFF NO. 5 by granting Respondent power of attorney to file their tariff with the KTC. (CX 1; CX 2; Respondent's Admission PP17, 20; e.g., CX 4).

2. The Kentucky Association Files for Increases in the Collective Rates

25. Respondent regularly files supplements to the tariff that contain proposed rate increases for its members. The decision to propose an increase to rates can either be agreed to by a voice vote at a general membership meeting or by a vote of the Board of Directors. (CX 117 (Mirus, Dep. at 62-63); CX 15; JX 1 P13). For example, on October 13, 1999, Respondent, on behalf of its members (through its Board of Directors), agreed to seek a 10% increase in the transportation rates and charges then in effect in Sections II and VI of KYDVR TARIFF NO. 5. (CX 19; Respondent's Admission P23).

26. On October 11, 2000, Respondent, on behalf of its members (through its Board of Directors), agreed to seek an 8% increase in the intrastate transportation rates and charges then in effect in Sections II and VI of KYDVR TARIFF NO. 5. (CX 15; Respondent's Admission P24).

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27. Other examples of rate increases that have been proposed by the Kentucky Association and which have taken effect include the following (JX 1 P18):

Supplement No.	Effective Date	Increase	CX
71	4-1-02	5% Intrastate rates & certain items	CX 10 - CX 12; CX 14
66	1-1-01	8% Intrastate rates	CX 15
63	4-1-00	10% Certain items & local moves	CX 16
61	1-1-00	10% Intrastate rates	CX 17 - CX 19
56	1-1-99	5% Intrastate rates & certain items	CX 20; CX 21
51	1-1-98	8% Across the board	CX 22 - CX 26
46	10-1-96	5% Across the board	CX 27 - CX 30
30	7-1-94	8% Across the board	CX 32 - CX 36
21	5-1-92	4.5% Intrastate rates	CX 37 - CX 40

28. The April 26, 1985 annual meeting minutes of the Kentucky Association state: "rates have increased 42% since 1980." (CX 44; JX 1 P19).

29. Respondent filed a collective amendment to the tariff to propose a new set of intrastate rates in 1990. Those rates were placed in Schedule G of Section II of the tariff and were 15% higher than the rates then in effect in Schedule F of Section II of the tariff. (CX 41).

30. The movers have agreed to specific charges in the tariff. For instance, effective 04/01/02, the rate is \$ 134.70 to move an automobile, which all but two Participating Carriers charge. (CX 1 at KTC 2026; CX 2 at KHGCA 6989; Respondent's Admission PP30-31; JX 1 PP20-21). Similarly, all but two Participating Carriers charge the rate effective 04/01/02 of \$ 84.15 to move jet skis. (CX 1 at KTC 2026; CX 2 at KHGCA 6989; Respondent's Admission P35; JX 1 PP22-23).

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31. There is considerable uniformity among movers with respect to intrastate rates. All of the following firms agree to have Respondent submit rates to the KTC and are required to charge the same intrastate transportation rates contained in Section II-B of KYDVR TARIFF NO. 5: A-1 Equipped Veteran's Mov/Stg., Inc.; Howard Ball Mov/Stg.; Carl Boyd, dba Harrison Movers; Brentwood Properties, LLC, dba Brentwood Mov/Stg.; Clark's Moving Co. dba Clarks Moving; Dahlenburg Trucking Co., Inc.; Ecton Movers, Inc.; Fallon Mov/Whsg.; Hall's Mov. Serv., Inc.; Hardin Mov/Del. Svc.; Shelby Hedger; H & O Transport, Inc.; Miller Mov/Stg., Inc.; Moyers Transfer, dba Leeman M. Moyer; Odle Movers (Robert Sadler, dba); Paducah Mov/Stg.; T. Peavler Mov. Sys., LLC; Sexton & Sons Mov/Stg., Inc.; Stevens Van Lines, Inc., dba Stevens Worldwide Van Lines; Whitis & Whitis, Inc., dba William H. Johnson Mov/Stg.; June Webb; Kimberley June Webb & Sharon Kay Webb (Webb Mov/Stg., dba). (CX 1 at KTC 1901-66; CX 2 at KHGCA 6936-6947; Respondent's Admission PP40, 41; JX 1 PP24-26).

3. Members of the Kentucky Association Agree on Increases in Collective Rates

32. Respondent has exerted pressure on participating carriers to conform to the collective rates. In one example, in early 1996, Boyd Movers sought an exception to the tariff whereby the firm would compensate the consumer more for damage done in a move. The head of the tariff committee called Mr. Buddy Boyd of Boyd Movers and urged him not to file his exemption. The head of the tariff committee wrote that he spoke to Boyd and pressured him not to go against the will of the majority of Participating Carriers. The notes of the conversation state:

- Spoke to Buddy Boyd in regard to weakness of his justification for exception, and advised him that the \$ 5,000.00 release liability was in conflict with provisions in the tariff.
- Also requested that put-off (delay) filing this exception until a later date, this will allow time to see

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how the majority of parties to the tariff adjust to these new rules and items applicable to valuation charges.

- Buddy stated that he did not want to "upset the program" or work against the majority of tariff participants. Therefore, he withdrew the requested exception as shown on this form.

- He did say that, in his opinion, and in the interests of the customer, he would like to see a set of valuation charges (lower) that would apply to local moves. Also, would it be possible to increase the 60 cent release up to 80 cents.

- This is a matter for further review and discussion.

(CX 48; CX 129 (Tolson, Dep. at 212-17)).

33. Participating Carriers use the knowledge of the tariff rates to keep rates elevated. For instance, one mover increased his local rate (by submitting a Form 4286 to the Kentucky Association), stating as his justification "somewhat lower than our competition in this area." (CX 49). Similarly, a mover filed a Form 4286 with the Kentucky Association for a higher local rate stating as his justification, "even with this rate increase we will still be the lowest priced hourly mover in the Owensboro area. We can raise our rates and still be in direct competition with the other moving companies." (CX 50).

34. Respondent's decisions to submit proposals for rate increases are implemented by majority vote. (CX 117 (Mirus, Dep. at 62-63; CX 15)). There are instances where an increase is proposed, but some movers "don't want an increase" because they "are getting along fine." (CX 117 (Mirus, Dep. at 163)). If the movers opposing an increase in rates are in the minority, the majority decision will nevertheless result in an increase in the collective rates. (CX 16 - CX 19).

35. The movers have agreed to tariff language that sets higher rates during the peak (summer) moving season. All of the

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Participating Carriers, except one or two, charge 10% higher rates from May 15th through September 30th. (CX 1 at KTC 2098; CX 2 at KHGCA 7018; CX 45 - CX 47; Respondent's Admission PP25, 26; JX 1 P17; CX 129 (Tolson, Dep. at 179-80)).

4. The Kentucky Association Has Prevented Carriers From Offering Discounts

36. Movers often seek to offer discounts from the collective rates. (E.g., CX 9). There have been instances where other Participating Carriers complain to the Kentucky Association Board to prevent these discounts from occurring. (F. 37-39; see generally, CX 129 (Tolson, Dep. at 34-40)).

37. An example of a complaint to Respondent is the complaint made by one Participating Carrier, A. Arnold, that its competitor, Shelter Moving, was offering a 52% discount: "we at A. Arnold appreciate and respect fair and honest competition. However, in our regulated state we do not condone dishonest business practices." Mr. William Debord, the KTC employee responsible for intrastate movers matters, sent Shelter Moving a warning letter telling it not to offer discounts. (CX 5; CX 6; CX 116 (Debord, Dep. II at 40-41); JX 1 P34).

38. Another mover, Rudy Miller, complained that his competitor, Berger, had offered a 30% discount from the tariff. (CX 7). Debord investigated this matter. (CX 116 (Debord, Dep. II at 44-45)).

39. Another mover alleged that Peters Movers was discounting 30% from the established tariff. (CX 8). Debord subsequently did "a routine investigation on Peters, but not a complaint audit." (CX 116 (Debord, Dep. II at 46-47)).

40. At times, consumers show estimates from one mover to another mover to try to get a lower price. There have been instances where, if one of the movers presents the consumer with an estimate that includes a discount, Respondent's officials have called the mover offering the discount to instruct that mover not to discount. (CX 129 (Tolson, Dep. at 37-39)).

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D. Collective Ratemaking Under the Articulated and Affirmatively Expressed State Policy of the Commonwealth of Kentucky

41. The relevant statutory and regulatory provisions relating to the Commonwealth of Kentucky's state policy are set forth in Section III, *infra*.

E. The Commonwealth of Kentucky Does Not Actively Supervise Collective Ratemaking**1. The KTC Provided More Supervision of Rates in the Past**

42. In the past, the KTC did take steps to supervise movers' rates. While the KTC initially required household goods movers to file annual financial reports, it subsequently stopped requiring such financial reports. The KTC would get financial reports on firms' costs and expenses which were routinely audited "through the '70s [and] through the '80s." The KTC would check their accuracy by comparing the data sent to the State with each firm's federal Interstate Commerce Commission filings, which could be 200 pages long. (CX 104; RX 129; CX 116 (Debord, Dep. II at 82-83, 86-89)).

43. In 1966, Respondent considered hiring a consultant to prepare information for the KTC. "It was decided that due to the amount of information which maybe [sic] required by D.M.T., it would be feasible and probably more economical to call in an outside rates firm" (CX 107). The expert under consideration had many years experience at the Interstate Commerce Commission, where he supervised "between 30 and 40 employees whose duties were to develop cost formulae for the determination of rail, motor carrier . . ., to prepare cost studies . . . [and] to furnish cost data to the Suspension Board and other members of the Commission staff for use in determining the reasonableness of rates for rail carriers, motor carriers, and barge carriers and to introduce cost and other evidence in proceedings before the I.C.C." (CX 106).

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44. In 1972, the KTC had a staff of three auditors and others who did "uniform cost stud[ies]" of for-hire carriers which involved a "mathematical formula" or a "statistical formula" that was used, which was "very, very in depth or involved." Now, no official cost studies for household goods movers are done. (CX 116 (Debord, Dep. II at 72-73)).

45. "In the '70s," the KTC routinely filled out a spreadsheet which contained the calculated operating ratio for all household goods movers. Those operating ratios varied from 92% for bigger carriers to over 100% for marginal carriers. (CX 116 (Debord, Dep. II at 88-89); JX 1 P48).

46. Until "in the '80s," Debord provided monthly written reports to the Commissioner of the Department of Vehicle Regulations which would analyze rate applications. (CX 116 (Debord, Dep. II at 74-76)).

47. Debord no longer provides monthly written reports to the Commissioner. "In the 1980's," the Commissioner told Debord "not to bother them with those things." (CX 116 (Debord, Dep. II at 76-77); JX 1 P47).

48. Debord testified that besides the initial minimum rate that was issued "in the 1950's or early 1960's," Debord did not "know of any household goods rate that was established by and set by order of the Cabinet or Department." (CX 116 (Debord, Dep. I at 49)).

2. The KTC Commits Very Limited Resources to Tariff Issues

49. Ms. Denise King was Director of the Division of Motor Carriers of the KTC and reported to Mr. William M. Bushart, Commissioner of the Department of Vehicle Regulations at the time the Complaint was issued. She had been Director since May 2003 and Assistant Director since January 2000. (CX 115 (King, Dep. at 10, 40, 43); JX 1 P29). Commissioner Bushart reported to Deputy Secretary of Transportation Clifford Linkes, who in turn reported directly to Secretary of Transportation James Codell, III. (CX 115 (King, Dep. at 10, 40, 43); JX 1 P29).

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50. King spends one to two percent of her time on household goods matters. (CX 115 (King, Dep. at 14-15)). King testified that the individual who is responsible for the program of activity on the part of the KTC with respect to household goods tariffs is Mr. William Debord. (CX 115 (King, Dep. at 9)).

51. King has never given any written or oral instructions to Debord on how he should determine whether the rates contained in the Kentucky Association's tariff meet the State's statutory standards. (CX 115 (King, Dep. at 20-23)). King has not given Debord any instruction on how to evaluate rate increase proposals and she has no role in determining whether to permit a rate increase to take effect; she has delegated such decisions to Debord. (CX 115 (King, Dep. at 29-31)).

52. King has never discussed with her supervisor the rates contained in the tariff or the standard to be used when reviewing rates and she has never been given any written instructions by her supervisor as to how she should analyze the rates contained in the tariff. (CX 115 (King, Dep. at 39-40)).

53. King has no standards for determining whether rates meet the statutory goal of being not unjust or unreasonable. King has never discussed any such standard with Debord. King also is not aware of any standards that her predecessors used to review household goods carriers' rates. (CX 115 (King, Dep. at 43-45)).

54. Debord testified that he is the person at the KTC responsible for intrastate movers matters. He has had responsibility for household goods matters since 1979. Debord is currently an "Administrative Specialist 3," employed by the Division of Motor Carriers. Debord works part-time, 100 hours per month. (CX 116 (Debord, Dep. I at 11-12); JX 1 P30).

55. From 1972 to 1979, Debord was employed with the "Division of Rates & Services" of the "Department of Motor Transportation," which was the name by which the Division of Motor Carriers was known at that time. From December 1979 to October 1999, he served as either Director, Acting Director, or Assistant Director of the Division of Motor Carriers, KTC. From 1972 until the present, Debord has been responsible for

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administering the Commonwealth of Kentucky's program for the regulation of household goods carriers. (CX 116 (Debord, Dep. I at 11-15)).

56. Debord has been a member of the National Association of State Transportation Specialists since 1972 and served as its President in 2000-2001. He has been involved with other trucking industry groups including the Specialized Riggers Conference and tax associations and groups. (CX 116 (Debord, Dep. I at 85)).

57. It has been a part of Debord's employment responsibilities since 1972 to be familiar with the Kentucky laws regulating household goods carriers. (CX 116 (Debord, Dep. I at 15)).

58. Debord spends "a very high percent," over half, of his time performing household goods compliance audits. (JX 1 P33; CX 116 (Debord, Dep. II at 21)). In a compliance audit, Debord investigates complaints about carriers that discount their rates. (CX 116 (Debord, Dep. I at 103-04)).

59. In addition, Debord spends time investigating illegal movers, handling complaints about damage caused by movers, conducting seminars, updating power of attorney forms, and handling inquiries from the public. (CX 116 (Debord, Dep. II at 19-24); JX 1 P31).

60. Debord is responsible for other matters besides household goods movers. He has responsibility for tariff filings and other matters involving passenger carriers such as taxis, regular route busses, airport limousines, airport shuttles, and charter bus operations, as well as trucking matters in general. (CX 116 (Debord, Dep. II at 15); JX 1 P31).

61. Debord does not get guidance from his supervisor about tariff issues. He has authority over such matters and has not reported to anyone in that regard since 1979. (CX 116 (Debord, Dep. II at 26-27); CX 115 (King, Dep. at 20-21; 23; 30-31)).

62. No KTC employees report to Debord. (CX 116 (Debord, Dep. II at 26); JX 1 P30).

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3. The KTC Does Not Receive Adequate Data

63. Household goods movers do not routinely submit balance sheets and income statements to the KTC. (CX 116 (Debord, Dep. II at 53-54); CX 115 (King, Dep. at 32); CX 129 Tolson, Dep. at 48)). The KTC does still receive "a limited number" of movers' financial statements on a voluntary basis. However, Debord testified that such filings were not audited and could "misrepresent the industry's economic conditions." (CX 116 (Debord, Dep. II at 82-83)).

64. The KTC does not get any formal data on the percentage of movers' interstate moves versus their intrastate moves. (CX 116 (Debord, Dep. II at 84-85); JX 1 P46).

65. Respondent does not compile business data on movers' costs. (CX 129 (Tolson, Dep. at 85); CX 117 (Mirus, Dep. at 78-79)).

66. If a Participating Carrier wants to file for an exception or make a change in its rate, the Kentucky Association requires the carrier to fill out a Form 4268 and send it to the Chairman of Respondent's tariff committee. (CX 12 - CX 13; CX 116 (Debord, Dep. II at 62-63)). The Form 4268's that are sent by Participating Carriers to Respondent's tariff committee are not routinely filed with the KTC. (CX 116 (Debord, Dep. II at 63-65)).

67. Debord testified that the KTC's efforts to determine the costs of household goods carriers are: Debord's knowledge of the industry, Debord's conversations with trucking companies to determine various costs, and Debord's review of various publications such as the Wall Street Journal. (CX 116 (Debord, Dep. I at 39-40)).

68. Debord is on the mailing list of the Kentucky Association. He receives tariff bulletins when they are sent to the Kentucky Association's membership. (CX 116 (Debord, Dep. I at 93-94)).

69. Debord has attended meetings of the Kentucky Association to "obtain information relative to the industry" and to "be made aware of tariff change proposals." (CX 116 (Debord, Dep. I at 86-87)).

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70. Debord testified that he learns the bases for planned rate increases at the Kentucky Association meetings. (CX 116 (Debord, Dep. I at 49-50)). However, movers do not disclose details about their costs, revenues, or profit margins at the Kentucky Association meetings. Mr. Dennis Tolson, President of the Kentucky Association, testified about the lack of specific information disclosed in the verbal discussions that take place at the Kentucky Association's board meetings: "you have to understand that these . . . men and women are competitors with one another, too, so that a lot of . . . exact detailed financial information is not made available to--for public consideration at that point." (CX 129 (Tolson, Dep. at 133)).

71. Movers would not disclose at a meeting that KTC officials attend the exact wages that they pay their workers. (CX 129 (Tolson, Dep. at 123)). Movers would not disclose their actual costs of obtaining supplies such as boxes. (CX 129 (Tolson, Dep. at 127)). They would also not disclose their margins on selling a box to a customer. (CX 129 (Tolson, Dep. at 127)). During the Kentucky Association meetings, associate members, who sell goods or services to movers, also do not divulge actual invoices showing what movers paid for their goods or services. (CX 129 (Tolson, Dep. at 238-39)).

72. When Debord does a tariff compliance investigation, he looks at certain documents that movers keep on individual moves. He does not routinely look at balance sheets, income statements, payroll documents, documents that show information about cost of capital, or documents that would allow him to analyze movers' profitability. (CX 116 (Debord, Dep. II at 78-81)).

73. The KTC does not receive any input from groups advocating on behalf of consumers. (CX 116 (Debord, Dep. II at 109-10)). In one instance of a limited hearing held on issues involving individual moving firms, the State did not allow people in the hearing room unless they represented a mover. (CX 117 (Mirus, Dep. at 98-99)).

74. The record does not indicate that notice of rate increases was ever provided to the public. (See CX 116 (Debord, Dep. II at

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59-60)). When asked about the notice requirements, Debord testified that information is available for inspection by the public at the Division of Motor Carriers. (CX 116 (Debord, Dep. I at 43-45)). Debord further testified that household goods carriers are not required to provide notice of rate increases to the public. (CX 116 (Debord, Dep. I at 43-45)).

4. The KTC Receives Minimal Justifications for Rate Increases

75. Minimal justification is provided to the KTC in support of movers' requests for rate increases. The Kentucky Association does not submit, nor does the KTC require, any business records, economic studies, or cost justification data. (CX 116 (Debord, Dep. II at 72-74, 109, 111-12, 115-16, 119-20, 124-26)).

76. Generally, it is customary for the Kentucky Association's representatives to have discussions with Debord to provide informal justifications regarding collectively set rates before they are filed by the Kentucky Association. (CX 116 (Debord, Dep. I at 132-33)).

77. The chairman of the tariff committee of the Kentucky Association, Mr. A.F. Mirus, described the information that the tariff committee provides to the KTC to justify general rate increases as follows: "I could have a conversation with [Debord] advising him as to what the board wishes to do, what the board of directors wishes to do, and more or less just to get his feeling on it." (CX 117 (Mirus, Dep. at 88)).

78. In response to a request to describe discussions with Debord about possible rate increases, Mirus said: "well, I would contact Mr. Debord and tell him as a result of a board meeting the board proposed a possible rate increase and that we would ask him what his feelings were on it before we got too deeply into it, because there was money involved, et cetera, and see what his feelings were on it. And if he felt it was, and nicely he would ask us what is your justification, and we would have something to back it up." (CX 117 (Mirus, Dep. at 151-52)).

79. Mirus did not provide Debord with detailed justifications or business documents to justify rate increases. (CX 117 (Mirus,

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Dep. at 153-54)). Instead, Mirus would "tell [Debord] what went on at the board meeting and that the membership, the general membership felt they needed an increase in their charges in order to offset the increase, whether it be in operation cost or whether it be in insurance, whichever the case may be." (CX 117 (Mirus, Dep. at 153)). Mirus testified that, in response to Mirus's statement to Debord that costs had gone up, "many times [Debord] would say file the tariff and we will take it from there." (CX 117 (Mirus, Dep. at 153)).

80. Debord testified that he learns the justifications for planned rate increases at the Kentucky Association meetings. (CX 116 (Debord, Dep. I at 49-50)). No specific information is discussed at the meetings. F. 70.

81. Debord could not recall specific justifications provided in support of proposals for general rate increases. (F. 82-84; CX 116 (Debord, Dep. II at 115-16)).

82. In Tariff Supplement 71, effective April 1, 2002, Respondent filed for a 5% increase on specific items contained in the tariff, such as the added cost of moving a car, which increased from \$ 128.30 to \$ 134.70. Debord does not recall the justification for that increase. (CX 116 (Debord, Dep. II at 119-20)). This rate increase was allowed to go into effect. (CX 10).

83. In December 2000, Respondent filed Tariff Supplement 66, seeking an 8% increase in intrastate rates. The written justification provided to the State for that increase was a cover letter. (RX 169). Debord characterized that letter as an "extra courtesy" and said that normally tariff filings were not accompanied by such a justification letter. (CX 116 (Debord, Dep. II at 97-101)). The justification provided by Respondent was an increase of interstate rates by 5% and a statement that the adjusted rates were deemed necessary to offset increases in operational expenses. (RX 169). Debord testified that he did not recall any oral statements justifying this rate increase during the time the Kentucky Association was preparing the rate increase. (CX 116 (Debord, Dep. II at 102-03)). This rate increase was allowed to go into effect. (CX 116 (Debord, Dep. II at 105)).

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84. In 1999, Respondent filed Tariff Supplement 61, seeking a 10% increase in intrastate rates. The written justification provided to the State for that increase was a cover letter which discussed a 5% increase in interstate rates. (RX 164; CX 116 (Debord, Dep. II at 112)). Debord testified that he did not "recall this particular event." (CX 116 (Debord, Dep. II at 113)). This rate increase was allowed to go into effect. (CX 17).

85. If a Participating Carrier wants to make a change in its rate, it is required by the Kentucky Association to fill out a Form 4268. (CX 12 - CX 13; CX 116 (Debord, Dep. II at 62-63)). Debord has not given Respondent any formal instructions about what information should be on the Form 4268. (CX 116 (Debord, Dep. II at 66-67)); see also CX 129 (Tolson, Dep. at 66)).

86. The information contained on the Form 4268's in Respondent's files lack adequate data regarding a justification for a rate increase. Many Participating Carriers have changed their rates without even filling out the Form 4268 or with providing minimal information on the form. Many simply assert that costs have risen or that the Participating Carrier wishes to raise its rates. (CX 57 - CX 103; JX 1 P28; CX 129 (Tolson, Dep. at 65)).

5. The KTC Does Not Analyze Requests for Rate Increases or Rates

87. Even during the time that the KTC calculated operating ratios, there was no written policy which set forth an acceptable level. The KTC did not have a numerical goal for an acceptable operating ratio. "As far as official policy stating that to allow ninety-five or ninety-three percent ratio--operating ratio, we never had that." The KTC did not mandate rates, as was done in many states. (CX 116 (Debord, Dep. II at 95-96); JX 1 P49).

88. The KTC does not have any standard or formula that it uses to determine whether to permit a rate increase or whether a rate increase is appropriate. (CX 116 (Debord, Dep. II at 105-09)). Similarly, the KTC does not have any way of knowing whether a rate increase will increase movers' profits. (CX 116 (Debord, Dep. II at 105-06)). Respondent's president testified he

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was not aware of any procedure used by the KTC to determine or justify rate increases. (CX 129 (Tolson, Dep. at 98-99)).

89. The KTC does not have any mathematical or numerical formula for determining whether movers' rates comply with the statutory standards. (CX 116 (Debord, Dep. II at 36-37, 108-09)). Debord was asked whether there were any written standards for determining whether rates were "reasonable" under Kentucky statutes. He testified that "there's not a written rule within the Cabinet that requires specific standards to be followed." (CX 116 (Debord, Dep. II at 36-37)). Similarly, Debord testified that the KTC did not have any way of analyzing whether rate increases would result in rates being "excessive." (CX 116 (Debord, Dep. II at 108-09)). Respondent's president testified he was not aware of any standard used by the KTC to determine if rates are appropriate. (CX 129 (Tolson, Dep. at 98-99)).

90. In one instance, a moving company that is not a member of the Kentucky Association, Apartment Movers, filed for individual rates. Debord was asked whether he had any standard for deciding whether to allow separate rates that had been submitted by a firm to go into effect if they were "X percent higher" than other firms' rates and Debord testified that "we don't have any specific standards documented." (CX 116 (Debord, Dep. II at 123-24)).

91. The Planes Moving Company filed an exception whereby it charges 20% more than the highest intrastate rates in the tariff. Another firm, Weil-Thoman, filed an exception whereby it charges 38% more than the highest intrastate rates in the tariff. In neither instance could Debord identify a standard that the KTC used to determine whether these rates complied with the statutory requirement that the rates be not "excessive." (CX 116 (Debord, Dep. II at 141-45)). The KTC permitted both of these firms to charge these increased rates. (CX 2 at KHGCA 7038).

92. Respondent does not have any formula it uses in determining what level of rate increase to seek. (CX 129 (Tolson, Dep. at 133, 142)). Nor does Respondent have any assumptions concerning what level of rate increase the KTC is likely to approve to go into effect. (CX 129 (Tolson, Dep. at 133)).

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93. When the intrastate rates are increased, the tariff has many rates which are adjusted upward. For instance, each rate table has 240 prices on it and there are seven rate tables. For a 5% rate increase, such as was contained in Supplement 71, the Kentucky Association prepares the new tables with the upwardly adjusted rates. Debord checks "three or four" numbers per page to see if the rate increase has been calculated accurately. (CX 116 (Debord, Dep. II at 137-40)). Debord conceded in his testimony that, "I'm sure there might be some math errors that arrive based upon not checking and auditing." (CX 116 (Debord, Dep. II at 140)).

6. The KTC Does Not Issue Written Decisions

94. When Respondent wants to change the tariff, it informs Debord of its proposal. Debord reviews and stamps the document requesting the change. (E.g., CX 108; see also RX 16 - RX 48; RX 102 ("Take to Bill Debord for acceptance stamp")). If the State does not act within thirty days, the change becomes effective. As Debord testified, "no action is approval." (CX 116 (Debord, Dep. II at 58-60)). As he further testified, "so, after the thirty days notice, then it becomes an approved tariff." (CX 116 (Debord, Dep. II at 60)).

95. The KTC does not issue a written decision when it permits rate increases to go into effect. (CX 116 (Debord, Dep. II at 77-78); CX 115 (King, Dep. at 34); CX 129 (Tolson, Dep. at 56, 130)). Further, the KTC does not set forth in writing any analysis of the collective rates contained in the tariff. (CX 129 (Tolson, Dep. at 130)).

7. The KTC Does Not Hold Hearings

96. Aside from hearings that were held "in the 1950's or early 1960's" when the tariff was first developed, the State has not held hearings to examine or analyze the collective rates contained in the Kentucky Association tariff. (CX 116 (Debord, Dep. I at 47-49); CX 116 (Debord, Dep. II at 67-69); CX 115 (King, Dep. at 33); JX 1 P45)).

97. The Kentucky Association's Board meetings are not publicly announced, and no group or individual representing

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consumers has ever attended a Board meeting. (CX 129 (Tolson, Dep. at 145)).

8. Interstate Rates

98. Respondent at times references increases in interstate rates when submitting a justification for increases in intrastate rates. F. 83, 84. The record does not indicate how the interstate rate levels are established. (See CX 129 (Tolson, Dep. at 193-94)). As Debord testified, the interstate rates are established by a private rate publishing agency and Debord did not know how that organization established the interstate rates. (CX 116 (Debord, Dep. II at 131-33)).

99. Movers are permitted to discount from the interstate tariff and do routinely discount off those rates. (CX 116 (Debord, Dep. II at 127-28)). Debord testified that he had seen a wide variety of discounts from the interstate rate including discounts as high as 70% and 75% from the interstate rate. (CX 116 (Debord, Dep. II at 128)).

100. Debord testified that he is "not aware of any" industry or government publication that tracks the actual cost of interstate moves as compared to the rates published in the interstate tariff. He also has not discussed that issue with movers. (CX 116 (Debord, Dep. II at 127-28)).

101. Debord testified that he has not compared and that it would be difficult to compare the rates in the Kentucky Association intrastate tariff with either the rates in the interstate tariff or with the actual rates charged for interstate moves. (CX 116 (Debord, Dep. II at 129-31); JX 1 P50).

102. The interstate tariff is not established using the standards set out in the Kentucky statutes. (CX 116 (Debord, Dep. II at 133-34)). As Debord testified, "my understanding, their goal is to let the industry charge as they wish, charge whoever they wish, whatever they wish and discriminate as they see fit." (CX 116 (Debord, Dep. II at 133-34)).

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III. RELEVANT PROVISIONS OF LAW

A. Constitution of the Commonwealth of Kentucky

1. Section 196 of the Kentucky Constitution provides, among other things, that the transportation of freight by common carrier ". . . shall be so regulated, by general law, as to prevent unjust discrimination." Ky. Const. § 196.

B. Statutes of the Commonwealth of Kentucky

2. Chapter 281 of the Kentucky Revised Statutes ("KRS") contains the principal provisions governing the regulation of motor common carriers of household goods in the Commonwealth of Kentucky. KRS Ch. 281.

3. The KTC has administrative powers and functions which include all administrative functions of the State in relation to motor transportation. (RX 75 (KRS 281.600)). The KTC is required to establish collective ratemaking procedures. (RX 80 (KRS 281.680(4))).

4. The term "common carrier" means any person who holds himself out to the general public to engage in the transportation by motor vehicle of persons or property in intrastate or interstate commerce over regular or irregular routes. (RX 69 (KRS 281.011)).

5. KRS 281.590 contains a "Declaration of Policy" ("Kentucky State Transportation Policy") regarding transportation in the Commonwealth of Kentucky. The Kentucky State Transportation Policy includes the following elements:

- to provide for fair and impartial regulation of all transportation subject to the provisions of Chapter 281;
- to promote safe, adequate, economical, and efficient service;
- to foster sound economic conditions among the several carriers;

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- to encourage the establishment and maintenance of reasonable charges for transportation service;
- to avoid unjust discrimination, undue preference, undue advantage, unfair competitive practices, and destructive competitive practices in the establishment and maintenance of transportation charges.

(RX 74).

6. KRS 281.590 provides that all of the provisions of Chapter 281 must be administered and enforced with a view to carry out the "Declaration of Policy" contained in KRS 281.590. (RX 74).

7. KRS 281.624 includes a definition of "household goods," as "personal effects and property used or to be used in a dwelling, when part of the equipment or supply of the dwelling, and similar property if the transportation of the effects or property is: (a) arranged and paid for by the householder, including transportation of property from a factory or store when the property is purchased by the householder with intent to use in his or her dwelling; or (b) arranged and paid for by another party." (RX 76).

8. KRS 281.640 describes the method of conduct of hearings before the Department, and specifically provides that nothing in the section shall prevent the commissioner of the Department from holding or conducting any hearing referred to in this section, in regard to rates, fares, and charges. (RX 78).

9. KRS 281.675(1) requires that "every rate, fare, and charge demanded or received by any certificate holder shall be just and reasonable, and every holder of a certificate shall furnish adequate, efficient, safe and reasonable service." (RX 79).

10. KRS 281.680(1) governs collective ratemaking by carriers of passengers and household goods. The subsection contains the following provisions:

- common carriers and irregular route common carriers of passengers and household goods must

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maintain a schedule of rates, charges, and classifications;

- a carrier must keep open for public inspection such parts of its schedule of rates, charges, and classifications as the Department deems necessary for public information;

- a carrier may become a participating party to a tariff published or issued by a tariff publishing agency;

- the "tariff-issuing agent" must file the carrier's tariff with the Department;

- each of the foregoing provisions is required to occur under administrative regulations promulgated by the department under KRS Chapter 13A.

(RX 80).

11. KRS 281.680(2) requires that a contract carrier's transportation contracts must be maintained on file with the department and requires that the contract carrier must "keep open for public inspection at designated offices such contracts as the department deems necessary for public information." The subsection further provides that the foregoing shall take place "under administrative regulations promulgated by the department under KRS Chapter 13A." (RX 80).

12. KRS 281.680(3) provides that "the department shall have full power concerning the control of rates and contracts under its administrative regulations." (RX 80).

13. KRS 281.680(4) provides the following:

- the department must establish collective ratemaking procedures.

- the department's collective ratemaking procedures must apply to all (a) commodities, and (b) services;

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for which the department prescribes (i) rates; (ii) charges; and (iii) classifications.

- the department's collective ratemaking procedures must assure that the revenues and costs of carriers are ascertained.

- the department's collective ratemaking procedures must be established for the purpose of "ensuring non-discriminatory rates, charges, and classifications for all shippers and users of transportation services for which the department prescribes rates."

(RX 80).

14. KRS 281.685(1) prohibits a common carrier or irregular route common carrier of household goods from charging an amount different than its tariff rate or charge for any regulated transportation service. The section also prohibits any refund, unreasonable preference, or rate discrimination. (RX 81).

15. KRS 281.690(1) contains the procedure for changes in the rates of household goods carriers. The section requires:

- changes in rates must be on 30 days notice to the KTC;

- the notice must state the proposed changes and effective date of the change;

- the carrier must give notice of the proposed rate change to interested persons as directed by the department in administrative regulations;

- proposed rate changes must be shown in new tariffs;

- the department may, by administrative regulations, allow for rate changes on less than 30 days' notice.

(RX 82).

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16. KRS 281.690(2) allows the department to schedule a hearing concerning the lawfulness of a proposed tariff rate change on its own motion or on the filing of a protest to the rate change. In the event of such a hearing, the following provisions apply:

- The department is obligated to mail written notice of the hearing to the applicant, protestant, and any other person who may be interested in or affected by the rate in the department's opinion;
- The department may suspend the proposed rate for up to 6 months from the proposed effective date by order stating the reasons for the suspension;
- The department must determine the just and reasonable rate if it finds the rate to be objectionable after hearing.

(RX 82).

17. KRS 281.695(1) provides that the department has the authority to fix and approve common carrier rates and insure adequate and convenient transportation service. In the event that the department finds a rate to be excessive, inadequate, unreasonable, or unjustly discriminatory after a hearing, the department may determine the just and reasonable rate. (RX 83).

18. KRS 281.705 authorizes the department to prescribe uniform systems of accounts and the filing of reports by motor carriers. (RX 85).

C. Regulations of the Kentucky Transportation Cabinet

19. Pursuant to KRS 281.600, the Department of Vehicle Regulation has the power to promulgate administrative regulations as it deems necessary to carry out the provisions of that chapter. (RX 75). Kentucky Administrative Regulations ("KAR") 601 KAR 1:050, 1:060, 1:070, and 1:080 were promulgated pursuant to KRS 281.600. 601 KAR 1:050, 1:060, 1:070, and 1:080. (RX 94, 95, 96, 98).

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20. 601 KAR 1:050 authorizes the KTC to fix or approve the rates, charges, and rules of carriers and prescribes the form of tariffs for carriers. This administrative regulation requires the filing and administration of just and reasonable rates. (RX 94).

21. 601 KAR 1:060 contains general rules governing tariffs and supplements. The regulation includes the following provisions:

- tariffs and supplements must be received at the KTC at least 30 days prior to the proposed effective date;
- the foregoing 30 day requirement does not apply to a tariff being filed (a) pursuant to an Order fixing rates; or (b) as the result of a hearing.
- specific provision governing the form and size of tariffs and information included in tariffs;
- a requirement that each common carrier and irregular route common carrier must maintain a copy of its intrastate tariffs at each of its terminals at which an agent is employed and its principal place of business;
- carriers' employees are ". . . required to give any desired information contained in such tariffs, to lend assistance to seekers of information therefrom, and to afford inquirers opportunity to examine any of such tariffs without requiring the inquirer to assign any reason for such desire."
- tariffs must contain the following: (a) table of contents; (b) list of participating carriers; (c) index of commodities; (d) explanation of abbreviations, symbols, and reference marks; (e) rules and regulations; (f) rates and charges expressed in dollars and cents per 100 pounds per mile or otherwise, as

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indicated; and (g) mileage or method of determining mileage where rates are based on distance from point of origin to point of destination.

(RX 95).

22. 601 KAR 1:070(2)(c) contains the requirements for changes in tariff rates and charges by household goods carriers. The requirements include the following:

- at or immediately prior to the time of filing the tariff or supplement containing the proposed changed rate or charge, the carrier must "notify all competing and connecting carriers having a situs within fifty (50) miles of his situs of such change";
- "similar notice must be given to any shipper or interested party requesting same";
- "if the change in the rates and charges involves an increase, then he shall also, and at the same time, cause a notice to be printed in a newspaper of general circulation in the area of his situs, which shall give notice of the proposed increase, the old rates and charges, the proposed rates and charges, and which shall state that any interested party may protest said increase by filing a protest with the Transportation Cabinet in accordance with its rules and administrative regulations."

(RX 96).

23. 601 KAR 1:070(2)(d) contains further requirements respecting the process of notice to shippers and other interested persons regarding tariff rate changes. The subsection contains the following requirements:

- Regular and irregular route common carrier truck operators (which includes household goods carriers);

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and tariff publishing agencies (such as Respondent) must maintain a list of shippers and interested parties.

- Any shipper desiring notice of rate changes of any carrier may request such carrier or its tariff publishing agent to be placed on the list for notices of rate changes.

- Once on the list, any such shipper or interested party must be provided with notice of any change in rates.

(RX 94).

24. 601 KAR 1:080(2) describes the requirements which must be met for charges for "accessorial" or "terminal" services provided for household goods carriers. These requirements include the following:

- charges for Accessorial and Terminal services must comply with the tariff filing requirements of 601 KAR 1:060;

- tariffs establishing such charges must separately state each service to be rendered and the charge therefore;

- tariffs may state an hourly labor charge applicable to miscellaneous labor service performed at the request of the shipper in connection with transportation when a tariff rate is not specifically provided;

- charges established for packing and unpacking shall be in amounts per container;

- charges for other services shall be stated on a unit or hourly basis, as appropriate;

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- no charge so established shall be lower than the cost of providing the service;
- the rate for transportation of goods shall not include the charge for any accessorial service; and
- no such services other than those for which separate charges have been so established shall be rendered by any such carrier.

(RX 98).

25. 601 KAR 1:080(3) prohibits discounting by household goods carriers. (RX 98).

26. 601 KAR 1:080(9) contains provisions governing the providing of estimates for household goods transportation services to shippers. (RX 98).

IV. ANALYSIS AND CONCLUSIONS OF LAW

A. Jurisdiction

The Complaint charges Respondent with violating Section 5 of the Federal Trade Commission Act, as amended ("FTC Act"). 15 U.S.C. § 45. Section 5(a)(2) of the FTC Act gives the Commission jurisdiction "to prevent persons, partnerships, or corporations . . . from using unfair methods of competition in or affecting commerce . . ." 15 U.S.C. § 45(a)(2); *Kaiser Aluminum & Chem. Corp. v. FTC*, 652 F.2d 1324, 1327 n.2 (7th Cir. 1981). See also *McLain v. Real Estate Bd. of New Orleans, Inc.*, 444 U.S. 232, 241-42 (1980); *Hosp. Bldg. Co. v. Trs. of Rex Hosp.*, 425 U.S. 738, 745-46 (1976). The FTC has jurisdiction to regulate intrastate activities of movers associations that affect interstate commerce. *Massachusetts Furniture & Piano Movers Ass'n, Inc. v. FTC*, 773 F.2d 391, 394 (1st Cir. 1985). Respondent does not dispute that the acts and practices of Respondent challenged in the Complaint have been and are now in or affecting commerce, as "commerce" is defined in the FTC Act, or that the Federal Trade Commission has jurisdiction in this proceeding. Stipulation P51; see also F. 7. Accordingly, the

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Commission has jurisdiction over Respondent and the subject matter of this proceeding.

B. Burden of Proof

Under Commission Rule of Practice 3.51(c)(1), "an initial decision shall be based on a consideration of the whole record relevant to the issues decided, and shall be supported by reliable and probative evidence." 16 C.F.R. § 3.51(c)(1). The Commission made amendments to its Rules of Practice, effective May 18, 2001. FTC Rules of Practice, Interim rules with request for comments, 66 Fed. Reg. 17,622 (April 3, 2001). Through these amendments, the Commission removed the requirement of Rule 3.51(c)(3) that the initial decision of an Administrative Law Judge ("ALJ") be supported by "substantial" evidence. 66 Fed. Reg. at 17,626. The Administrative Procedure Act, however, requires that an ALJ may not issue an order "except on consideration of the whole record or those parts thereof cited by a party and supported by and in accordance with the reliable, probative, and substantial evidence." Administrative Procedure Act ("APA") 5 U.S.C. § 556(d). According to Black's Law Dictionary, "probative evidence" means having the effect of proof; tending to prove, or actually proving an issue. "Substantial evidence" is defined in Black's Law Dictionary as such evidence that a reasonable mind might accept as adequate to support a conclusion. At the adjudicative level of these proceedings, any difference between "probative" evidence and "substantial" evidence is not dispositive under these standards. Therefore, all findings of fact in this Initial Decision are supported by reliable, probative, and substantial evidence.

The parties' burdens of proof are governed by Commission Rule 3.43(a), Section 556(d) of the APA, and case law. FTC Rules of Practice, Interim rules with request for comments, 66 Fed. Reg. 17,622, 17626 (April 3, 2001). Pursuant to Commission Rule 3.43(a), "counsel representing the Commission . . . shall have the burden of proof, but the proponent of any factual proposition shall be required to sustain the burden of proof with respect thereto." 16 C.F.R. § 3.43(a). Under the APA, "except as otherwise provided by statute, the proponent of a rule or order has

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the burden of proof." 5 U.S.C. § 556(d). See also *Steadman v. SEC*, 450 U.S. 91, 102 (1981) (APA establishes preponderance of the evidence standard of proof for formal administrative adjudicatory proceedings).

The government bears the burden of establishing a violation of antitrust law. *United States v. E.I. duPont de Nemours & Co.*, 366 U.S. 316, 334 (1961). "The antitrust plaintiff must present evidence sufficient to carry its burden of proving that there was [an anticompetitive] agreement." *Monsanto Co. v. Spray-Rite Serv. Corp.*, 465 U.S. 752, 763 (1984). Accordingly, Complaint Counsel bears the burden of demonstrating that Respondent's actions are anticompetitive.

"State action immunity is an affirmative defense as to which [defendant] bears the burden of proof." *Yeager's Fuel, Inc. v. Pennsylvania Power & Light Co.*, 22 F.3d 1260, 1266 (3d Cir. 1994); *FTC v. Ticor Title Ins. Co.*, 504 U.S. 621, 638 (1992) ("The party claiming the immunity must show that state officials have undertaken the necessary steps to determine the specifics of the price-fixing or ratesetting scheme."). See also *Patrick v. Burget*, 486 U.S. 94, 103 (1988) (respondents have not shown the active supervision required to result in state action immunity). Accordingly, Respondent bears the burden of demonstrating that its actions are shielded by the state action doctrine.

C. Relevant Market

The relevant market has two components, a geographic market and a product market. *H.J., Inc. v. Int'l Tel. & Tel.*, 867 F.2d 1531, 1537 (8th Cir. 1989). Even in a horizontal price fixing case analyzed under the per se rule, the relevant market must be defined. *Bogan v. Hodgkins*, 166 F.3d 509, 515 (2d Cir. 1999); *Double D Spotting Service, Inc. v. Supervalu, Inc.*, 136 F.3d 554, 559 (8th Cir. 1998). The relevant geographic market is the region "in which the seller operates, and to which the purchaser can practicably turn for supplies." *Tampa Elec. Co. v. Nashville Coal Co.*, 365 U.S. 320, 327 (1961). The relevant product or service market is "composed of products that have reasonable interchangeability for the purposes for which they are produced - price, use and qualities considered." *United States v. E.I. du Pont*

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de Nemours & Co., 351 U.S. 377, 404 (1956). The relevant market in this case is not a contested issue. Consumers seeking local or intrastate household goods moving services turn to household goods movers that provide local or intrastate moving services within the Commonwealth of Kentucky. F. 1, 2, 7. Therefore, for assessing the allegations of the Complaint, the relevant geographic market is the Commonwealth of Kentucky and the relevant product market is intrastate and local moving services in the Commonwealth of Kentucky.

D. Horizontal Agreement

The FTC Act's prohibition of "unfair methods of competition" encompasses violations of other antitrust laws, including Section 1 of the Sherman Act, which prohibits agreements in restraint of trade. *California Dental Ass'n v. FTC*, 526 U.S. 756, 762 n.3 (1999). The Commission relies on Sherman Act law in adjudicating cases alleging unfair competition. E.g., *FTC v. Indiana Fed'n of Dentists*, 476 U.S. 447, 451-52 (1986); *In re California Dental Ass'n*, 121 F.T.C. 190, 292 n.5 (1996).

Agreements among competitors to fix or set prices have been historically condemned as per se illegal. *United States v. Socony-Vacuum Oil Co.*, 310 U.S. 150, 218 (1940); see also *Arizona v. Maricopa County Med. Soc'y*, 457 U.S. 332 (1982). Further, ratemaking associations, in which members are otherwise competitors, that establish rates that apply to and across the membership constitute illegal price fixing arrangements, and absent the existence of an antitrust law defense, have been proscribed by the courts for nearly sixty years. *Georgia v. Pennsylvania R.R.*, 324 U.S. 439, 456, 460-61 (1945) (holding that collective rate publication by railroads constituted illegal price fixing under the antitrust laws).

Conduct similar to the conduct challenged in this action - collective intrastate ratemaking by an association of motor carriers - has been held to violate antitrust laws, if not immune under the state action doctrine. E.g., *United States v. Southern Motor Carriers Rate Conference*, 467 F. Supp. 471, 486 (N.D. Ga. 1979), *aff'd*, 702 F.2d 543 (5th Cir. 1983), *rev'd on other grounds*, 471 U.S. 48 (1985); *In re Massachusetts Furniture and Piano*

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Movers Ass'n, 102 F.T.C. 1176, 1201 (1983), aff'd, 102 F.T.C. 1176, 1224-26, rev'd on other grounds, 773 F.2d 391 (1st Cir. 1985); and *In re New England Motor Rate Bureau, Inc.*, 112 F.T.C. 200, 261 (1986), aff'd, 112 F.T.C. 263 (1989), rev'd on other grounds, 908 F.2d 1064 (1st Cir. 1990).

In *United States v. Southern Motor Carriers Rate Conference*, the district court held that defendants, rate bureaus who, on behalf of their members, published tariffs containing proposed rates for intrastate for-hire transportation of general commodities, were in violation of the Sherman Act. 467 F. Supp. at 486. The Supreme Court reversed, finding defendants' activities immunized by the state action doctrine, but characterizing the challenged collective ratemaking as "anticompetitive conduct." *Southern Motor Carriers Rate Conf., Inc. v. United States*, 471 U.S. 48, 65 (1985). The collective ratemaking process in this case is similarly anticompetitive conduct.

Respondent's conduct in this case is also similar to the conduct engaged in by a household goods carrier that was found to violate Section 5 of the FTC Act. *In re Massachusetts Furniture and Piano Movers Ass'n*, 102 F.T.C. 1176. There, the Administrative Law Judge held that concerted activity to influence or tamper with the level of prices, which putative competitors may either accept or reject, was violative of antitrust laws. 102 F.T.C. at 1200-01. The Commission agreed, stating, "plainly, the rate-making activities of the Association are per se unlawful under the antitrust laws." 102 F.T.C. at 1225. The Court of Appeals for the First Circuit agreed that collective ratemaking was price fixing, but remanded for further consideration the association's state action defense. 773 F.2d at 397.

Similarly, in *New England Motor Rate Bureau, Inc.*, the Administrative Law Judge held, and the Commission affirmed, that the Respondent's acts and practices of collectively formulating intrastate rates and issuing tariffs prevented customers from making price comparisons and constituted a per se violation of the Federal Trade Commission Act. 112 F.T.C. at 261, 285. The Court of Appeals for the First Circuit did not address whether collective ratemaking was price fixing, but

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reversed the Commission's decision on whether the active supervision requirement for state action immunity was present. 908 F.2d at 1077.

In *FTC v. Ticor Title Ins. Co.*, 112 F.T.C. 344 (1989), the Commission was confronted with an assertion that, under *Broadcast Music, Inc. v. CBS*, 441 U.S. 1 (1979), tariffs containing collective rates should not automatically be treated as a per se violation of the antitrust laws. The Commission rejected that argument: "Respondents have not advanced, and we cannot conceive of, any plausible efficiency justification for their price fixing activities." 112 F.T.C. at 465. The Commission's decision was affirmed by the Supreme Court, which stated, "this case involves horizontal price fixing No antitrust offense is more pernicious than price fixing." *Ticor*, 504 U.S. at 639. Thus, the Commission has held that a rate bureau that prepares a collective tariff cannot assert a legitimate justification for its horizontal agreement. In this case, Respondent has not raised one.

Respondent's sole argument is that its conduct is immune under the state action doctrine. Nowhere does Respondent argue that its conduct is not price fixing. The evidence establishes that Respondent has coordinated a price fixing agreement. F. 14-40. The household goods carriers that participate in the Kentucky Association are competitors with each other. F. 8. Respondent's actions facilitate the members' agreement on the schedule of local and intrastate rates that each will charge, as well as agreements on specific rates for additional tasks such as hauling a car or moving jet skis. F. 30. The members, through Respondent's efforts, collectively agree to file rate increases. F. 25-29. At least once every year for many years, Respondent has filed a tariff supplement raising the rates that members must charge approximately five to ten percent per year. F. 27. Members also have agreed to establish uniform hours for overtime charges and have agreed to specific "peak" summer dates when members increase their rates. F. 35. These are the types of horizontal agreements courts have found to be per se illegal in the past. Thus, unless the conduct here is shielded by the state action defense, it violates Section 5 of the Federal Trade Commission Act.

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E. State Action Defense

The state action doctrine was forged by the United States Supreme Court in *Parker v. Brown*, 317 U.S. 341 (1943). In *Parker*, the Supreme Court considered whether the Sherman Act prohibits anticompetitive actions taken by a state. Petitioner in that case was a raisin producer who brought suit against the California Director of Agriculture to enjoin the enforcement of a marketing plan adopted under the State's Agricultural Prorate Act. That statute restricted competition among food producers in the State in order to stabilize prices and prevent economic waste. Relying on principles of federalism and state sovereignty, the Supreme Court refused to find in the Sherman Act "an unexpressed purpose to nullify a state's control over its officers and agents." *Id.* at 351. The Sherman Act, the Supreme Court held, was not intended "to restrain state action or official action directed by a state." *Id.* Where the "state itself exercises its legislative authority in making the regulation and in prescribing the conditions of its application, . . . [the state] impose[s] the restraint as an act of government." *Id.* at 352.

Although *Parker* involved a suit against a state official, the Supreme Court subsequently recognized that *Parker*'s federalism rationale demanded that the state action exemption also apply in certain suits against private parties. E.g., *Southern Motor Carriers Rate Conference*, 471 U.S. 48. In *California Retail Liquor Dealers Assn. v. Midcal Aluminum, Inc.*, 445 U.S. 97 (1980), the Supreme Court established a rigorous two-pronged test to determine whether anticompetitive conduct engaged in by private parties should be deemed state action and thus shielded from the antitrust laws:

First, the challenged restraint must be "one clearly articulated and affirmatively expressed as state policy"; second, the policy must be "actively supervised" by the State itself.

Midcal, 445 U.S. at 105 (quoting *Lafayette v. Louisiana Power & Light Co.*, 435 U.S. 389, 410 (1978)).

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In *FTC v. Ticor Title Ins. Co.*, 504 U.S. 621, 638 (1992), the Supreme Court confirmed the two prong test established in *Midcal*. "Our insistence on real compliance with both parts of the *Midcal* test will serve to make clear that the State is responsible for the price fixing it has sanctioned and undertaken to control." *Id.* at 636. The Supreme Court provided further rationale for the state action doctrine:

Midcal confirms that while a State may not confer antitrust immunity on private persons by fiat, it may displace competition with active state supervision if the displacement is both intended by the State and implemented in its specific details. Actual state involvement, not deference to private price-fixing arrangements under the general auspices of state law, is the precondition for immunity from federal law. Immunity is conferred out of respect for ongoing regulation by the State, not out of respect for the economics of price restraint.

Id. at 633.

Respondent in this case asserts that the challenged conduct meets both prongs of the *Midcal* test and the standards established in *Ticor*. Complaint Counsel does not argue that the challenged restraint is not clearly articulated and affirmatively expressed as state policy. Rather, Complaint Counsel argues that the key issue is whether the policy is actively supervised by the Commonwealth of Kentucky.

1. Whether the Challenged Restraint is One Clearly Articulated and Affirmatively Expressed as State Policy

The challenged restraint in this case is the Respondent's filing with the State a collective tariff for intrastate household goods movers in Kentucky. The tariff sets forth the rates that household goods movers must charge for their moving services. F. 13-21, 27. Through its statutes and regulations, the Commonwealth of Kentucky has clearly articulated and affirmatively expressed a state policy in favor of collective ratemaking. For example, KRS

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281.680(4) provides that the KTC must establish collective ratemaking procedures; that the department's collective ratemaking procedures must assure that the revenues and costs of carriers are ascertained; and that the department's collective ratemaking procedures must be established for the purpose of "ensuring non-discriminatory rates, charges, and classifications for all shippers and users of transportation services for which the department prescribes rates." KRS 281.680(4). KRS 281.685(1) prohibits a common carrier or irregular route common carrier of household goods from charging an amount different from the rates, fares, or charges specified in its tariffs. The section also prohibits any refund, unreasonable preference, or rate discrimination. KRS 281.685(1). KRS 281.690(1) contains the procedure for changes in the rates of household goods carriers. KRS 281.690(1). Other examples of Kentucky's articulation of its State policy are set forth in Section III, *supra*.

In *Southern Motor Carriers Rate Conf. v. United States*, 471 U.S. 48 (1985), petitioners were rate bureaus composed of motor common carriers who submitted joint rate proposals on behalf of their members to the Public Service Commission for approval or rejection. The Supreme Court held that where the State statutes explicitly permitted collective ratemaking by common carriers, the rate bureaus' challenged actions were "taken pursuant to an express and clearly articulated state policy." *Id.* at 63. In this case, where Kentucky statutes and regulations explicitly permit collective ratemaking, Respondent's challenged actions are within a clearly articulated and affirmatively expressed state policy. Accordingly, Respondent has established the first prong of the state action doctrine.

2. Whether the Policy is Actively Supervised by the Commonwealth of Kentucky

The second prong, "the active supervision requirement[,]" mandates that the State exercise ultimate control over the challenged conduct." *Patrick*, 486 U.S. at 101 (citing *Southern Motor Carriers Rate Conference, Inc.*, 471 U.S. at 51 (noting that state public service commissions "have and exercise ultimate authority and control over all intrastate rates")); *Parker v. Brown*,

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317 U.S. at 352 (stressing that a marketing plan proposed by raisin growers could not take effect unless approved by a state board)). "The mere presence of some state involvement or monitoring does not suffice." Patrick, 486 U.S. at 101 (citation omitted).

The Supreme Court explained:

The active supervision prong of the Midcal test requires that state officials have and exercise power to review particular anticompetitive acts of private parties and disapprove those that fail to accord with state policy. Absent such a program of supervision, there is no realistic assurance that a private party's anticompetitive conduct promotes state policy, rather than merely the party's individual interests.

Patrick, 486 U.S. at 101.

In *Ticor*, the Supreme Court further explained: "the purpose of the active supervision inquiry . . . is to determine whether the State has exercised sufficient independent judgment and control so that the details of the rates or prices have been established as a product of deliberate state intervention, not simply by agreement among private parties." 504 U.S. at 634-35. "The analysis asks whether the State has played a substantial role in determining the specifics of the economic policy." *Id.* at 635.

The Supreme Court, in *Ticor*, noted that a "beginning point" of the active state supervision inquiry is to determine whether the State's program is in place, whether the program is staffed and funded, whether the program grants to the state officials ample power and the duty to regulate pursuant to the declared standards of state policy, whether the policy is enforceable in the state's courts, and whether the policy demonstrates some basic level of activity directed towards seeing that the private actors carry out the state's policy and not simply their own policy. *Ticor*, 504 U.S. at 637-38 (citing *New England Motor Rate Bureau*, 908 F.2d at 1071). However, the Supreme Court found that this level of supervision alone is not sufficient to constitute active supervision.

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Id. Instead, the Supreme Court held that "where prices or rates are set as an initial matter by private parties, subject only to a veto if the State chooses to exercise it, the party claiming the immunity must show that state officials have undertaken the necessary steps to determine the specifics of the price-fixing or ratesetting scheme." Id. at 638.

Although the Supreme Court did not enumerate what steps are necessary to determine whether the active supervision prong has been met, other courts addressing the active supervision requirement have identified specific state supervisory activities that they considered in determining whether the antitrust defendant could sustain its burden. *Union Carbide Corp. v. Florida Power & Light Co.*, 1993 U.S. Dist. LEXIS 21203, *27 (M.D. Fla. 1993) ("[a] court will examine several factors to assess a state's participation in operative decisions relating to the anticompetitive conduct at issue."). Some of these factors are: the state collects accurate business data, conducts economic studies, reviews profit levels and develops standards or measures such as operating ratios, conducts hearings, and issues a written decision. See, e.g., *Ticor*, 112 F.T.C. at 428, 432, 438; *Yeager's Fuel*, 22 F.3d at 1271-72; *DFW Metro Line Services v. Southwestern Bell Tel. Corp.*, 988 F.2d 601, 606 (5th Cir. 1993); *Stanislaus v. Pacific Gas & Elec. Co.*, 1994 U.S. Dist. LEXIS 21032, *78-79 (E.D. Cal. 1994); *Vernon v. Southern Calif. Gas Co.*, 1994 U.S. Dist. LEXIS 20900, *6-7 (C.D. Cal. 1994); *TEC Cogeneration Inc. v. Florida Power & Light Co.*, 86 F.3d 1028, 1029 (11th Cir. 1996). While no one of these measures is a "necessary step" to find active supervision, a finding, as in this case, that none of these measures have been taken clearly leads to the conclusion that the State has not taken adequate steps to actively supervise the challenged program. As set forth below, the evidence presented in this case demonstrates that the KTC has not sufficiently exercised its statutory power to review the challenged anticompetitive acts of Respondent and disapprove those actions that fail to accord with state policy.

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a. Respondent has not demonstrated that the KTC actively supervises the collective ratemaking process

The Kentucky regulatory structure provides for an active role for the KTC. The KTC's statutory policy is to avoid unfair competitive practices. KRS 281.590. The KTC is authorized to establish collective ratemaking procedures for the purpose of ensuring reasonable and non-discriminatory rates. KRS 281.680. In addition, Kentucky statutes allow the KTC to schedule hearings concerning the lawfulness of proposed tariff rate changes and to determine just and reasonable rates if, after a hearing, the department finds that rate to be objectionable. KRS 281.690. "Alone, however, [the] potential for supervision does not satisfy the second prong of the Midcal test." *DFW Metro Line Services*, 988 F.2d at 606. The KTC must actually fulfill the active role granted to it under the statute. See *id.*

As discussed below, the level of funding and staffing that the KTC has dedicated to approve collective rates indicates that the KTC is not actually fulfilling the active role granted to it. In addition, the KTC has not received or reviewed reliable data in connection with proposed rate increases, has not inquired into the justifications provided for rate increases, does not adequately analyze requests for rate increases, does not issue written decisions, and does not conduct hearings with respect to rate increases. Although all those measures are not requirements for finding active supervision, a determination that none of them have been met can only lead to the conclusion that the KTC does not actively supervise the collective ratemaking process.

(i) Program in place, but minimal staffing and funding

Among the factors described by the Supreme Court as a starting point for analyzing active supervision are whether the program is staffed and funded and whether the program grants to the state officials ample power and the duty to regulate pursuant to the declared standards of state policy. *Ticor*, 504 U.S. at 637-68. The KTC's review of household goods matters currently resides with its Division of Motor Carriers. F. 11. Ms. Denise King was the director of the Division of Motor Carriers at the time the Complaint was issued. F. 49. King, who spent only one

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to two percent of her time on household goods matters, testified that Mr. William Debord was responsible for the KTC's program with respect to household goods tariffs. F. 50. No one at the KTC other than Debord works on household goods tariffs and no employees report to Debord. F. 50, 54, 62.

Debord has had responsibility for household goods matters since 1979. F. 54. He is now a part-time employee. F. 54. He works a total of 100 hours per month. F. 54. In addition to household goods matters, Debord has responsibility for tariff filings and other matters involving passenger carriers such as taxis, regular route busses, airport limousines, airport shuttles, and charter bus operations, as well as trucking matters in general. F. 60. Debord's responsibilities involving household goods matters include investigating unlicensed movers, conducting seminars, updating power of attorney forms, and handling inquiries from the public. F. 59. The majority of his time is devoted to "compliance audits," which are on-site visits Debord makes to determine whether movers are offering discounts to consumers. F. 58.

The evidence in this case demonstrates a minimal level of staffing for the KTC's regulatory program. This level of staffing weighs against a finding that state officials exercise ample power pursuant to the declared standards of state policy.

(ii) Failure to verify statutory compliance

In *Midcal*, the Supreme Court found that active supervision was not adequate where "the State simply authorizes price setting and enforces the prices established by private parties. The State neither establishes prices nor reviews the reasonableness of the price schedules." 445 U.S. at 105-06. Under *Midcal*, active supervision is not established where "the State does not monitor market conditions or engage in any 'pointed reexamination' of the program." *Id.* As detailed in the Findings of Fact F. 63-102 and summarized below, the evidence presented in this case establishes that the KTC neither establishes prices nor performs a pointed reexamination of the reasonableness of the rates submitted.

The KTC does not establish the rates. See F. 15-17. Instead, the legislature has established collective ratemaking procedures.

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F. 94; KRS 281.680. The Kentucky legislature has determined that the rates that movers can charge must be, among other things, reasonable and not excessive. KRS 281.590; 281.690; 281.695. The Kentucky legislature has also determined that its policy includes to avoid unfair competitive practices. KRS 281.590. As summarized below, the KTC's review of rates to determine whether rates are reasonable does not satisfy Midcal and Ticor because the KTC does not collect or examine data to determine the reasonableness of the rates, receives only minimal justifications for increases to rates, does not have established standards to review the reasonableness of the rates, does not issue written decisions, and does not hold hearings. Thus, the KTC does not determine the specifics of the ratesetting scheme, as required by Ticor.

A Kentucky administrative regulation contains requirements that must be followed if movers change the tariff rates. The requirements include the following: "if the change in the rates and charges involves an increase, then he shall also, and at the same time, cause a notice to be printed in a newspaper of general circulation in the area of his situs which shall give notice of the proposed increase, the old rates, and charges, the proposed rates and charges, and which shall state that any interested party may protest said increase by filing a protest with the Transportation Cabinet in accordance with its rules and administrative regulations." 601 KAR 1:070(2)(c). Despite numerous rate increases over the years, a review of all exhibits and testimony in the record does not indicate that any such notices have ever been published. E.g., F. 74.

. Lack of collection or examination of data

Courts have evaluated whether a state receives reliable data or collects and verifies data from industry participants to determine whether an agency's review is sufficient. "Courts will further examine whether the state monitors conditions in the relevant market and engages in 'pointed reexamination of the program.'" *Union Carbide*, 1993 U.S. Dist. LEXIS 21203 at *28 (quoting *Midcal*, 445 U.S. at 106). The Commission, in *Ticor*, found no active supervision based in part on testimony by a state official

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that he "didn't have any idea what an efficient company's expenses would be for search and examination services." Ticor, 112 F.T.C. at 434. Further, the Commission found active review lacking where the agency "suffered from a dearth of information that would have enabled it to assess the appropriateness of the filed rates." Ticor, 112 F.T.C. at 432. The ALJ findings that were accepted by the Commission were favorably cited by the Supreme Court. Ticor, 504 U.S. at 638.

The Kentucky legislature has indicated that the State should review carriers' revenue and cost data. KRS 281.680(4). Despite this requirement, the KTC does not require household goods movers to submit cost and expense data to the State and does not collect or verify data from industry participants. F. 63-64, 67, 70, 71. For instance, movers do not routinely submit balance sheets and income statements to the KTC. F. 63. The KTC does receive "a limited number" of movers' financial statements on a voluntary basis. F. 63. However, Debord testified that such filings could "misrepresent the industry's economic conditions." F. 63.

Debord visits movers' offices to look at documents that movers keep on individual moves. F. 72. However, he does not review balance sheets, income statements, payroll documents, documents that show information about cost of capital, or documents that would allow him to analyze movers' profitability. F. 72.

Respondent also does not compile accurate data on movers' costs. F. 65. Respondent requests financial information from its members only when members file for an exception to an item in the tariff. F. 66. In those instances, the Kentucky Association requires the carrier to fill out a Form 4268. F. 66. These forms are received by the Kentucky Association's tariff committee, but are not routinely filed with the KTC. F. 66.

One analytical tool that states have used to review the reasonableness of rates is the use of a private consultant performing a return on capital analysis to evaluate a proposed rate increase. Ticor, 112 F.T.C. at 382. At one point, Kentucky did use one of these methods; it maintained a spreadsheet containing calculations of all movers' operating ratios. F. 45, 46. However,

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"sometime in the 1980's," Debord was told not to bother his supervisors with that analysis. F. 47.

. Minimal scrutiny of rate increase proposals

Courts also evaluate the scrutiny of rate increases performed by the state. In *Yeager's Fuel*, where defendant annually described its program to the state bureau, the Third Circuit held that such "reporting alone does not indicate active supervision because the Bureau does no more than review the reports." 22 F.3d at 1271. The Third Circuit did, however, find active supervision where it was "clear that the Bureau has considered these programs more extensively than simply reviewing [the] reports upon submission." *Id.*

In this case, there is nothing in the record to establish that the KTC does more than simply review and approve the submissions. See F. 75-94. The chairman of the tariff committee of Respondent testified that if Respondent wanted a rate increase, Respondent would inform Debord that the general membership felt that they needed an increase in order to offset costs. F. 79. See also F. 94; RX 102 ("Take to Bill Debord for acceptance stamp"). Debord testified that the KTC's efforts to determine costs were based on Debord's knowledge of the industry, Debord's conversations with trucking companies, and Debord's review of newspapers. F. 67. The record does not indicate that the KTC considered these rate increases more extensively than simply reviewing tariffs upon submission. See F. 75-94.

This minimal level of review is not sufficient to constitute a pointed examination. "Rubber stamp approval of private action does not constitute state action." *A.D. Bedell Wholesale Co. v. Philip Morris, Inc.*, 263 F.3d 239, 260 (3d Cir. 2001). "If review is not meaningful because a state regulator fails or is unable to evaluate whether rates are 'reasonable' as required by statute, then the rates are the product of private and not state action." *Ticor*, 112 F.T.C. at 434.

A general rate increase involves adjusting upward hundreds of prices contained in the tariff's rate charts. F. 93. Debord checks only a few of the numbers on each page for mathematical

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accuracy. F. 93. A ministerial checking of the information submitted, such as the mere checking of filed rates for mathematical accuracy, does not equate to active supervision. *Ticor*, 504 U.S. at 638.

In *Ticor*, state agencies were supplied with profit data and actual rates of return on capital. Even there, the Commission found active supervision absent because the State did not obtain information on what lay behind the profit figures. 112 F.T.C. at 416, 432; *Ticor Title Ins. Co. v. FTC*, 998 F.2d 1129, 1140 (3d Cir. 1993) (on remand from Sup. Ct.), cert. denied, 510 U.S. 1190 (1994). See also *Yeager's Fuel*, 22 F.3d at 1271 (active supervision requirement met where agency's approval of rate "amounted to more than mere examination for mathematical accuracy, for it has actually considered complaints about the [challenged rate] and decided that it served [state policy objectives].")

. Lack of review of justification for increases

Some courts have found active supervision where the record reflects references into the agency's inquiry into the reasonableness of the submitted rates. E.g., *DFW Metro Line Services*, 988 F.2d at 606. See also *Midcal*, 445 U.S. at 104 (citing *Cantor v. Detroit Edison Co.*, 428 U.S. 579 (1976) ("no antitrust immunity was conferred when a state agency passively accepted a public utility's tariff"). In this case, the record does not reflect the KTC's request for or review of justifications for rate increases. F. 75-86.

When Respondent seeks a rate increase, it submits a list of the changes it is requesting and a cover letter requesting that the increase be permitted to take effect. E.g., F. 82-84. Respondent does not submit, nor does the KTC require, any business records, economic study, cost studies, or cost justification data. F. 75. Debord testified that, generally, he learns of the justifications for planned rate increases at the Kentucky Association meetings. F. 80. However, because these are meetings of competitors, movers provide only general information and do not disclose details about their costs, revenues, or profit margins at Kentucky Association meetings. F. 70.

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The record contains numerous examples of collective rate increases where only minimal justification was provided. For instance, in December 2000, Respondent sought an 8% intrastate rate increase. F. 83. The written justification for that increase was a cover letter which discussed a 5% interstate rate increase. F. 83. Debord could not recall any oral statements made to justify this rate increase. F. 83. In 1999, Respondent sought a 10% increase in intrastate rates. F. 84. However, the written justification provided to the State was a cover letter which discussed a 5% interstate rate increase. F. 84. Debord could not recall any oral statements made to justify this rate increase. F. 84. Further, increases to interstate rates provide little justification to increases in intrastate rates because movers are permitted to and do discount from the interstate rates and because the KTC has not compared or evaluated interstate rates. F. 98-102.

. Lack of criteria to evaluate increases

Some courts have found active supervision where the agency review includes an application of criteria to consider competitive concerns. E.g., Stanislaus, 1994 U.S. Dist. LEXIS 21032 at *78-79. In Ticor, the Commission found no active supervision where there was no "program of supervision," but merely a "hit-and-miss review." 112 F.T.C. at 432.

Here, the KTC has no standards or measures in place for determining whether the rates they allow to go into effect are reasonable. F. 88-89. As Debord stated, there is no "written rule within the Cabinet that requires specific standards to be followed." F. 89. Debord testified that he does not receive any guidance from his superiors about tariff issues and he has not reported to anyone in that regard since 1979. F. 61. See also F. 52-53 (testimony of King that she had no standards for determining whether the rates were unjust or unreasonable; nor had she had a discussion with Debord about standards for determining whether the rates were unjust or unreasonable.)

In addition to not having standards in place to review the collective rate increases challenged in this case, the State also does not have standards in place to review rates filed by particular

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members that exceed the collective rates. See F. 90, 91. In one instance, a Participating Carrier filed an exception whereby it would charge 20% more than the highest intrastate rates in the tariff. F. 91. Another firm filed an exception whereby it would charge 38% more than the highest intrastate rates in the tariff. F. 91. Both of these firms operate in the same geographic region. F. 91. In neither instance could Debord identify a standard that the State would use to determine whether these rates complied with the statutory requirement that rates not be "excessive." F. 91. The KTC permitted both moving companies to charge these increased rates. F. 91.

. No written opinions

Whether a state issues written opinions evaluating rates has also been considered by courts in determining active supervision. E.g., DFW Metro Line Services, 988 F.2d at 606 (court found active supervision where there were published decisions that indicated that the agency had conducted other broad-based ratemaking proceedings); Yeager's Fuel, 22 F.3d at 1271 (active supervision found where agency issued a final staff report reviewing the challenged programs in response to inquiries from the legislature and protests by others); Vernon, 1994 U.S. Dist. LEXIS 20900 at *6-7 (active supervision found where agency issued two orders on the issue which contained lengthy consideration of the parties' positions, findings of fact, and conclusions of law and a detailed explanation for the agency's reasons for denying the requested rate.)

The KTC does not issue a written decision with respect to Respondent's tariff filings. F. 95. When the Kentucky Association institutes a change to the tariff--typically the change involves an increase in rates--it informs Debord of the change, and he stamps the document requesting the change "received." F. 94. After thirty days, the change takes effect. As Debord testified, "no action is approval." F. 94. When Respondent submitted papers to implement a rate increase in 1994, the Kentucky Association's notes of the filing bluntly stated, "take to Bill Debord for acceptance stamp." F. 94. Aside from stamping the document received, there is no statement issued by the KTC explaining why

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it permits the movers to increase prices that consumers must pay. F. 95.

. No hearings

Whether a state holds hearings to evaluate rates has also been considered by courts in determining active supervision. E.g., *TEC Cogeneration*, 86 F.3d at 1029 ("eleven-month contested administrative proceeding" and "extensive and contested agency proceedings"); *Destec Energy, Inc. v. Southern Cal. Gas Co.*, 5 F. Supp. 2d 433, 457-58 (S.D. Tex. 1997) (contested hearings, circulation of proposed resolutions for public notice and comment before being adopted, and a "fact-finding process" that "required public proceedings in which ratepayers and the public were represented"); *Lease Lights, Inc. v. Public Serv. Co. of Okla.*, 849 F.2d 1330, 1334 (10th Cir. 1988) (the Commission conducted three days of public hearings involving extensive testimony and over 100 exhibits). In *Southern Motor Carriers*, the government conceded that prong two of Midcal was met where the District Court found that "although [the] submitted rates could go into effect without further state activity, the State had ordered and held ratemaking hearings on a consistent basis, using the industry submissions as the beginning point." *Ticor*, 504 U.S. at 639; see also *Southern Motor Carriers*, 471 U.S. at 66.

In this case, the KTC has not held ratemaking hearings on a consistent basis. F. 96. Kentucky held hearings in the "1950's or early 1960's," when the State first approved the Kentucky Association's tariff. F. 96. The Kentucky legislature itself has specifically identified public hearings as one of the ways the KTC is expected to consider rates. See, e.g., KRS 281.640, 281.690(2), 281.695(1). However, Kentucky has not held any hearings "since the 1950's or early 1960's" to examine or analyze the collective rates contained in the Kentucky Association tariff. F. 96.

The KTC also does not receive any informal input from groups advocating on behalf of consumers and has not received or considered complaints about the rates in the tariffs. F. 73. The record is clear that the Kentucky Association meetings that Debord attends are not open to the public and have never been attended by members of the public. F. 73.

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b. Respondent's arguments not persuasive**(i) Respondent has not met the requirements of Midcal and Ticor**

Respondent argues that it has met its burden of showing active supervision. Respondent states that Kentucky has in place statutes and regulations pertaining to movers and asserts that Debord, because of his experience, can judge whether rates are reasonable based on his discussions with movers and his review of general industry information. Post Trial Brief of Respondent at 11-14. Respondent asserts that Debord's review constitutes active supervision because: (a) Debord has knowledge of the industry and reviews general information such as the Wall Street Journal; (b) Debord attends meetings where movers discuss rates; and (c) witnesses have testified that rate increases have been discussed beforehand. Respondent's Post Trial Proposed Findings of Fact PP74-77, 92-93. Further, Respondent argues that active supervision exists, even though the record makes clear that the only input the State receives on the appropriate level of rates is provided in the discussions between the movers and the person who is responsible for regulating them. The evidence shows that year after year the KTC has permitted the private actor's collective rates and rate increases to go into effect as proposed.

Respondent cites no case where such a minimal level of state activity has been held to constitute active supervision. The evidence presented by Respondent falls far short of the "active supervision" required by Midcal, Ticor and other relevant cases.

(ii) Intervention by the KTC does not indicate active supervision

Respondent states that the KTC has asked the Administrative Law Judge to permit the KTC to intervene in this proceeding and argues that there could be no more dramatic indication of the existence of "active supervision" than this fact. Post Trial Brief of Respondent at 7-8. Respondent asserts that the KTC's decision to intervene shows "enthusiastic interest" in the regulatory program. Id. at 20. While through its motion to intervene, the KTC did seek permission to "offer evidence and testimony at the hearing," the

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KTC did not appear at the hearing. Trial Volume 1, March 16, 2004 ("Trial Tr.") at 4.

The Post Trial brief of the KTC adds no new arguments or analysis to this proceeding. It contains two conclusory sentences asserting that the KTC actively supervised tariffs and that collectively set rates provide great benefit. However, KTC's brief contains no recitation or analysis of facts. The KTC's brief lists a number of statutes and regulations in support of its assertion that prong one of the Mical test is met, but provides no proposed findings of fact to indicate steps it has taken to actively supervise the program.

In *Midcal*, where the state agency responsible for administering the program did not appeal the decision of the California Court of Appeal, the Supreme Court noted that the State had "shown less than an enthusiastic interest in its wine pricing system." 445 U.S. at 112 n.12. In *Ticor*, the states filed briefs as amici curiae arguing that Respondent's broad immunity rule would not serve the state's best interests. 504 U.S. at 635. Unlike in *Midcal* and *Ticor*, in this case, the state agency responsible for administering the program has expressed its support of the program and its opposition to this action. However, Respondent has cited no cases that have held that the mere act of intervening in a proceeding rises to the level of a necessary step to actively supervise the regulatory scheme. The evidence presented indicates that, despite the intervention, the KTC has not taken the necessary steps required by *Midcal*, *Ticor*, and other relevant cases.

(iii) Reliance on excluded evidence is inappropriate

In the Post Trial Order issued in this case on March 17, 2004, the parties were instructed not to "cite to documents that are not in evidence." Post Trial Order at 2. Nevertheless, in its Post Trial Brief, Intervenor KTC cites to the Declaration of Maxwell C. Bailey Submitted in Support of KTC Motion to Intervene ("Bailey Declaration"). Post Trial Brief of KTC at 1. That declaration had been offered into evidence by the Kentucky Association as exhibit RX 227 and was excluded from evidence as unreliable hearsay. Pretrial Hearing, March 16, 2004 ("Pretrial Tr.") at 11-12. No

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party took the deposition of Secretary Bailey. The KTC was given the opportunity to have Secretary Bailey's views considered by the Court. In granting the KTC's motion to intervene, the KTC was provided the opportunity to call Secretary Bailey as a witness at trial, as long as he was first deposed. Intervention Order at 3-4. The KTC did not call Secretary Bailey as a witness at trial. Trial Tr. at 45; Pretrial Tr. at 16.

Respondent, rather than citing directly to the excluded declaration, cites to and quotes from the KTC's Post Trial Brief to summarize the position of the KTC in this proceeding. Respondent's Post Trial Brief at 8-9. The portions of the KTC Brief that are cited by Respondent are a recitation of the Bailey declaration. Respondent's arguments that rely upon the Bailey Declaration are disregarded.

F. Summary

The evidence in this case demonstrates that, while the KTC has a program in place for regulating prices, it has not taken adequate measures to supervise the collective ratemaking process. "The mere potential for state supervision is not an adequate substitute for a decision by the State." *Ticor*, 504 U.S. at 638. See also *Am. Tel. & Tel. Co. v. IMR Capital Corp.*, 888 F. Supp. 221, 240 (D. Mass. 1995) ("theoretical power to regulate such behavior" is not enough to make such behavior the State's own and immunize it from federal law). The methods and procedures utilized by the KTC have failed to verify compliance with the existing regulatory framework. Accordingly, the second prong of the Midcal test has not been met. Because Complaint Counsel has established antitrust liability and Respondent's conduct is not immunized by the state action doctrine, the appropriate remedy is ordered.

G. Remedy

Pursuant to Section 5 of the Federal Trade Commission Act, upon determination that the challenged practice is an unfair method of competition, the Commission "shall issue . . . an order requiring such . . . corporation to cease and desist from using such method of competition or such act or practice." 15 U.S.C. §

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45(b); *FTC v. Nat'l Lead Co.*, 352 U.S. 419, 428 (1957) (Commission is authorized "to enter an order requiring the offender to 'cease and desist' from using such unfair method."). The Supreme Court has held that the Commission has wide discretion in determining the type of order that is necessary to bring an end to the unfair practices found to exist, so long as the remedy selected has a reasonable relation to the proven violations. *Jacob Siegel Co. v. FTC*, 327 U.S. 608, 611 (1946); *National Lead*, 352 U.S. at 429.

Complaint Counsel attached a proposed order to its Post Trial Brief. However, Complaint Counsel failed to include any argument, case law, or discussion of authority in support of its proposed order. Moreover, neither Respondent nor KTC addressed, objected to, or otherwise discussed the specific provisions of the proposed order submitted by Complaint Counsel.

In this case, Complaint Counsel has proven that Respondent engaged in horizontal price fixing through its collective ratemaking practices. The remedy necessary to bring an end to this unfair practice is an order requiring Respondent to cease and desist from collective ratemaking. The Order requires Respondent, inter alia, to cease and desist from developing tariffs that contain collective rates for the intrastate transportation of property or other related services, goods or equipment and to provide notice of this Order to its members. Because existing tariffs are based upon a finding of unlawful collective ratemaking, Respondent must take actions to cancel or withdraw existing tariffs. Further, since the violation of law has now been found, this Order remains in effect until active supervision is demonstrated to the Commission. This Order is narrowly tailored and reasonably related to the violation of law found to exist.

V. SUMMARY OF CONCLUSIONS OF LAW

1. The Federal Trade Commission has jurisdiction over the subject matter of this proceeding and over Respondent Kentucky Household Goods Carriers Association.

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2. The acts and practices charged in the Complaint in this matter took place in or affecting commerce within the meaning of the Federal Trade Commission Act, as amended.

3. The relevant market is intrastate and local moving services in the Commonwealth of Kentucky.

4. Respondent Kentucky Association, its members, officers, and directors, are engaged in a continuing combination and conspiracy to fix rates charged by motor common carriers for the intrastate transportation of property within the Commonwealth of Kentucky.

5. The acts and practices of the Kentucky Association in the Commonwealth of Kentucky, as set forth in paragraph 4 above, constitute unfair methods of competition in violation of Section 5 of the Federal Trade Commission Act, as amended.

6. The state action defense is an affirmative defense to an antitrust action. The Respondent bears the burden of establishing the defense.

7. Respondent has not established that the Kentucky Transportation Cabinet ("KTC") took the regulatory steps necessary to make the collective rates in Respondent Kentucky Association's tariff the State's own.

8. Respondent's activities were not subject to active supervision by the Commonwealth of Kentucky through the KTC.

9. Respondent's activities in the Commonwealth of Kentucky, as set forth in paragraphs 4 and 5 above, are not immune from liability under Section 5 of the Federal Trade Commission Act by reason of the state action defense.

10. Complaint Counsel met its burden of proof in support of the Violation of Section 5 of the Federal Trade Commission Act charged in the Complaint.

11. Relief designed to remedy Respondent Kentucky Association's unlawful activities and to require Respondent to cease and desist from collective ratemaking is appropriate.

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12. The Order entered herewith is necessary and appropriate to remedy the violation of law found to exist.

ORDER

I.

IT IS ORDERED that, for the purposes of this Order, the following definitions shall apply:

1. "Respondent" or "KHGCA" means the Kentucky Household Goods Carriers Association, Inc., its officers, executive board, committees, parents, representatives, agents, employees, successors, and assigns;
2. "Carrier" means a common carrier of property by motor vehicle;
3. "Intrastate transportation" means the pickup or receipt, transportation, and delivery of property hauled between points within the Commonwealth of Kentucky for compensation by a carrier authorized by the Kentucky Transportation Cabinet's Division of Motor Carriers to engage therein;
4. "Member" means any carrier or other person that pays dues or belongs to KHGCA or to any successor corporation;
5. "Tariff" means the publication stating the rates of a carrier for the transportation of property between points within the Commonwealth of Kentucky, including updates, revisions, and/or amendments, including general rules and regulations;

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6. "Rate" means a charge, payment, or price fixed according to a ratio, scale, or standard for direct or indirect transportation service;

7. "Collective rates" means any rate or charge established under any contract, agreement, understanding, plan, program, combination, or conspiracy between two or more competing carriers, or between any two or more carriers and Respondent; and

8. "Person" means both natural persons and artificial persons, including, but not limited to, corporations, unincorporated entities, and governments.

II.

IT IS FURTHER ORDERED that Respondent, its successors and assigns, and its officers, agents, representatives, directors, and employees, directly or through any corporation, subsidiary, division, or other device, shall immediately cease and desist from entering into, and shall, within 120 days after service upon it of this Order, cease and desist from adhering to or maintaining, directly or indirectly, any contract, agreement, understanding, plan, program, combination, or conspiracy to fix, stabilize, raise, maintain, or otherwise interfere or tamper with the rates charged by two or more carriers for the intrastate transportation of property or related services, goods, or equipment, including, but not limited to:

1. Knowingly preparing, developing, disseminating, or filing a proposed or existing tariff that contains collective rates for the intrastate transportation of property or other related services, goods, or equipment;

2. Providing information to any carrier about rate changes considered or made by any other carrier employing the publishing services of Respondent prior to the time at which such rate change becomes a matter of public record;

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3. Inviting, coordinating, or providing a forum (including publication of an informational bulletin) for any discussion or agreement between or among competing carriers concerning rates charged or proposed to be charged by carriers for the intrastate transportation of property or related services, goods, or equipment;
4. Suggesting, urging, encouraging, persuading, or in any way influencing members to charge, file, or adhere to any existing or proposed tariff provision which affects rates, or otherwise to charge or refrain from charging any particular price for any services rendered or goods or equipment provided;
5. Maintaining any rate or tariff committee or other entity to consider, pass upon, or discuss intrastate rates or rate proposals; and
6. Preparing, developing, disseminating, or filing a proposed or existing tariff containing automatic changes to rates charged by two or more carriers.

III.

IT IS FURTHER ORDERED that Respondent shall, within 120 days after service upon it of this Order:

1. Take such action pursuant to the laws of the Commonwealth of Kentucky as may be necessary to effectuate the cancellation and withdrawal of all tariffs and any supplements thereto on file with the Kentucky Transportation Cabinet's Division of Motor Carriers that establish rates for transportation of property or related services, goods, or equipment by common carriers in the Commonwealth of Kentucky;

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2. Terminate all previously executed powers of attorney and rate and tariff service agreements, between it and any carrier utilizing its services, authorizing the publication and/or filing of intrastate collective rates within the Commonwealth of Kentucky;
3. Take action pursuant to the laws of the Commonwealth of Kentucky to cancel those provisions of its articles of incorporation, by-laws, and procedures and every other rule, opinion, resolution, contract, or statement of policy that has the purpose or effect of permitting, announcing, stating, explaining, or agreeing to any business practice enjoined by the terms of this Order; and
4. Take action pursuant to the laws of the Commonwealth of Kentucky to amend its by-laws to require members of KHGCA to observe the provisions of this Order as a condition of membership in KHGCA.

IV.

IT IS FURTHER ORDERED that, within fifteen (15) days from service upon it of this Order, Respondent shall mail or deliver a copy of this Order to each current member of Respondent engaged in the transportation of household goods, and until the requirements of Paragraph VII have been met, to each new member engaged in the transportation of household goods within ten (10) days of each such member's acceptance by Respondent.

V.

IT IS FURTHER ORDERED that Respondent shall notify the Commission at least thirty (30) days prior to any proposed change in Respondent, such as dissolution, assignment, or sale resulting in the emergence of a successor corporation, or any other proposed change in the corporation which may affect compliance obligations arising out of this Order.

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VI.

IT IS FURTHER ORDERED that Respondent shall file a written report within six (6) months from the date of service upon it of this Order, and annually on the anniversary date of the original report, until the requirements of paragraph VII have been met, and at such other times as the Commission may require by written notice to Respondent, setting forth in detail the manner and form in which Respondent has complied with this Order.

VII.

IT IS FURTHER ORDERED that this Order shall remain in effect until such time as Respondent demonstrates to the Commission that the Commonwealth of Kentucky has taken adequate measures to actively supervise the clearly articulated and affirmatively expressed state policy to regulate collective rates of carriers for the transportation of property between points within the Commonwealth of Kentucky or until modified or vacated by the Commission.

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IN THE MATTER OF

SAN JUAN IPA, INC.

CONSENT ORDER, ETC., IN REGARD TO ALLEGED VIOLATIONS OF
SEC. 5 OF THE FEDERAL TRADE COMMISSION ACTDocket C-4142; File No. 0310181
Complaint, June 30, 2005--Decision, June 30, 2005

This consent order, among other things, prohibits the respondent from entering into, participating in, implementing, or otherwise facilitating any combination, conspiracy, agreement, or understanding between or among any physicians (1) to negotiate on behalf of any physician with any payor; (2) to deal, refuse to deal, or threaten to refuse to deal with any payor; (3) regarding any term, condition, or requirement upon which any physician deals, or is willing to deal, with any payor, including, but not limited to, price terms; or (4) not to deal individually with any payor, or not to deal with any payor through any arrangement other than the respondent. The order also requires the respondent, for three years, to notify the Commission at least sixty days before entering into any arrangement with any physicians under which the respondent would act as their messenger or agent with payors regarding contracts or terms of dealing. In addition, the order requires the respondent, for three years, to notify the Commission before participating in a qualified risk-sharing arrangement or qualified clinically integrated arrangement.

Participants

For the Commission: *Steve Vieux, Aaron Hewitt, David R. Pender, Daniel P. Ducore, and Louis Silvia.*

For the Respondent: *Daniel L. Wellington, Fulbright & Jaworski.*

COMPLAINT

Pursuant to the provisions of the Federal Trade Commission Act, as amended, 15 U.S.C. § 41 *et seq.*, and by virtue of the authority vested in it by said Act, the Federal Trade Commission (“Commission”), having reason to believe that San Juan IPA, Inc. (“Respondent”), has violated Section 5 of the Federal Trade Commission Act, 15 U.S.C. § 45, and it appearing to the Commission that a proceeding by it in respect thereof would be in

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the public interest, hereby issues this Complaint stating its charges in that respect as follows:

NATURE OF THE CASE

1. This matter concerns horizontal agreements among competing physicians in the Farmington, New Mexico, area to fix prices charged to health care plans and other third-party payors (“payors”), and to refuse to deal with payors except on collectively agreed terms. These physicians, who constitute most of the physicians in the Farmington area, orchestrated their price-fixing agreements and joint refusals to deal through Respondent.

RESPONDENT

2. Respondent is a not-for-profit corporation, organized, existing, and doing business under and by virtue of the laws of the State of New Mexico, with its principal address at 2325 East 30th Street, Farmington, NM 87401.

THE FTC HAS JURISDICTION OVER RESPONDENT

3. At all times relevant to this Complaint, Respondent has been engaged in the business of contracting with payors, on behalf of Respondent’s members, for the provision of physician services to persons for a fee.

4. Except to the extent that competition has been restrained as alleged herein, Respondent’s physician members have been, and are now, in competition with each other for the provision of physician services in the Farmington, New Mexico, area to persons for a fee.

5. Respondent was founded by, is controlled by, and carries on business for the pecuniary benefit of its physician members. Accordingly, Respondent is a corporation within the meaning of Section 4 of the Federal Trade Commission Act, as amended, 15 U.S.C. § 44.

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6. Respondent's general business practices, including the acts and practices herein alleged, are in or affecting "commerce" as defined in the Federal Trade Commission Act, as amended, 15 U.S.C. § 44.

OVERVIEW OF MARKET AND PHYSICIAN COMPETITION

7. Farmington is located in San Juan County, in northwestern New Mexico. The closest major cities to Farmington are Albuquerque, the largest city in New Mexico, 181 miles to the southeast; and Santa Fe, the state capital and second largest city in the state, 205 miles to the southeast.

8. Respondent is an independent physician association ("IPA") with approximately 120 physician members, all of whom are licensed to practice allopathic or osteopathic medicine in the State of New Mexico.

9. To be marketable in the Farmington area, a payor's health insurance plan must include in its physician network a large number of primary care and specialist physicians who practice in that area. Members of Respondent account for approximately 80% of the physicians who independently practice in the Farmington area.

10. Physicians contract with payors to establish the terms and conditions, including price terms, under which they render services to the subscribers to the payors' health insurance plans ("insureds"). Physicians entering into such contracts often agree to lower compensation to obtain access to additional patients made available by the payors' relationship with insureds. These contracts may reduce payors' costs and enable them to reduce the price of insurance, and thereby result in lower medical care costs for insureds. Competing physicians, absent agreements among them on the terms, including price, on which they will provide

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services to insureds, decide individually whether to enter into payor contracts to provide services to insureds, and what prices they will accept pursuant to such contracts.

11. Competing physicians sometimes use a “messenger” to facilitate their contracting with payors in ways that do not constitute an unlawful agreement on prices and other competitively significant terms. Legitimate messenger arrangements can reduce contracting costs between payors and physicians. A messenger can be an efficient conduit to which a payor submits a contract offer, with the understanding that the messenger will transmit that offer to a group of physicians and inform the payor how many physicians across specialties accept the offer or have a counteroffer. At less cost, payors can thus discern physician willingness to contract at particular prices, and assemble networks, while physicians can market themselves to payors and assess contracting opportunities. A messenger may not negotiate prices or other competitively significant terms, however, and may not facilitate coordination among physicians on their responses to contract offers.

**OVERVIEW OF RESPONDENT’S CONTRACTING ON
BEHALF OF ITS PHYSICIAN MEMBERS**

12. Payors and physicians in the Farmington area agree on physician compensation by using either a percentage discount from the physician’s full billed charges, or a fixed percentage of the Medicare Resource Based Relative Value Scale (“RBRVS”). RBRVS is a system used by the Centers for Medicare and Medicaid Services to determine the amount to pay physicians for the services they render to Medicare patients. Several payors in the Farmington area make contract offers to individual physicians or groups at a price level specified as some percentage of the RBRVS fee for a particular year (*e.g.*, “110% of 2004 RBRVS”). Payors often prefer this method of determining price to discounts off full billed charges, because the former method allows payors

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to know exactly the price they will pay physicians. Contracts that determine price based on a discount off billed charges, in contrast, allow physicians unilaterally to increase their billed charges.

13. Respondent was incorporated in 1986 to help its physician members determine whether to participate in payor contracts. Respondent's physician members participate in Respondent's payor contracts by signing a "Membership Agreement" that requires physician signatories to accept fee schedules specified in the contracts that Respondent signs with payors. Payor contracts include fee schedules that apply to the entire membership. The fee schedules contain either all set prices, all discounts off full billed charges, or both such pricing methods, which vary by physician service.

14. Respondent's physician members agreed to refuse offers payors made to them individually and to demand that payors deal for physician services solely with Respondent – thereby hindering payors' efforts to establish competitive physician networks in the Farmington area. Due to Respondent's large share of Farmington-area physicians, payors have repeatedly acceded to Respondent's price demands for all of its physician members.

**RESPONDENT FIXED PRICES BY DEMANDING A SET
DISCOUNT OFF BILLED CHARGES**

15. From 1998 until 2001, Respondent was a one-third owner in a joint venture called Lifecourse Management Services ("LMS"). LMS designated certain seats on its Board of Directors specifically for Respondent's members. LMS had a Contracts Committee, half of whose members were Respondent's representatives. This committee adopted a policy of demanding payment from payors for physician services at full billed charges less a fixed 10% discount, and refusing to contract with payors that did not meet LMS's demand. LMS contracted with payors under this policy until LMS dissolved in July 2001. Respondent estimated that these contracts increased physician prices by a range of 10% to 62%.

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16. Since July 2001, Respondent maintained at least three such pre-existing LMS contracts – all of which automatically renewed every year.

17. After LMS dissolved, Respondent signed contracts with at least nine payors. As to each contract, Respondent adopted LMS's pricing policy. It successfully bargained on its members behalf for full billed charges less a fixed 10% discount. These contracts automatically renewed every year. Respondent's negotiations with Admar Corporation ("Admar") and Southwest HeathNet, Inc. ("Southwest") exemplify Respondent's tactic of joint price-setting.

18. In January 2001, LMS demanded that Admar, a preferred provider organization, pay LMS's physician members at full billed charges less 10%. The following month, while LMS and Respondent were preparing for LMS's dissolution, Admar offered individual physician members of Respondent a contract with prices at 145% of RBRVS for medicine and surgery codes. Respondent's Executive Director instructed its physician members to disregard Admar's direct contract proposals, because Respondent was in the process of negotiating a contract with Admar. Admar was thereafter unable to contract directly with any of Respondent's physician members, increasing the pressure on Admar to contract with Respondent. In September 2001, Admar agreed to pay Respondent's physician members at full billed charges less 10%.

19. Southwest is a physician-hospital organization in Cortez, Colorado. In early 2001, Southwest contacted LMS, seeking to gain access to Respondent's physician members in the Farmington, New Mexico area, for payors with which Southwest had contracts. LMS insisted that the payors dealing with Southwest could have access to Respondent's members only by agreeing to pay them their full billed charges less 10%. After LMS dissolved, Southwest dealt directly with Respondent, which adopted LMS's bargaining position and was successful in negotiating contracts with Southwest's payors on these terms.

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Respondent estimated that these contracts increased prices for its member physicians by as much as 60%.

RESPONDENT ALSO NEGOTIATED OTHER FIXED-PRICE PAYOR CONTRACTS

20. During its negotiations with other payors, including Blue Cross & Blue Shield of New Mexico (“Blue Cross”) and Molina Healthcare of New Mexico (“Molina”) (formerly known as Cimarron Health Plan), Respondent purported to be a legitimate messenger, but did not act accordingly. Instead, Respondent coordinated its physician members’ responses to these payors’ price offers, by not transmitting certain offers to its physician members for their unilateral consideration and demanding prices from these payors on the collective behalf of its physician members.

21. In May 2001, Blue Cross made a price offer to Respondent for transmission to its members. Respondent did not transmit this offer to its physician members. Instead, in August 2001, Respondent demanded from Blue Cross, on behalf of its physician members, prices for non-surgical codes that were approximately 17% to 19% higher than Blue Cross’s offer. Later that month, Blue Cross increased its price offer to Respondent’s physician members by 2% to 14% more than the initial Blue Cross offer. Respondent again did not transmit this offer to its physician members. In October 2001, Blue Cross again increased its offer to Respondent’s physician members, to prices ranging from 10% to 16% higher than the initial Blue Cross offer. Only at that point did Respondent transmit this offer to its physician members, who accepted it.

22. Throughout 2002, Molina attempted to contract directly with individual physician members of Respondent for its commercial product. Virtually every member of Respondent insisted on contracting with Molina only through Respondent, however, and rejected Molina’s direct contract proposals. In January 2003, Molina proposed 140% of RBRVS to Respondent

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for all physician services. Respondent did not transmit this proposal to its physician members, and, without having asked its members for their individual price terms, told Molina that the physicians would require higher prices for surgical codes. In March 2003, Molina increased its price offer by more than 10% over its initial proposal for surgical codes, and Respondent transmitted this offer to its physician members – the majority of whom refused it. Molina requested the names of the minority of physicians who indicated their willingness to accept Molina’s price terms, but Respondent refused to comply – thus bolstering the group’s collective leverage by stifling Molina’s ability to enter individual with certain members. To date, Molina has not entered into a commercial contract with the Respondent, and as a result Molina has been unable to obtain a viable network of physicians in the Farmington area for its commercial product.

RESPONDENT’S PRICE FIXING IS NOT JUSTIFIED

23. Respondent’s joint negotiation of fees has not been, and is not, reasonably related to any efficiency-enhancing integration.

RESPONDENT’S ACTIONS HAVE HAD SUBSTANTIAL ANTICOMPETITIVE EFFECTS

24. Respondent’s actions described in Paragraphs 13 through 22 of this Complaint have had, or tend to have, the effect of restraining trade unreasonably and hindering competition in the provision of physician services in the Farmington area in the following ways, among others:

- a. price and other forms of competition among Respondent’s members were unreasonably restrained;
- b. prices for physician services were increased; and
- c. health plans, employers, and individual consumers were deprived of the benefits of competition among physicians.

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**RESPONDENT'S CONDUCT CONSTITUTES A
VIOLATION OF THE
FEDERAL TRADE COMMISSION ACT**

25. The combination, conspiracy, acts, and practices described above constitute unfair methods of competition in violation of Section 5 of the Federal Trade Commission Act, 15 U.S.C. § 45. Such combination, conspiracy, acts, and practices, or the effects thereof, are continuing and will continue or recur in the absence of the relief herein requested.

WHEREFORE, THE PREMISES CONSIDERED, the Federal Trade Commission on this thirtieth day of June, 2005, issues its complaint against Respondent.

DECISION AND ORDER

The Federal Trade Commission (“Commission”), having initiated an investigation of certain acts and practices of the San Juan IPA, Inc. (“San Juan IPA”), hereinafter sometimes referred to as “Respondent,” and Respondent having been furnished thereafter with a copy of the draft of Complaint that counsel for the Commission proposed to present to the Commission for its consideration and which, if issued, would charge Respondent with violations of Section 5 of the Federal Trade Commission Act, as amended, 15 U.S.C. § 45; and

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

The Commission having thereafter considered the matter and having determined that it had reason to believe that Respondent has violated the said 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 and having duly considered the comment received from an interested person pursuant to Section 2.34 of its Rules, now in further conformity with the procedure described in Commission Rule 2.34, 16 C.F.R. § 2.34, the Commission hereby issues its Complaint, makes the following jurisdictional findings and issues the following Order:

1. Respondent San Juan IPA is a not-for-profit corporation, organized, existing, and doing business under and by virtue

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of the laws of the State of New Mexico, with its principal address at 2325 East 30th Street, Farmington, NM 87401.

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

ORDER**I.**

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

- A. “Respondent” means San Juan IPA, Inc., its officers, directors, employees, agents, attorneys, representatives, successors, and assigns; and the subsidiaries, divisions, groups, and affiliates controlled by San Juan IPA, Inc., and the respective officers, directors, employees, agents, attorneys, representatives, successors, and assigns of each.
- B. “ Medical group practice” means a bona fide, integrated firm in which physicians practice medicine together as partners, shareholders, owners, members, or employees, or in which only one physician practices medicine.
- C. “Participate” in an entity means (1) to be a partner, shareholder, owner, member, or employee of such entity, or (2) to provide services, agree to provide services, or offer to provide services, to a payor through such entity. This definition also applies to all tenses and forms of the word “participate,” including, but not limited to, “participating,” “participated,” and “participation.”
- D. “Payor” means any person that pays, or arranges for the payment, for all or any part of any physician services for itself or for any other person. “Payor” includes any person that develops, leases, or sells access to networks of

physicians.

- E. “Person” means both natural persons and artificial persons, including, but not limited to, corporations, unincorporated entities, and governments.
- F. “Physician” means a doctor of allopathic medicine (“M.D.”) or a doctor of osteopathic medicine (“D.O.”).
- G. “Preexisting contract” means a contract that was in effect on the date of the receipt by a payor that is a party to such contract of notice sent, pursuant to Paragraph V.A.3 of this Order, of such payor’s right to terminate such contract.
- H. “Principal address” means either (1) primary business address, if there is a business address, or (2) primary residential address, if there is no business address.
- I. “Qualified clinically-integrated joint arrangement” means an arrangement to provide physician services in which:
 - 1. all physicians that participate in the arrangement participate in active and ongoing programs of the arrangement to evaluate and modify the practice patterns of, and create a high degree of interdependence and cooperation among, the physicians who participate in the arrangement, in order to control costs and ensure the quality of services provided through the arrangement; and
 - 2. any agreement concerning price or other terms or conditions of dealing entered into by or within the arrangement is reasonably necessary to obtain significant efficiencies through the joint arrangement.
- J. “Qualified risk-sharing joint arrangement” means an arrangement to provide physician services in which:

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1. all physicians who participate in the arrangement share substantial financial risk through their participation in the arrangement and thereby create incentives for the physicians who participate jointly to control costs and improve quality by managing the provision of physician services, such as risk-sharing involving:
 - a. the provision of physician services for a capitated rate from payors;
 - b. the provision of physician services for a predetermined percentage of premium or revenue from payors;
 - c. the use of significant financial incentives (*e.g.*, substantial withholds) for physicians who participate to achieve, as a group, specified cost-containment goals; or
 - d. the provision of a complex or extended course of treatment that requires the substantial coordination of care by physicians in different specialties offering a complementary mix of services, for a fixed, predetermined price, where the costs of that course of treatment for any individual patient can vary greatly due to the individual patient's condition, the choice, complexity, or length of treatment, or other factors; and
2. any agreement concerning price or other terms or conditions of dealing entered into by or within the arrangement is reasonably necessary to obtain significant efficiencies through the joint arrangement.

II.

IT IS FURTHER ORDERED that Respondent, directly or indirectly, or through any corporate or other device, in connection with the provision of physician services in or affecting commerce,

as “commerce” is defined in Section 4 of the Federal Trade Commission Act, 15 U.S.C. § 44, cease and desist from:

- A. Entering into, adhering to, participating in, maintaining, organizing, implementing, enforcing, or otherwise facilitating any combination, conspiracy, agreement, or understanding between or among any physicians:
 - 1. to negotiate on behalf of any physician with any payor;
 - 2. to deal, refuse to deal, or threaten to refuse to deal with any payor;
 - 3. regarding any term, condition, or requirement upon which any physician deals, or is willing to deal, with any payor, including, but not limited to, price terms; or
 - 4. not to deal individually with any payor, or not to deal with any payor through any arrangement other than Respondent;
- B. Exchanging or facilitating in any manner the exchange or transfer of information among physicians concerning any physician’s willingness to deal with a payor, or the terms or conditions, including price terms, on which the physician is willing to deal;
- C. Attempting to engage in any action prohibited by Paragraphs II.A or II.B, above; and
- D. Encouraging, suggesting, advising, pressuring, inducing, or attempting to induce any person to engage in any action that would be prohibited by Paragraphs II.A through II.C above.

PROVIDED, HOWEVER, that nothing in Paragraph II of this Order shall prohibit any agreement involving, or conduct by, Respondent, that is reasonably necessary to form, participate in, or take any action in furtherance of a qualified risk-sharing joint arrangement or a qualified clinically-integrated joint arrangement,

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so long as the arrangement does not restrict the ability, or facilitate the refusal, of physicians who participate in it to deal with payors on an individual basis or through any other arrangement.

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

- A. Respondent shall, pursuant to each purported qualified risk-sharing joint arrangement or purported qualified clinically-integrated joint arrangement (“Arrangement”), for three (3) years from the date this Order becomes final, notify the Secretary of the Commission in writing (“Qualified Arrangement Notification”) at least sixty (60) days prior to:
1. Participating in, organizing, or facilitating any discussion or understanding with or among any physicians in such Arrangement relating to price or other terms or conditions of dealing with any payor; or
 2. Contacting a payor, pursuant to an Arrangement to negotiate or enter into any agreement concerning price or other terms or conditions of dealing with any payor, on behalf of any physician in such Arrangement.

PROVIDED, HOWEVER, that the Qualified Arrangement Notification required by this Paragraph III.A is not required for negotiations or agreements with subsequent payors pursuant to any Arrangement for which the Qualified Arrangement Notification was given.

- B. Respondent shall include the following information in the Qualified Arrangement Notification:
1. for each physician participant, his or her name, address, telephone number, medical specialty, medical practice group, if applicable, and the name of each hospital where he or she has privileges;

2. a description of the Arrangement, its purpose, function, and area of operation;
 3. a description of the nature and extent of the integration and the efficiencies resulting from the Arrangement;
 4. an explanation of the relationship of any agreement on prices, or contract terms related to price, to furthering the integration and achieving the efficiencies of the Arrangement;
 5. a description of any procedures proposed to be implemented to limit possible anticompetitive effects resulting from the Arrangement or its activities; and
 6. all studies, analyses, and reports, that were prepared for the purpose of evaluating or analyzing competition for physician services in the Farmington, New Mexico, area, including, but not limited to, the market share of physician services.
- C. If, within sixty (60) days from the Commission's receipt of the Qualified Arrangement Notification, a representative of the Commission makes a written request for additional information to the Respondent, then Respondent shall not engage in any conduct described in Paragraph III.A.1 or Paragraph III.A.2 of this Order prior to the expiration of thirty (30) days after substantially complying with such request for additional information, or such shorter waiting period as may be granted in writing from the Bureau of Competition. The expiration of any waiting period described herein without a request for additional information or without the initiation of an enforcement proceeding shall not be construed as a determination by the Commission, or its staff, that a violation of the law, or of this Order, may not have occurred. Further, receipt by the Commission from Respondent of any Qualified Arrangement Notification, pursuant to Paragraph III of this

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Order, is not to be construed as a determination by the Commission that any such Arrangement does or does not violate this Order or any law enforced by the Commission.

IV.

IT IS FURTHER ORDERED that, for a period of three (3) years from the date this Order becomes final, Respondent shall notify the Secretary of the Commission in writing (“Messenger Notification”) at least sixty (60) days prior to entering into any arrangement with any physicians under which Respondent would act as a messenger, or an agent on behalf of those physicians, with payors regarding contracts or terms of dealing. The Messenger Notification shall include the proposed geographic area of operation, a copy of any proposed physician participation agreement (including a copy of each form intended to be used to communicate with physician participants regarding contracts or terms of dealing with payors), a description of the proposed arrangement’s purpose and function, a description of any resulting efficiencies expected to be obtained through the arrangement, and a description of procedures to be implemented to limit possible anticompetitive effects, such as those prohibited by this Order. Messenger Notification is not required for Respondent’s subsequent acts as a messenger pursuant to an arrangement for which the Messenger Notification has been given. Receipt by the Commission from Respondent of any Messenger Notification, pursuant to Paragraph IV of this Order, is not to be construed as a determination by the Commission that any action described in such Messenger Notification does or does not violate this Order or any law enforced by the Commission.

V.

IT IS FURTHER ORDERED that Respondent shall:

- A. Within thirty (30) days from the date that this Order becomes final, send by first-class mail, return receipt requested, a copy of this Order and the Complaint to:

1. each physician who participates, or has participated, in Respondent since January 1, 2003;
 2. each officer, director, manager, and employee of Respondent; and
 3. the chief executive officer of each payor with which Respondent has a record of having been in contact since January 1, 2003, regarding contracting for the provision of physician services, and include in such mailing the notice specified in Appendix A to this Order;
- B. Terminate, without penalty or charge, and in compliance with any applicable laws, any preexisting contract with any payor for the provision of physician services, at the earlier of: (1) the termination date specified in a written request from a payor to Respondent to terminate such contract, or (2) the earliest termination or renewal date (including any automatic renewal date) of such contract; *provided, however*, a preexisting contract may extend beyond any such termination or renewal date no later than one (1) year from the date that the Order becomes final if, prior to such termination or renewal date, (a) the payor submits to Respondent a written request to extend such contract to a specific date no later than one (1) year from the date that this Order becomes final, and (b) Respondent has determined not to exercise any right to terminate; *provided further*, that any payor making such request to extend a contract retains the right, pursuant to part (1) of Paragraph V.B of this Order, to terminate the contract at any time;
- C. Within ten (10) days of receiving a written request from a payor, pursuant to Paragraph V.B(1) of the Order, distribute, by first-class mail, return receipt requested, a copy of that request to each physician participating in Respondent as of the date Respondent receives such request;

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- D. For a period of three (3) years from the date that this Order becomes final:
1. Distribute by first-class mail, return receipt requested, a copy of this Order and the Complaint to:
 - a. each physician who begins participating in Respondent, and who did not previously receive a copy of this Order and the Complaint, within thirty (30) days of the time that such participation begins;
 - b. each payor that contracts with Respondent for the provision of physician services, and that did not previously receive a copy of this Order and the Complaint, within thirty (30) days of the time that such payor enters into such contract; and
 - c. each person who becomes an officer, director, manager, or employee of Respondent, and who did not previously receive a copy of this Order and the Complaint, within thirty (30) days of the time that he or she assumes such responsibility with Respondent; and
 2. Annually publish a copy of this Order and the Complaint in an official annual report or newsletter sent to all physicians who participate in Respondent, with such prominence as is given to regularly featured articles;
- E. File a verified written report within sixty (60) days from the date that this Order becomes final, annually thereafter for three (3) years on the anniversary of the date this Order becomes final, and at such other times as the Commission may by written notice require. Each such report shall include:
1. a detailed description of the manner and form in which Respondent has complied and is complying with this Order; and

2. copies of the return receipts required by Paragraphs V.A, V.C, and V.D.1 of this Order; and
- F. Notify the Commission at least thirty (30) days prior to any proposed (1) dissolution of Respondent, (2) acquisition, merger or consolidation of Respondent, or (3) any other change in Respondent that may affect compliance obligations arising out of the order, including but not limited to assignment, the creation or dissolution of subsidiaries, or any other change in Respondent.

VI.

IT IS FURTHER ORDERED that Respondent shall notify the Commission of any change in its principal address within twenty (20) days of such change in address.

VII.

IT IS FURTHER ORDERED that, for the purpose of determining or securing compliance with this Order, Respondent shall permit any duly authorized representative of the Commission:

- A. Access, during office hours and in the presence of counsel, to inspect and copy all books, ledgers, accounts, correspondence, memoranda, calendars, and other records and documents in its possession, or under its control, relating to any matter contained in this Order; and
- B. Upon five (5) days' notice to Respondent, and in the presence of counsel, and without restraint or interference from it, to interview officers, directors, or employees of Respondent.

VIII.

IT IS FURTHER ORDERED that this Order shall terminate on June 30, 2025.

Decision and Order

Appendix A

[letterhead of San Juan IPA]

[name of payor's CEO]

[address]

Dear _____:

Enclosed is a copy of a complaint and a consent order ("Order") issued by the Federal Trade Commission against San Juan IPA, Inc. ("San Juan IPA").

Pursuant to Paragraph V.B of the Order, San Juan IPA must allow you to terminate, upon your written request, without any penalty or charge, any contracts with San Juan IPA that were in effect prior to your receipt of this letter.

Paragraph V.B of the Order also provides that, if you do not terminate a contract, the contract will terminate on its earliest termination or renewal date (including any automatic renewal date). However, at your request, the contract may be extended to a date no later than [appropriate date, pursuant to the Order, to be filled in by San Juan IPA]. If you choose to extend the term of the contract, you may later terminate the contract at any time.

Any request either to terminate or to extend the contract should be made in writing, and sent to me at the following address: [address].

Sincerely,

Analysis of Agreement Containing Consent Order to Aid Public Comment

The Federal Trade Commission has accepted, subject to final approval, an agreement containing a proposed consent order with San Juan IPA, Inc. (San Juan IPA). The agreement settles charges that San Juan IPA violated Section 5 of the Federal Trade Commission Act, 15 U.S.C. § 45, by orchestrating and implementing agreements among physician members of San Juan IPA to fix prices and other terms on which they would deal with health plans, and to refuse to deal with such purchasers except on collectively-determined terms. The proposed consent order has been placed on the public record for 30 days to receive comments from interested persons. Comments received during this period will become part of the public record. After 30 days, the Commission will review the agreement and the comments received, and decide whether it should withdraw from the agreement or make the proposed order final.

The purpose of this analysis is to facilitate public comment on the proposed order. The analysis is not intended to constitute an official interpretation of the agreement and proposed order, or to modify their terms in any way. Further, the proposed consent order has been entered into for settlement purposes only and does not constitute an admission by San Juan IPA that it violated the law or that the facts alleged in the complaint (other than jurisdictional facts) are true.

The Complaint

The allegations of the complaint are summarized below.

San Juan IPA is an independent physician association (IPA) with approximately 120 physician members. San Juan IPA does business in the Farmington, New Mexico, area, which is located in the northwestern corner of New Mexico.

Analysis

San Juan IPA's physician members account for approximately 80% of the physicians independently practicing (that is, those not employed by area hospitals) in and around the Farmington area. To be marketable in the Farmington area, a payor's health insurance plan must have access to a large number of physicians who are members of San Juan IPA.

Although San Juan IPA purported to operate as a "messenger model"¹-- that is, an arrangement that does not facilitate horizontal agreements on price -- it engaged in various actions that demonstrated or orchestrated such agreements. San Juan IPA coordinated joint pricing among its physician members in three ways. First, San Juan IPA was a party to contracts that a joint venture, in which San Juan IPA participated, collectively negotiated on behalf of San Juan IPA's members. Second, San Juan IPA, on behalf of its physician members, collectively negotiated contracts for payment of physician services at full billed charges less a 10% discount, made collective demands, and refused to deal with payors. Finally, San Juan IPA coordinated its members' responses to payor offers for fixed-price contracts, by not transmitting certain offers to its physician members and collectively demanding prices, on behalf of its physician members, from these payors.

San Juan IPA succeeded in forcing numerous health plans to raise the fees paid to its physician members, and thereby raised the cost of medical care in the Farmington area. San Juan IPA engaged in no efficiency-enhancing integration sufficient to justify

¹ Some arrangements can facilitate contracting between health care providers and payors without fostering an illegal agreement among competing physicians on fees or fee-related terms. One such approach, sometimes referred to as a "messenger model" arrangement, is described in the 1996 Statements of Antitrust Enforcement Policy in Health Care jointly issued by the Federal Trade Commission and U.S. Department of Justice, at 125. See <http://www.ftc.gov/reports/hlth3s.htm#9>.

joint negotiation of fees. By orchestrating agreements among its members to deal only on collectively-determined terms, and actual or threatened refusals to deal with health plans that would not agree to those terms, San Juan IPA violated Section 5 of the FTC Act.

The Proposed Consent Order

The proposed order is designed to remedy the illegal conduct charged in the complaint and prevent its recurrence. It is similar to recent consent orders that the Commission has issued to settle charges that physician groups engaged in unlawful agreements to raise fees they receive from health plans.

The proposed order's specific provisions are as follows:

Paragraph II.A prohibits San Juan IPA from entering into or facilitating any agreement between or among any physicians: (1) to negotiate with payors on any physician's behalf; (2) to deal, not to deal, or threaten not to deal with payors; (3) on what terms to deal with any payor; or (4) not to deal individually with any payor, or to deal with any payor only through an arrangement involving San Juan IPA.

Other parts of Paragraph II reinforce these general prohibitions. Paragraph II.B prohibits San Juan IPA from facilitating exchanges of information between physicians concerning whether, or on what terms, to contract with a payor. Paragraph II.C bars attempts to engage in any action prohibited by Paragraph II.A or II.B, and Paragraph II.D proscribes inducing anyone to engage in any action prohibited by Paragraphs II.A through II.C.

As in other Commission orders addressing providers' collective bargaining with health care purchasers, certain kinds of agreements are excluded from the general bar on joint negotiations. San Juan IPA would not be precluded from engaging in conduct that is reasonably necessary to form or participate in legitimate joint contracting arrangements among

Analysis

competing physicians in a “qualified risk-sharing joint arrangement” or a “qualified clinically-integrated joint arrangement.” The arrangement, however, must not facilitate the refusal of, or restrict, physicians in contracting with payors outside of the arrangement.

As defined in the proposed order, a “qualified risk-sharing joint arrangement” possesses two key characteristics. First, all physician participants must share substantial financial risk through the arrangement, such that the arrangement creates incentives for the physician participants jointly to control costs and improve quality by managing the provision of services. Second, any agreement concerning reimbursement or other terms or conditions of dealing must be reasonably necessary to obtain significant efficiencies through the joint arrangement.

A “qualified clinically-integrated joint arrangement,” on the other hand, need not involve any sharing of financial risk. Instead, as defined in the proposed order, physician participants must participate in active and ongoing programs to evaluate and modify their clinical practice patterns in order to control costs and ensure the quality of services provided, and the arrangement must create a high degree of interdependence and cooperation among physicians. As with qualified risk-sharing arrangements, any agreement concerning price or other terms of dealing must be reasonably necessary to achieve the efficiency goals of the joint arrangement.

Paragraph III, for three years, requires San Juan IPA to notify the Commission before participating in contracting with health plans on behalf of a qualified risk-sharing joint arrangement or a qualified clinically-integrated joint arrangement. Paragraph III also sets out the information necessary to make the notification complete.

Paragraph IV, for three years, requires San Juan IPA to notify the Commission before entering into any arrangement to act as a messenger, or as an agent on behalf of any physicians, with payors

regarding contracts. Paragraph IV also sets out the information necessary to make the notification complete.

Paragraph V.A requires San Juan IPA to distribute the complaint and order to all physicians who have participated in San Juan IPA, and to payors that negotiated contracts with San Juan IPA or indicated an interest in contracting with San Juan IPA. Paragraph V.B requires San Juan IPA, at any payor's request and without penalty, or, at the latest, within one year after the order is made final, to terminate its current contracts. Paragraph V.C requires San Juan IPA to distribute payor requests for contract termination to all physicians who participate in San Juan IPA. Paragraph V.D.1.b requires San Juan IPA to distribute the complaint and order to any payors that negotiate contracts with San Juan IPA in the next three years.

Paragraphs VI and VII of the proposed order impose various obligations on San Juan IPA to report or provide access to information to the Commission to facilitate monitoring San Juan IPA's compliance with the order.

The proposed order will expire in 20 years.

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IN THE MATTER OF

TELEBRANDS CORP.

ORDER

IT IS HEREBY ORDERED THAT Complaint Counsel's December 17, 2004 Motion for Leave to Substitute an Amended Version of Answering Brief and Cross Appeal Brief and Errata Sheet, as supplemented by Complaint Counsel's January 7, 2005 filing, is granted.

IN THE MATTER OF

CHICAGO BRIDGE & IRON COMPANY N.V.

**ORDER GRANTING CB&I'S MOTION FOR
CLARIFICATION; DENYING AS
MOOT CB&I'S MOTION FOR STAY; DIRECTING
FURTHER BRIEFING ON COMPLAINT COUNSEL'S
MOTION FOR CLARIFICATION; AND
DENYING AS MOOT CB&I'S REQUEST TO TOLL THE
TIME PERIOD
FOR FILING PETITION FOR REVIEW**

On February 1, 2005, Respondents Chicago Bridge & Iron Company N.V. and Chicago Bridge & Iron Company ("CB&I") filed a petition to reconsider the Commission's opinion and to modify the Commission's order, issued pursuant to Section 7 of the Clayton Act, 15 U.S.C. § 18, and Section 5 of the FTC Act, 15 U.S.C. § 45. CB&I also filed a separate motion for clarification of the Commission's order or, in the alternative, for a stay pending judicial review. On January 31, 2005, Complaint Counsel filed a petition for reconsideration to clarify Respondents' obligations as to the Pitt-Des Moines and CB&I corporate names. This Order addresses the parties' motions for clarification and Respondents' motion for stay and request to toll the time period for filing a petition for review.

1. Respondents' Motion for Clarification or, in the Alternative, for a Stay

Respondents request clarification that Paragraph III of the Commission's order – which requires CB&I to reorganize its Industrial Division and, to the extent necessary, its water tank unit into two separate, stand-alone divisions for purposes of divesting one of them – is a divestiture provision within the meaning of Section 5(g)(4) of the FTC Act, 15 U.S.C. § 45(g)(4), and is therefore automatically stayed pending Respondents' appeal. In

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the alternative, Respondents request that the Commission exercise its discretion to stay Paragraph III of its order pending resolution of all appeals. Complaint Counsel supports entry of a discretionary stay of Paragraph III but asserts that Paragraph III is not on its face a divestiture provision and thus would not be stayed. We believe that the provision requiring the division of assets makes sense only as an immediate forerunner to divestiture in this case. It would therefore be premature for CB&I to divide these assets until CB&I's motion for reconsideration and rights of judicial review have been exhausted. We further believe that Paragraph III is, in essence, a divestiture provision within the meaning of Section 5(g)(4) and is subject to the statutory stay.

For these reasons, we conclude that Respondents' motion for clarification should be granted. Accordingly, we deny CB&I's motion for a discretionary stay as moot. CB&I has not requested a stay of any other provision of the Commission's order. As a consequence, Paragraphs III, IV and V of the order are stayed by operation of law; no other provision is stayed.

2. Complaint Counsel's Motion for Clarification

Complaint Counsel seeks clarification of the Commission's order to make clear that the purchaser of the assets sold pursuant to the Commission's divestiture order shall not acquire any right or title to the CB&I name. CB&I agrees that this clarification is appropriate.

Complaint Counsel also seeks clarification of the Commission's order to require transfer, along with the divested entity, of the Pitt-Des Moines ("PDM") name and mark. In response, CB&I has represented that its "one-year, non-renewable, non-exclusive transitional license" to the use of PDM's mark expired on February 6, 2002.

We are concerned that a potential purchaser of the divested entity may need to use either the PDM or the CB&I name during a transitional period, in order to restore competition in the relevant

markets. PDM remains a party to this proceeding, but it has not objected or otherwise presented its views on the inclusion of the PDM name in assets of the divested entity. CB&I appears to have assumed, in its response to Complaint Counsel's motion to clarify, that it would not be called on to allow use of its own name, in the event PDM's name could not be included in the divested entity's assets.

Accordingly, we direct that CB&I and PDM each file a brief within 10 calendar days of service of this order, addressing the feasibility of granting a transitional license that would allow a purchaser to use its name, and setting forth any consequences of granting such a license that it wishes to call to the Commission's attention. In addition, because CB&I has argued that certain contract provisions would make it difficult if not impossible to assign its contracts, CB&I should discuss why a transitional license to its name would not address that problem. Complaint Counsel is granted leave but is not required to file a response within 10 calendar days after service of Respondents' briefs on this issue. If Complaint Counsel does not intend to file a response, we direct Complaint Counsel to so inform the Commission within the 10-day time period.

3. CB&I's Request to Toll Statutory Time Period for Seeking Judicial Review

CB&I has requested that the Commission toll the time period for filing its petition for judicial review until the Commission has acted on CB&I's petition to the Commission, which seeks reconsideration pursuant to Section 3.55 or, in the alternative, Section 3.72(a) of the Commission's rules. 16 C.F.R. §§ 3.55, 4.72(a). On March 10, 2005, CB&I filed a petition for review in the United States Court of Appeals for the Fifth Circuit. Accordingly, we deny this portion of CB&I's motion as moot.

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Accordingly,

IT IS ORDERED THAT the Commission's order in this matter, issued on January 6, 2005, is clarified to provide that division of CB&I's assets pursuant to Paragraph III is a divestiture-related provision within the meaning of Section 5(g)(4) of the FTC Act, 15 U.S.C. § 45(g)(4);

IT IS FURTHER ORDERED THAT CB&I and PDM each file a brief within 10 calendar days of service of this order, addressing the feasibility and consequences of granting a transitional license allowing the purchaser of the divested entity to use its (CB&I's or PDM's) name for a transitional period after divestiture;

IT IS FURTHER ORDERED THAT Complaint Counsel respond to CB&I's and PDM's briefs on this issue within 10 calendar days of service or, in the alternative, give the Commission notice within that 10-day time period that no response is necessary; and

IT IS FURTHER ORDERED THAT CB&I's request that the Commission toll the time period for filing its petition for judicial review until the Commission has acted on CB&I's petition to the Commission is denied as moot.

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IN THE MATTER OF

HOECHST AG**ORDER REOPENING AND MODIFYING ORDER**

On December 16, 2004, Aventis S.A. (“Aventis”), the successor to respondents Hoechst AG and Rhone-Poulenc S.A. named in the consent order issued by the Commission on January 18, 2000, in Docket No. C-3919 (“Order”), filed its Petition of Aventis to Reopen and Modify Order (“Petition”), seeking to set aside those provisions relating to the divestiture of Aventis’ interest in Rhodia, a French chemical company. For the reasons stated below, the Commission has determined to grant the Petition.

When the Order was initially issued, the Commission determined that the merger of Rhone-Poulenc and Hoechst would, among other things, increase the likelihood of coordinated interaction in the market for cellulose acetate.¹ Specifically, the Commission found that Rhodia competes in the U.S. cellulose acetate market through its participation in Primester, a joint venture with Eastman Chemical Company (“Eastman”). The U.S. market also includes Celanese Limited (“Celanese”) and Eastman on its own, apart from its participation in the Primester joint venture. Rhone-Poulenc and Hoechst owned Rhodia and Celanese, respectively, prior to the merger that created Aventis. The merger therefore raised a competitive concern relating to Primester and Celanese.

Ultimately, undertakings entered into with the Directorate General for Competition of the European Commission (“EC”) and

¹ Cellulose acetate is a thermoplastic that is used to produce, among other products, cigarette filters, tool handles, tapes and films. In applications where it is used, there are no cost effective substitutes.

Order

supplemented by the Order resolved the competitive concern relating to Primester and Celanese in two steps. First, the EC undertakings required Hoechst to spin off Celanese. Second, the EC undertakings and the Order required the parties to reduce Aventis' holdings in Rhodia because the Kuwait Petroleum Company ("KPC"), a former Hoechst shareholder, would hold a controlling interest in Celanese and a working interest in Aventis after the merger. It was because of concerns that KPC would be in a position post-merger to coordinate the actions of Celanese, Primester (through Aventis/Rhodia), and perhaps Eastman through Primester, that the Commission required Aventis to reduce its holdings in Rhodia. The Order thus is designed and intended to sever the potential KPC influence on Rhodia/Primester.

Paragraph VI. of the Order, as modified, requires Aventis to reduce its interest in Rhodia to five (5) percent or less by April 22, 2005.² The Order also requires Aventis to maintain unsold Rhodia voting securities in escrow with a proxy system that prevents Aventis from exercising its voting rights, and restricts Aventis from influencing or receiving confidential information concerning Rhodia's cellulose acetate business. The Order therefore limits KPC's ability to coordinate the interaction between Rhodia, through Aventis, and Celanese.

KPC has recently divested all of its shares in Celanese to BCP Crystal Acquisition Group GmbH & Co. KG, an entity affiliated

² Aventis previously filed two petitions to reopen and modify the Order as it relates to the required divestiture of its Rhodia shares. The first petition was filed on September 16, 2002, and the second petition was filed on September 30, 2003. In both instances, the Commission granted Aventis' petition to reopen and modify on public interest grounds. Specifically, the Commission determined that Rhodia's precarious financial condition warranted an order modification that, in essence, gave Aventis a longer period of time to divest the Rhodia shares.

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with the Blackstone Group (“Blackstone”), a U.S. based private equity fund. On February 2, 2004, Blackstone launched a friendly public takeover of Celanese and announced that, if successful, it intended to take Celanese private. On April 2, 2004, Blackstone and Celanese announced that the tender offer was successful, with 83.6% of issued and outstanding shares being tendered, and that all the conditions precedent to the completion of the offer had been met. Pursuant to the tender offer, KPC tendered all of its shares in Celanese to Blackstone.

Aventis offers two reasons why the Order provisions relating to the divestiture of the Rhodia shares should be set aside. First, Aventis asserts that the modifications are necessary because changed conditions of fact (*i.e.*, KPC’s tender of its interest in Celanese to Blackstone) render the Order provisions relating to the divestiture of the Rhodia shares obsolete. Second, Aventis argues that the modifications are warranted because it is in the public interest to set aside the divestiture requirements in an attempt to preserve Rhodia’s financial viability.

Section 5(b) of the Federal Trade Commission Act, 15 U.S.C. § 45(b), provides that the Commission shall reopen an order to consider whether it should be modified if the respondent “makes a satisfactory showing that changed conditions of law or fact” so require. A satisfactory showing sufficient to require reopening is made when a request to reopen identifies significant changes in circumstances and shows that the changes either eliminate the need for the order or make continued application of it inequitable or harmful to competition.³

³ S. Rep. No. 96-500, 96th Cong., 2d Sess. 9 (1979) (significant changes or changes causing unfair disadvantage); *Louisiana-Pacific Corp.*, Docket No. C-2956, Letter to John C. Hart (June 5, 1986), at 4 (unpublished) (“Hart Letter”). *See also United States v. Louisiana-Pacific Corp.*, 967 F.2d 1372, 1376-77 (9th Cir. 1992) (“A decision to reopen does not necessarily entail a decision to modify the Order. Reopening may occur even where the

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Section 5(b) also provides that the Commission may also reopen and modify an order when, although changed circumstances would not require reopening, the Commission determines that the public interest so requires. Respondents are therefore invited in petitions to show how the public interest warrants the requested modification.⁴ In the case of “public interest” requests, FTC Rule of Practice 2.51(b) requires an initial “satisfactory showing” of how modification would serve the public interest before the Commission determines whether to reopen an order and consider all of the reasons for and against its modification.⁵

A “satisfactory showing” requires, with respect to public interest requests, that the requester make a *prima facie* showing of a legitimate public interest reason or reasons justifying relief. A request to reopen and modify will not contain a “satisfactory showing” if it is merely conclusory or otherwise fails to set forth by affidavit(s) specific facts demonstrating in detail the reasons why the public interest would be served by the modification.⁶ This showing requires that the requester demonstrate, for example, that there is a more effective or efficient way of achieving the purposes of the order, that the order in whole or part is no longer needed, or that there is some other clear public interest that would be served if the Commission were to grant the requested relief. In addition, this showing must be supported by evidence that is credible and reliable.

petition itself does not plead facts requiring modification.”).

⁴ Hart Letter at 5; 16 C.F.R. § 2.51.

⁵ 16 C.F.R. § 2.51(b). *See also Supplementary Information, Amendment to 16 C.F.R. § 2.51(b), August 15, 2001, (“Amendment”).*

⁶ 16 C.F.R. § 2.51.

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If, after determining that the requester has made the required showing, the Commission decides to reopen the order, the Commission will then consider and balance all of the reasons for and against modification. In no instance does a decision to reopen an order oblige the Commission to modify it,⁷ and the burden remains on the requester in all cases to demonstrate why the order should be reopened and modified. The petitioner's burden is not a light one in view of the public interest in repose and the finality of Commission orders.⁸ All information and material that the requester wishes the Commission to consider shall be contained in the request at the time of filing.⁹

The Commission has determined that changed conditions of fact and the public interest require a reopening and modification as requested by Aventis. Among other things, the purpose of the Order is to maintain competition in the market for cellulose acetate, by severing the common link between Celanese and Rhodia (*i.e.*, KPC). The Order contemplated that, by requiring Aventis to divest its Rhodia shares, KPC would no longer have any influence over Rhodia, thereby making coordination between Rhodia and Celanese impossible to achieve. Once KPC transferred all of its shareholdings in Celanese to Blackstone, KPC no longer had any ability to coordinate the activities of both Celanese and Rhodia. It therefore appears that one of the goals of the Order was accomplished, albeit through a different mechanism, and divestiture of the Rhodia shares is no longer necessary.

⁷ See *United States v. Louisiana-Pacific Corp.*, 967 F.2d 1372, 1376-77 (9th Cir. 1992) (reopening and modification are independent determinations).

⁸ See *Federated Department Stores, Inc. v. Moitie*, 425 U.S. 394 (1981) (strong public interest considerations support repose and finality).

⁹ 6 C.F.R. § 2.51(b).

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The Commission also finds that it is in the public interest to reopen and set aside those Order provisions relating to the divestiture of the Rhodia shares. Rhodia remains in severe financial difficulty. Rhodia's shares currently trade at approximately € 1-2 per share, down from € 22 per share in the months that followed the Aventis transaction, and Rhodia's debt remains extremely high. A continued requirement that Aventis divest its Rhodia shares may force Rhodia's share price down further. Such a result could worsen Rhodia's already precarious financial situation and may ultimately harm competition in the cellulose acetate market.

For these reasons, the Commission finds that changed conditions of fact and the public interest requires a modification of the Order. KPC's potential coordination of Rhodia and Celanese, which resulted in the Rhodia divestiture requirement, is no longer possible because KPC has no continued interest in Celanese. Further, it appears that Rhodia's financial condition may worsen if Aventis, as a large shareholder, is required to divest its interest in the company. Therefore, the reasons to modify the order outweigh the reasons to retain it as written. Accordingly,

IT IS ORDERED that this matter be, and it hereby is, reopened;

IT IS FURTHER ORDERED that Paragraphs VI.B through VI.D, VII and VIII of the Order be, and they hereby are, set aside, as of the effective date of this Order;

IT IS FURTHER ORDERED that Paragraph IX of the Order be, and it hereby is, modified, as of the effective date of this Order, to read as follows:

That within thirty (30) days after the date this Order becomes final and every sixty (60) days thereafter until Respondents have fully complied with the provisions of Paragraphs II.B. through II.G., or until a trustee has been appointed pursuant to Paragraph IV.A., and Respondents have complied with

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Paragraph VI.A. of this Order, Respondents shall submit to the Commission a verified written report setting forth in detail the manner and form in which they intend to comply, are complying, and have complied with this Order. Respondents shall submit at the same time a copy of their report concerning compliance with this Order to any Interim Trustee(s) who has been appointed. Respondents shall include in their reports, among other things that are required from time to time, a full description of the efforts being made to comply with Paragraph II.B. through II.G. and Paragraph VI.A. of the Order, including a description of all substantive contacts or negotiations for the divestiture and the identities of all parties contacted. Respondents shall include in their reports copies of all written communications to and from such parties, all internal memoranda, and all reports and recommendations concerning completing the obligations. After completing the obligations required under Paragraphs II.B. through II.G. and Paragraph VI.A. of this Order, Respondents shall submit reports, setting forth in detail the manner and form in which they intend to comply, are complying, and have complied with the Order, every year beginning on the anniversary of the date this Order became final until and including the tenth anniversary of the date of this Order.; and

IT IS FURTHER ORDERED that Paragraph XII. of the Order be, and it hereby is, modified, as of the effective date of this Order, to read as follows:

That this Order shall terminate at the earlier of: (1) April 13, 2010; or (2) after the divestitures required by Paragraphs II.B. through II.F., IV., V., and VI. of this Order have been accomplished.

Chairman Majoras recused.

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IN THE MATTER OF

CHICAGO BRIDGE & IRON COMPANY N.V.**ORDER GRANTING IN PART AND DENYING IN PART
RESPONDENTS' MOTION FOR IN CAMERA
TREATMENT OF MATERIAL PREVIOUSLY
DESIGNATED AS CONFIDENTIAL**

Pursuant to Commission Rule 3.45(b), Respondents Chicago Bridge & Iron Company N.V. and Chicago Bridge & Iron Company ("CB&I" or "the Respondents") have filed a Motion for *In Camera* Treatment of Material Previously Designated as Confidential ("the Motion"). The materials for which CB&I seeks *in camera* treatment consist of Attachment A to Complaint Counsel's Opposition to Respondents' Petition to Reconsider ("the Opposition") (Exhibit A of the Motion), related discussion on page 12 of the Opposition that was redacted from the public version of the Opposition, and portions of the Motion and Exhibit B of the Motion (Affidavit of Richard E. Goodrich). CB&I seeks *in camera* treatment of these materials for a period of five years.

CB&I asserts that the material in question was previously submitted to the Commission's staff and was designated highly confidential at that time. The Respondents claim that the material contains "highly confidential business information, the release or publication of which would substantially harm CB&I's business." Motion at 2. CB&I also maintains that it has endeavored to preserve the secrecy of this information. Complaint Counsel does not oppose Respondents' motion.

The Commission finds that CB&I has satisfied the standard set forth in Commission Rule 3.45(b) and shown that the disclosure of the information for which it seeks *in camera* treatment would likely result in "clearly defined, serious injury." 16 C.F.R. § 3.45(b). See *H.P. Hood & Sons, Inc.*, 58 F.T.C. 1184, 1188 (1961); *Bristol-Myers Co.*, 90 F.T.C. 455, 456 (1977); *General Foods Corp.*, 95 F.T.C. 352, 355 (1980). The Commission,

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however, is not persuaded that *in camera* treatment should be granted for the five-year period requested by CB&I. The information for which such treatment is being granted is temporal in nature, and its competitive sensitivity is likely to diminish over time. Accordingly, the Commission believes that a two-year period is appropriate.

IT IS THEREFORE ORDERED that (a) Exhibit A to the Motion and (b) those portions of the Motion, Exhibit B thereto, and the Opposition that were redacted in the public record shall be afforded *in camera* treatment for a period of two years from the date of this Order, at which time Respondents may show cause why those materials should not be made public.

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IN THE MATTER OF

CHICAGO BRIDGE & IRON COMPANY N.V.**DECISION AND ORDER PARTIALLY DENYING
RESPONDENTS' PETITION FOR RECONSIDERATION
AND DIRECTING FURTHER BRIEFING
ON SPECIFIC REMEDY ISSUES****I. Introduction**

On December 21, 2004, we issued our final decision in this matter and found that the acquisition by Chicago Bridge & Iron Company N.V. and Chicago Bridge & Iron Company (“CB&I” or “Respondents”) of certain Pitt-Des Moines, Inc. (“PDM”) assets was likely to lessen competition substantially in four relevant markets in the United States: (1) field-erected liquefied natural gas (“LNG”) storage tanks; (2) field-erected liquefied petroleum gas (“LPG”) storage tanks; (3) field-erected liquid nitrogen, oxygen, and argon (“LIN/LOX”) storage tanks; and (4) thermal vacuum chambers (“TVCs”).¹ Having concluded that the

¹ This Decision and Order uses the following abbreviations for third-party companies referenced herein: American Tank & Vessel, Inc. (“AT&V”), Aker Kvaerner (“Kvaerner”), Bechtel Corporation (“Bechtel”), British Petroleum (“BP”), Cheniere Energy, Inc. (“Cheniere”), CMS Energy (“CMS”), Dynegy, Inc. (“Dynegy”), El Paso Corp. (“El Paso”), Freeport LNG Development LP (“Freeport LNG”), Ishikawa Heavy Industries (“IHI”), Matrix Service Co. (“Matrix”), Memphis Light, Gas & Water (“MLGW”), Sempra Energy LNG (“Sempra”), S.N. Technigaz (“Technigaz”), Skanska AB (“Skanska”), Toyo Kanetsu K.K. (“TKK”), TRW Space & Electronics (“TRW”), Whessoe International (“Whessoe”), Yankee Gas Services Co. (“Yankee Gas”), Zachry Construction Corporation (“Zachry”). All other company references use the company’s full name or the only name referred to in the record.

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acquisition violated Section 5 of the Federal Trade Commission Act, 15 U.S.C. § 45, and Section 7 of the Clayton Act, 15 U.S.C. § 18, we ordered CB&I to reorganize its Industrial Division (and to the extent necessary its Water Division) into two, separate stand-alone divisions and divest one of them.²

On February 1, 2005, pursuant to Rule 3.55 of the Commission's Rules of Practice, 16 C.F.R. §3.55, CB&I filed a Petition to Reconsider the Opinion and Order in Light of Entry After the Close of the Record and Overbreadth ("Respondents' Petition").³ The petition alleges that demand in the LNG tank market has increased since the record's close and that new entrants have bid on and been awarded LNG tank jobs.⁴ Respondents identify awards associated with four LNG projects as evidence of post-acquisition entry: (1) Dynegy's award of an LNG tank contract to Skanska; (2) Sempra's award of an engineering, procurement, and construction ("EPC") contract to

²Op. at 105

³This Decision and Order also uses the following abbreviations for citations to the record:

- Tr. – Transcript of testimony before the Administrative Law Judge
- RAB – Respondents' Appeal Brief
- CCACAB – Answering and Cross-Appeal Brief of Counsel Supporting the Complaint
- RRCARB – Respondents' Reply and Cross-Appeal Response Brief
- OA – Transcript of the Oral Argument on Appeal held November 12, 2004
- CX – Complaint Counsel's Exhibit
- Op. – Commission Opinion issued December 21, 2004 (*in camera*).

⁴Respondents' Petition at 2.

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Kvaerner/IHI; (3) Freeport LNG's award of an LNG tank contract to Technigaz/Zachry; and (4) Cheniere's award of an LNG tank contract to the MHI/Matrix team.⁵ Based on these awards, the petition argues that "the competitive landscape has . . . undergone a sea-change, rendering inaccurate the Commission's predictions" on the difficulty of entry.⁶ According to Respondents, these changed conditions necessitate that we reconsider our decision and rescind our order of divestiture.⁷ In addition, Respondents assert that our Order imposed relief beyond that ordered by the Administrative Law Judge ("ALJ") and requested by Complaint Counsel in their cross-appeal. Respondents therefore argue that they did not have an opportunity to address the appropriateness of the remedy.

Complaint Counsel oppose Respondents' Petition⁸ and argue that Respondents do not meet the standard for reopening the record, which limits a petition to new questions raised by a decision or order of the Commission that the petitioner had no opportunity to argue.⁹ Specifically, Complaint Counsel assert that Respondents' Petition does not present a new question because, in this proceeding, Respondents have already raised the argument that post-acquisition entry constrains CB&I.¹⁰ Complaint Counsel further argue that although Respondents' Petition contains new

⁵*Id.* at 7-10.

⁶*Id.* at 2.

⁷*Id.* at 18.

⁸Complaint Counsel's Opposition to Respondents' Petition to Reconsider, filed Feb. 11, 2005 ("Complaint Counsel's Opposition").

⁹Complaint Counsel's Opposition at 4 (citing 16 C.F.R. § 3.55 (2005)).

¹⁰*Id.* at 6-9.

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evidence, Respondents failed to timely raise this evidence, because the events described in the petition occurred prior to oral argument and the issuance of our decision.¹¹ In addition, Complaint Counsel argue that the evidence presented by Respondents does not show that the alleged new entry has restored the competition lost from the acquisition.¹² Finally, Complaint Counsel argue that the remedy raises no new questions under Rule 3.55.¹³

In this Decision and Order, we examine the two issues that Respondents' Petition raises – the sufficiency of entry and the relief in our Final Order – under two separate standards. We first discuss the requirements for granting reconsideration under Rule 3.55 and our reasons for rejecting Respondents' Petition under this standard. We then exercise our discretion under Rule 3.72(a) to consider the merits of Respondents' Petition. We find that Respondents have not shown that entry has restored the competition lost from the acquisition. We thus deny Respondents' Petition on the merits insofar as it raises issues concerning the effectiveness of new entry. Finally, we address Respondents' request that we modify our remedy, and we order further briefing from the parties on specific remedy issues.

II. Standard for Granting a Petition for Reconsideration under Rule 3.55

___ Rule 3.55 requires that a petition for reconsideration “be confined to new questions raised by the decision or final order and

¹¹*Id.* at 10-13.

¹²*Id.* at 12 (citing U.S. Dep't of Justice & Fed. Trade Comm'n, *Horizontal Merger Guidelines* § 3.0 (1992, as amended 1997), reprinted in 4 Trade Reg. Rep. (CCH) ¶ 13,104 (hereinafter *Merger Guidelines*)).

¹³*Id.* at 27.

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upon which the petitioner had no opportunity to argue before the Commission.”¹⁴ This standard recognizes that litigation must end at some point, and that decision makers must render their judgment based on a finite body of evidence. We thus view reconsideration of a fully-litigated opinion and order as an “extraordinary remedy which should be used sparingly.”¹⁵

A. Post-Acquisition Entry

Respondents’ main argument – that increased demand has triggered entry that constrains CB&I post-acquisition – is not a new question raised by our decision. Rather, because the acquisition resulted in near-monopoly or monopoly in each of the relevant markets, this case turned on whether entry and expansion in the relevant markets could restore the competition lost from the acquisition. During the administrative trial, Respondents argued at length that demand in the LNG tank market had increased and spurred three new entrants with the ability to constrain CBI – Skanska/Whessoe, TKK’s joint venture with AT&V, and

¹⁴16 C.F.R. § 3.55. Respondents’ Petition addresses only the LNG tank market. In addition, Respondents request that if we re-open the record, they be allowed to present evidence of entry in the LPG and LIN/LOX markets. We presume that Respondents have presented their strongest case for reopening the record. Indeed, Respondents state that the evidence of post-acquisition entry in the LPG and LIN/LOX tank markets does not show “as dramatic a transformation” as the LNG tank market. Respondents’ Petition at 2, n.3. Because we have found Respondents’ Petition unpersuasive as to the LNG tank market, we conclude that we need not take evidence on the LPG and LIN/LOX markets.

¹⁵*See, e.g., Donald Riggs v. Anthony Auto Sales Inc.*, No. Civ. A 97-0507, 1998 U.S. Dist. LEXIS 21639, at *6 (W.D.La. Aug. 28, 1998) (applying this standard to a motion to reconsider under Fed. R. Civ. P. 59(e)).

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Technigaz's joint venture with Zachry.¹⁶ As support for Respondents' argument, they presented evidence that Dynegy considered bids from these three new entrants and excluded CB&I from bidding on its Hackberry import terminal.¹⁷ At oral argument, Respondents again highlighted the Dynegy project and stated that this project was "dispositive"¹⁸ of the case and showed that "CB&I has no ability to exercise market power."¹⁹ Respondents also argued that the presence of the new entrants constrained CB&I's pricing for two sole-source contracts.²⁰ For example, they asserted that the customers could have terminated negotiations with CB&I and sought out another supplier had they not been satisfied with CB&I's price.²¹

Our Opinion specifically considered these assertions and rejected Respondents' entry argument. After an examination of the bidding history, entry conditions, and post-acquisition bidding evidence in the relevant markets, we concluded that:

Respondents' evidence of entry into the LNG tank market and expansion of smaller incumbents in the LPG and LIN/LOX tank markets establishes neither that entry or expansion into these markets is easy nor that it has actually occurred at a level that will meaningfully constrain CB&I post-acquisition. Although some companies have shown interest in these markets, we find that this mere interest and intention to compete does not make them

¹⁶See generally RAB at 34-40.

¹⁷*Id.* at 35.

¹⁸OA at 6.

¹⁹*Id.* at 9-10.

²⁰RAB at 35-37; OA at 10-12.

²¹OA at 10-12.

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competitors sufficient to replace the competition lost from CB&I's acquisition of PDM.²²

Respondents' Petition merely seeks to provide additional factual support for a position that Respondents have already argued. It thus does not meet the mandatory requirement of Rule 3.55 that the petition present only new questions raised by Commission decisions or orders.

Previously unavailable new evidence can form a basis for reconsideration provided that it meets Rule 3.55's requirements.²³ To present such evidence, however, a petitioner also must satisfy the standards for reopening the record and admitting new evidence. Among other things, a petitioner must demonstrate that it acted with diligence to bring forth the new evidence in a timely manner.²⁴ Respondents' Petition does not show that they have met this requirement. Rather, the evidence relied on by Respondents' Petition is a mixture of events that occurred before we issued our decision in December 2004 and events not accompanied by a date. For example, Respondents' Petition states that Dynegy sold its Hackberry facility to Sempra in February 2003 and rebid the EPC contract shortly thereafter.²⁵ Although it is unclear from Respondents' Petition at what point the EPC

²²Op. at 90.

²³ Cf. *Chrysler Corp. v. FTC*, 561 F.2d 357, 362-63 (D.C. Cir. 1977) (upholding the FTC's decision to allow admission of new evidence where *inter alia* the evidence was unavailable at the time of trial). See also *Riggs*, 1998 U.S. Dist. LEXIS 21639, at *7 (stating that one ground for reconsideration under Fed. R. Civ. P. 59(e) is to allow the moving party to present "newly discovered evidence or previously unavailable evidence").

²⁴*Brake Guard Products, Inc.* 125 F.T.C. 138, 248 n.38 (1998).

²⁵Respondents' Petition at 7.

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contract was awarded, it states that CB&I submitted its bid in August 2004, approximately five months before we issued our decision. Similarly, Respondents' Petition states that Freeport LNG awarded the tank subcontract for its project in June 2004.²⁶ Our Rules provide Respondents with the opportunity to petition to reopen the record at any time before we issue our decision.²⁷ We thus conclude that Respondents have not met their burden under our rules for either reopening the record or reconsideration of an issued decision.²⁸ We therefore deny this portion of Respondents' Petition under Rule 3.55.²⁹ As discussed below, however, we will

²⁶*Id.* at Ex. 2.

²⁷A petition to reopen the record may be filed prior to the ALJ's filing of his Initial Decision, 16 C.F.R. §3.51(e), or before oral argument. 16 C.F.R. 3.54(a). *See also Rambus, Inc.*, Dkt. No. 9302 (Dec. 6, 2004) (Order Directing Redesignation of the Record); *Brake Guard Products, Inc.* 125 F.T.C. at 248 n.38 (noting the standard for reopening the record in a pending administrative litigation after trial has ended but before the Commission has issued its opinion). In addition, a petition may be filed before we issue our decision. 16 C.F.R. 3.54(a). *See Chrysler Corp.*, 87 F.T.C. at 750 n.38 (admitting materials three weeks after oral argument).

²⁸*See Novartis Corp.*, 1999 FTC LEXIS 212, at *1 (Jul. 2, 1999) (denying a petition for reconsideration where respondent could have introduced evidence of the factual developments that occurred after the record's close at an earlier stage). *See also Riggs*, 1998 U.S. Dist. Lexis 21639, at *7 (a Rule 59(e) motion to reconsider may not be used to "present evidence that could have been raised prior to the entry of judgment").

²⁹Respondents' Supplement to Petition to Reconsider the Opinion and Order in Light of Entry After the Close of the Record and Overbreadth, filed February 14, 2005 ("Respondents' Supplement") states that Cheniere awarded an LNG tank to

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further address these matters under our discretionary authority.

B. Relief in Final Order

Respondents' Petition also asserts that the remedy ordered by the Commission goes further than the relief ordered by the ALJ and that requested by Complaint Counsel and thus raises a new question that Respondents had no opportunity to address.³⁰ The crux of Respondents' argument is that our requirement that CB&I equally divide its current "Relevant Business" and divest one of the units is virtually limitless on its face, goes beyond the assets related to the Engineered Construction ("EC") and Water Divisions, and inappropriately includes some assets owned by CB&I pre-acquisition and others acquired by CB&I post-acquisition.³¹ Specifically, Respondents challenge the Order's definition of "Relevant Business," which includes "all assets of every description . . . engaged, directly or indirectly, in all aspects of engineering, designing, estimating, bidding, procuring, fabricating, erecting, rehabilitating or selling any: water storage tank or system; industrial process system . . . ; flat bottom tank, pressure vessel or sphere; low temperature or cryogenic tank system; vacuum chamber or system; steel plate fabrication; and

MHI/Matrix on February 4, 2005. Because our Rules do not contemplate such a filing, we treat Respondents' Supplement as a request for leave to file the supplement and accordingly grant that request and analyze it on its merits. Unlike the other evidence presented in Respondents' Petition, the event described in this Supplement occurred after we issued our decision and was thus previously unavailable. For the reasons we have already stated, however, we find that this evidence raises no new question and thus fails to meet Rule 3.55's mandatory requirements.

³⁰Respondents' Petition at 13-14.

³¹*Id.* at 14-16.

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specialty structure, including the Relevant Products.”³² They ask us to eliminate CB&I’s requirement to divest the “unrelated assets” and require the acquirer to justify the divestiture of assets beyond those acquired from PDM.³³

As we explained in our Opinion, however, the Notice of Contemplated Relief that accompanied the Complaint in this matter stated that if the Commission determined that the acquisition was anticompetitive, it might order “[r]eestablishment by CB&I of two distinct and separate, viable, and competing businesses, one of which shall be divested by CB&I.”³⁴ The Notice further elaborated that a divestiture could include “such other businesses as necessary” and “all intellectual property, knowhow, trademarks, trade names, research and development, customer contracts, and personnel, including but not limited to management, sales, design, engineering, estimation, fabrication, and construction personnel. . .”³⁵ This language contemplates the very type of relief that we subsequently ordered and put Respondents on notice that the Commission might order the remedy they now challenge.

In addition, Complaint Counsel’s cross-appeal of the Initial Decision raised the specific issues that Respondents’ Petition claims they had no opportunity to address. In their cross-appeal, Complaint Counsel argued that the Commission would need to order divestiture not only of the acquired assets but also of “assets necessary to reconstitute a competitor.”³⁶ They further argued that the Commission should assign a percentage of CB&I’s work in

³²*Id.* at 15-16 (quoting Final Order at 3-4).

³³*Id.* at 16.

³⁴*Op.* at 101.

³⁵*Id.*

³⁶CCACAB at 67-68.

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progress to the potential buyer, require Respondents to take steps to encourage experienced employees to transfer to the buyer, and appoint a monitor trustee.³⁷ All three of these requests suggest relief beyond divesting those assets acquired from PDM. Moreover, Complaint Counsel attached a proposed order with language identical to our definition of “Relevant Business” to their cross-appeal brief.³⁸ Respondents’ Reply and Cross-Appeal Response brief acknowledged the proposed order and argued at length that the three main requirements urged by Complaint Counsel were unnecessary.³⁹ Respondents therefore not only had ample opportunity to argue the points raised in their petition⁴⁰ but took advantage of that opportunity. Accordingly, we conclude that Respondents’ Petition to reconsider the relief in the Order does not satisfy the standards of Rule 3.55 and deny it. However, we consider the issues raised by CB&I about the breadth of relief under our discretionary authority.

III. The Commission’s Discretionary Authority to Consider a Petition

Section 5(b) of the FTC Act, 15 U.S.C. § 45(b), provides that “the Commission may at any time, upon such notice and in such manner as it shall deem proper, modify or set aside, in whole or in part, any order made” under Section 5 of the Act. Section 3.72(a) of the Commission’s Rules of Practice, 16 C.F.R. § 3.72(a)(2005),

³⁷*Id.* at 70-77.

³⁸*Id.* at App. A.

³⁹RRCARB at 45-58.

⁴⁰*See Indiana Federation of Dentists*, 101 F.T.C. 718 (1983) (“Since the language to which respondent refers was contained in the draft order accompanying complaint counsel’s answering brief, it is not a matter upon which respondent can claim to have had no previous opportunity to argue.”).

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provides us with discretion under such circumstances to “enter a new decision modifying or setting aside the whole or any part of the findings as to the facts, conclusions, . . . order or opinion issued by the Commission” Because the sufficiency of entry in the relevant markets was a particularly important issue in this case, we exercise our discretion here and consider new evidence that might bear on the ability of new entrants to restore competition sufficiently in the LNG tank market. In addition, although Respondents should have raised their remedy concerns before now, we take seriously our responsibility to protect markets and conclude that we should not disregard completely the specific difficulties Respondents raise about the implementation of our Final Order. We therefore have determined to exercise our discretion to consider Respondents’ Petition.

A. Post-Acquisition Entry

Predicting future market behavior is never easy and is particularly difficult in markets characterized by changing conditions such as increased demand. Moreover, *General Dynamics*⁴¹ and its progeny instruct that our analysis be forward-looking, which means that we must consider the most recent market realities. At the same time, evidence of past market behavior is often a good predictor of future developments, especially in the absence of evidence that there have been fundamental changes in market dynamics. Therefore, to evaluate Respondents’ arguments, we consider evidence related to the pre-acquisition dynamics of this market, post-acquisition evidence adduced at trial, and new evidence presented by Respondents’ Petition.

We agree in principle that a new supplier’s ability to bid on and win an award to build an LNG tank is relevant to a showing that it has the capability to constrain CB&I sufficiently (and thus to

⁴¹*United States v. General Dynamics Corp.*, 415 U.S. 486 (1974).

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replace the competition lost from the acquisition).⁴² For a number of reasons, however, we conclude that Respondents have not shown that the competition lost from CB&I's acquisition of the PDM assets has been restored.

To begin, we find Respondents' argument – that CB&I's post-acquisition losses conclusively demonstrate that CB&I is sufficiently constrained – unpersuasive. Entry might signal that post-acquisition prices have increased to a level that makes the market attractive to new firms. Whether those new entrants are able to compete at the price that prevailed before the transaction is another matter.⁴³ We thus view the evidence that CB&I has not won every post-acquisition bid as inconclusive. In addition, the post-acquisition awards to a company other than CB&I do not show that CB&I is constrained at the pre-acquisition level. Finally, although Respondents did not present much evidence related to CB&I's post-record wins, we glean from the available material that CB&I has obtained at least three sole-source, turnkey contracts for LNG projects since the record's close.⁴⁴ When those contracts are added to the five post-acquisition projects CB&I had been awarded prior to the record's close, it is clear that CB&I has obtained many more contracts for LNG projects than it has lost. For these reasons, we conclude that CB&I's post-acquisition losses standing alone do not answer the ultimate question in this case – whether competition has been restored to the pre-

⁴²*United States v. Syufy Enters.*, 903 F.2d 659, 665 (9th Cir. 1990) (finding a merger to monopoly acceptable where a post-merger entrant took a significant share of the first-run film market away from the incumbent firm).

⁴³See F.M. Scherer & David Ross, *INDUSTRIAL MARKET STRUCTURE AND ECONOMIC PERFORMANCE* 362 (3d ed. 1990) (“The higher prices are, the more rapidly potential entrants will perceive the attractiveness of entry”).

⁴⁴See Complaint Counsel's Opposition at Ex. C, Ex. E, Ex. F.

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acquisition level. We therefore adhere to our earlier conclusion that CB&I's acquisition of the PDM assets substantially lessened competition in the U.S. market for field-erected LNG tanks and thus violated the antitrust laws.

1. Analysis of Respondents' Evidence

Despite Respondents' assertions, we believe it is a mistake simply to accept that evidence of post-acquisition LNG tank awards to suppliers other than CB&I necessarily means that CB&I is constrained at the pre-merger level. Such a viewpoint fails to account for the possibility that post-acquisition prices have increased beyond the pre-acquisition level and also runs afoul of basic economic principles.⁴⁵ This point is especially salient when a firm acquires its closest competitor and achieves a monopoly position in a market characterized by high entry barriers. Economic theory teaches us that under such circumstances, the merged firm has both the incentive and ability to raise price.⁴⁶ At

⁴⁵This error is commonly known as the cellophane fallacy, which derives from criticism of the Supreme Court's decision in *United States v. E.I. du Pont de Nemours & Co.*, 351 U.S. 377 (1956). See *United States v. Oracle*, 331 F. Supp. 2d 1098, 1121 (N.D.Cal. 2004) ("The error in the logic of *Du Pont* is that 'the existence of significant substitution in the event of further price increases or even at the current price does not tell us whether the defendant already exercises significant market power.'" (citing *Eastman Kodak Co. v. Image Technical Servs. Inc.*, 504 U.S. 451, 471 (1992))). See also Steven C. Salop, *The First Principles Approach to Antitrust, Kodak, and Antitrust at the Millennium*, 68 *Antitrust L.J.* 187, 197 (2000); William M. Landes & Richard A. Posner, *Market Power in Antitrust Cases*, 94 *Harv. L. Rev.* 937, 960-63 (1981).

⁴⁶Generally speaking, the monopolist can set price without fear of losing sales to another competitor in the market. Dennis W. Carlton & Jeffrey M. Perloff, *MODERN INDUSTRIAL*

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a sufficiently high price, however, even a monopolist is constrained by competition from distant substitutes⁴⁷ and the possible entry of new suppliers.

Respondents' entry argument therefore misses a crucial point – the fact that actual or potential entry constrains the monopolist's ability to increase price without limit does not show that competition lost from an acquisition has been replaced. For example, a new entrant may be incapable of restoring competition to the pre-acquisition level because its costs do not allow it to compete at the price that prevailed in the market prior to the acquisition. In such instances, entry is a direct result of the monopolist's pricing above the competitive level rather than a force that will return the market to the status quo ante.

Where a new entrant has some ability to compete, but lacks the ability to restore the competition lost from an acquisition, a monopolist will not necessarily lower its price to the level that prevailed before the acquisition. To do so would mean foregoing

ORGANIZATION 87 (3rd ed. 2000) (“A monopoly sets its price without fear that it will be undercut by a rival firm”); Richard Posner, ANTITRUST LAW 11 (2d ed. 2001) (“The monopolist will never be content to charge a price at which the demand for his product is *inelastic*, that is, a price at which the proportional reduction in the quantity demanded as a result of raising price slightly would be less than the proportional increase in price.”). Such monopolistic reaction may include not only higher nominal price but also reductions in quality of service or responsiveness to customer needs, such as CB&I's evident unwillingness to engage in competitive bidding and insistence on sole-source, turnkey contracts. *See Nat'l Soc'y of Prof'l Engineers v. United States*, 435 U.S. 679, 695 (1978) (identifying quality, service, safety, and durability as important elements to a bargain).

⁴⁷*United States v. Eastman Kodak Co.*, 853 F. Supp. 1454, 1469 (1994) (quoting Landes & Posner, *supra* note 45, at 961).

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monopoly profits.⁴⁸ We see this dynamic in the facts of this case. CB&I recognizes that its insistence on sole-source, turnkey contracts might cause some customers to select other suppliers for preliminary work and that those suppliers may, in turn, have an advantageous position for bidding on the LNG tanks in question.⁴⁹ This possibility of lost business, however, has not altered CB&I's behavior. As a result, we find that CB&I need not have won every post-acquisition contest to demonstrate that it has obtained and exercised market power as a result of the acquisition.⁵⁰ Rather, the exercise of market power by CB&I may explain why other suppliers have entered and some customers have switched to suppliers that lack CB&I's cost advantages and experience. As numerous courts have observed, "At a high enough price, even poor substitutes look good to the consumer."⁵¹

⁴⁸Posner, ANTITRUST LAW, *supra* note 46, at 73 n.31.

⁴⁹*See, e.g.*, Tr. at 4938 (Scorsone stating that CB&I's refusal to bid on LNG tanks separately from the EPC contract for the Dynegy project and Dynegy's subsequent selection of Skanska as the EPC means that it cannot "force" customers to select it as an EPC contractor). *Cf. Id.* at 4232-33 (Glenn predicting that Freeport LNG's choice of Technip to perform preliminary engineering work may translate into an EPC contract if the Freeport LNG is satisfied with Technip's work).

⁵⁰Carlton and Perloff, *supra* note 46 at 92.

⁵¹*Eastman Kodak Co.*, 853 F. Supp at 1469. *Cf. Oracle*, 331 F. Supp. 2d at 1121 ("[B]ecause a monopolist exercises market power by increasing price until the cross-price elasticity of demand is so high that a further price increase would be unprofitable, a high cross-price elasticity of demand at current prices, by itself, does not demonstrate that the seller lacks market power").

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2. Post-Acquisition Projects

Respondents' post-acquisition examples of entry also fail to demonstrate that CB&I is constrained to the pricing that prevailed before the acquisition. For each of the post-acquisition projects identified by Respondents, CB&I has insisted on sole-source, turnkey contracts, despite the fact that many LNG customers have expressed a desire not to structure their LNG projects in this way.⁵² This pattern shows a lack of competition as to "one of the elements of a bargain"⁵³ important to customers and evidences an exercise of market power by CB&I. It is true that Dynegy, Freeport LNG, and Cheniere, each of which did not want to grant sole-source, turnkey contracts, awarded LNG tank contracts to other suppliers post-acquisition. However, given CB&I's refusal to undertake work on terms other than its own, we are not

⁵²See Tr. at 4568-71 (Dynegy wanted to bid the LNG tanks separately from the engineering work to save costs); Tr. at 6974-76, 6978 (Freeport LNG wanted to bid the EPC award for its project competitively and thus contacted other companies to assist with the preliminary work after CB&I refused to do any work absent being awarded a sole-source, turnkey contract for the facility); Tr. at 6069-71 (BP initially wanted to bid the LNG tanks for its three facilities competitively, but awarded CB&I sole-source, turnkey contracts for the facilities after CB&I refused to do preliminary work absent such a commitment). We found that this behavior suggested that CB&I did not view the new entrants as meaningful competition. Op. at 64-65. Respondents' Petition suggests that CB&I has continued this policy despite customers' preference to the contrary. For example, Mr. Blum's declaration makes clear that CB&I attempted to negotiate a sole-source, turnkey contract with Cheniere, which ultimately hired another company solely to do the preliminary work. Respondents' Petition at Ex. 5 ¶ 4.

⁵³*Prof'l Engineers*, 435 U.S. at 695. See also discussion *supra* note 46.

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convinced that these alternate suppliers sufficiently constrain CB&I. In addition, one of the awards identified by Respondents (Sempra's award to the Kvearner/IHI team) is an EPC contract for the entire facility rather than an award for LNG tanks. Because winning an EPC contract for the entire LNG project does not necessarily show an ability to compete for building an LNG tank, Respondents have not shown that this award is probative of competition in the relevant market.⁵⁴

a. Dynegy's Hackberry Terminal

Respondents first argue that after the record's close, CB&I lost the LNG tank award for Dynegy's Hackberry facility to Skanska. While it is true that the LNG tank contract for this project was awarded after the record closed, CB&I's preclusion from bidding on this tank was discussed at length during trial, argued on appeal, and addressed in our Opinion.⁵⁵ At the time of the Record's close, the contest for this award was between Skanska/Whessoe and TKK/AT&V. That Skanska/Whessoe prevailed over TKK/AT&V when CB&I did not submit a bid is not probative of Skanska's ability to constrain CB&I sufficiently. We thus adhere to our previous finding that this project does not support Respondents' argument that post-acquisition entry sufficiently constrains CB&I.

Respondents also argue that Dynegy could have accepted a late bid from CB&I if it were not satisfied with the bids from the new

⁵⁴For example, at trial the head of CB&I's Industrial Division identified two separate sets of competitors for constructing LNG tanks and performing EPC duties. *Compare* Tr. at 4948 (identifying LNG tank competitors as Skanska/Whessoe, Technigaz/Zachry, TKK/ATV, Daewoo/S&B and possibly MHI and IHI) *with* Tr. at 4935 (identifying EPC competitors as Halliburton, KBR, Flour, Technigaz, Skanska Whessoe, Black & Veatch, Daewoo, Tractebel, and Chiyoda JGC).

⁵⁵Op. at 58-60.

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entrants. This argument was also raised at trial by Respondents' economic expert, Dr. Harris.⁵⁶ Although our Opinion did not specifically address this particular piece of evidence, it considered and rejected both Dr. Harris' specific testimony and assumptions related to the Dynegy project and Respondents' general argument that the Dynegy project showed sufficient post-acquisition entry.⁵⁷ There is also no evidence in the record to suggest that LNG tank customers accept late bids, and Respondents do not point to a single example of such behavior in their petition. Therefore, we conclude that Respondents' theoretical argument is not supported by the evidence and reject it.

b. Sempra's Hackberry Project

Prior to oral argument, Dynegy sold its Hackberry facility to Sempra. Rather than keeping Skanska as the EPC, Sempra solicited new bids for an EPC contractor and ultimately awarded

⁵⁶Tr. at 7349 (Dr. Harris testifying that Dynegy "had the opportunity to have CB&I bid and turned them down"). Dr. Simpson, Complaint Counsel's economic expert, addressed Dr. Harris' argument and stated that Dynegy might not violate its own bidding rules because "Dynegy would do business with vendors in the future, and if it looks as if Dynegy is willing to bend their rules in one case, that this could have adverse effects in their dealings with other firms." Tr. at 3338. *See also* Tr. at 3341-42 ("Another reason why a buyer would be – might be reluctant to accept a late bid is that the late bidder hadn't complied with the way the buyer wanted things done initially, and to the extent that the buyer thought that that might indicate that the person submitting the late bid would not follow the buyer's instructions in other areas, then the buyer – that would be a basis for why the buyer would be reluctant to purchase from that late bidder.").

⁵⁷*See generally* Op. at 58-60, 83-88.

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the contract to the Kvaerner/IHI team.⁵⁸ Respondents argue that because Kvaerner/IHI was awarded this project, sufficient entry in the LNG tank market has occurred.⁵⁹ Respondents' argument, however, does not account for the fact that an EPC contract is different from an LNG tank contract. An EPC contractor performs the engineering, procurement, and construction of the LNG facility and is essentially a general contractor for the entire facility. Because EPC contractors often subcontract the construction of an LNG tank, we find that an EPC award is not necessarily probative of competition in the LNG tank market.

With this distinction in mind, we find that the evidence presented by Respondents does not specifically address whether CB&I lost the LNG tank contract to Kvaerner/IHI. Rather, Respondents present a declaration from Michael Miles, a CB&I employee,⁶⁰ which states that "CB&I lost the EPC contract for the Hackberry project to Aker Kvaerner/IHI. The tank subcontract

⁵⁸Respondents did not submit this information until they filed the current petition. Instead, they argued in their appeal briefs and at oral argument that Skanska was a viable competitor, *because* it had been named EPC contractor for Dynegey's Hackberry facility. RAB at 15; OA at 6.

⁵⁹Respondents' Petition at 5, 8 n.15.

⁶⁰Although we give Respondents the benefit of the doubt and credit Mr. Miles' declaration, so far as it goes, we note that CB&I cast some doubt on his credibility at trial. Mr. Miles contacted and met with employees at Howard Fabrication, CB&I's competitor, to propose that CB&I and Howard Fabrication work together to give TRW a price for an upcoming TVC bid. Tr. at 245. To explain why this possibly collusive conduct was not problematic under the antitrust laws, Mr. Scorsone explained that "Mike Miles is a first-level salesperson for CB&I," who does not set contract prices on his own authority. Tr. at 5061-62. *See also* Complaint Counsel's Opposition at 17.

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went with the EPC contract.”⁶¹ This statement, of course, does not tell us whether Kvaerner/IHI might subcontract the LNG tank work to another company.

Even if we assume that Kvaerner/IHI will build the LNG tank, the special circumstances that surround this EPC award lead us to question whether this project demonstrates that the competition lost from the merger has been restored. In particular, it does not appear that CB&I had the bonding capacity necessary to win the EPC contract, which allegedly led to the LNG tank subcontract.⁶² CB&I initially partnered with Bechtel to bid on this project.⁶³ Bechtel agreed to “perform the systems design work and procurement work” for the terminal (essentially to be the EPC contractor), and CB&I planned to undertake the “tank design and construction on a turnkey basis for Bechtel.”⁶⁴ However, Bechtel withdrew at the last moment, and CB&I was forced to bid alone for the entire project.⁶⁵ Bechtel’s very late withdrawal likely had a negative impact on CB&I’s chance of winning the EPC award for this project. Presumably, CB&I agreed to submit a bid with Bechtel for this project because the Bechtel/CB&I combination presented certain advantages over a bid from CB&I alone.

⁶¹Respondents’ Petition at Ex. 2 ¶ 10.

⁶²In testifying about another project of similar size, CB&I’s CEO, Gerald Glenn, stated that CB&I was rejected as EPC contractor, because it did not have the bonding capability necessary to handle the project. Tr. at 4151, 4939.

⁶³Respondents’ Petition at Ex. 2 ¶ 6.

⁶⁴*Id.*

⁶⁵*Id.* at Ex. 2 ¶ 7.

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c. Freeport LNG

At the time we issued our decision, Freeport LNG had awarded Technip the front-end engineering and design (“FEED”) contract and hired S&B/Daewoo to help with the FERC drawings.⁶⁶ However, because the EPC contractor had not yet been selected and possible tank constructors had yet not been identified, we concluded that this project was at too early a stage to be probative of competition in the LNG tank market.⁶⁷ After the record’s close, Freeport LNG awarded Technip the EPC contract for this project, and Technip subsequently sent out requests for proposals (“RFPs”) to potential tank subcontractors.⁶⁸ Respondents argue that because the tank subcontract was ultimately awarded to Technigaz/Zachry, this project demonstrates that competition has been restored post-acquisition.⁶⁹

As with Sempra’s EPC award, the evidence that Respondents presented about the Freeport LNG project raises serious questions about the probative value of this award. Mr. Miles’ declaration states that “Technip had been working in association with Zachry in the project’s FEED stage and . . . Zachry’s involvement in the FEED and EPC contract gave Technigaz/Zachry the advantage in the tank bid.”⁷⁰ Freeport LNG turned to Technigaz/Zachry for the preliminary work on this project only after CB&I refused to do

⁶⁶Respondents argued on appeal that this project is evidence that competition had been restored in the LNG tank market. RAB at 27.

⁶⁷Op. at 62.

⁶⁸Technip pre-qualified Technigaz/Zachry, Skanska/Whessoe, TKK/AT&V, S&B/Daewoo, and CB&I. Respondents’ Petition at 8.

⁶⁹*Id.* at 8-9.

⁷⁰*Id.* at Ex. 2 ¶ 15.

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such work – absent a commitment from Freeport LNG that CB&I be awarded a contract to build the entire facility on a turnkey basis.⁷¹ CB&I's refusal to perform this preliminary work thus appears to have resulted in the LNG tank being awarded to Technigaz/Zachry. Consequently, this project is not good evidence that Technigaz/Zachry sufficiently constrains CB&I or that a future entrant could constrain CB&I.

d. Cheniere's Corpus Christi and Sabine Pass Projects

Respondents' Petition finally argues that Cheniere's selection of Black & Veatch to provide FERC assistance and FEED and of Bechtel to act as the EPC contractor for both its Corpus Christi and Sabine Pass projects shows that meaningful entry has occurred. These awards, however, do not inform us about competition in the relevant market, LNG tanks. Neither Black & Veatch nor Bechtel builds LNG tanks and each will thus have to subcontract that work.⁷²

In the supplement to their petition, Respondents state that Cheniere awarded its Sabine Pass LNG tank contract to MHI/Matrix and argue that this award shows that new entrants have been able to establish a presence in the U.S. market.⁷³ We note that the sole evidence of MHI/Matrix's award comes from an amended declaration of Ronald Blum, which states that on February 4, 2005 he "learned that the LNG tank subcontract [sic]

⁷¹Tr. at 7065-66, 7069-70. *See also* Complaint Counsel's Opposition at 9-10 n.11.

⁷²Tr. at 521, 4936-37. Respondents' Petition recognizes this fact with respect to Bechtel and states that "Bechtel subsequently asked CB&I and others to submit new bids for the LNG tank construction on both projects." Respondents' Petition at 9.

⁷³Respondents' Supplement at 3, Ex.1.

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for the Sabine Pass project [had] been awarded to MHI/Matrix.”⁷⁴ Even if we assume that Mr. Blum’s information is correct, we doubt that this incident has sufficient predictive significance because CB&I insisted that Cheniere grant CB&I a sole-source turnkey contract as a condition for performing any of the preliminary work.⁷⁵

e. Early-Stage Projects

Respondents also assert that Kellogg, Brown & Root has been chosen to do the preliminary engineering and FERC work for Mitsubishi’s Long Beach project and that this award further evidences entry.⁷⁶ We find Respondents’ argument flawed because Kellogg, Brown & Root does not build LNG tanks – CB&I’s declaration from Mr. Miles even states that he expects CB&I to bid for the tank work.⁷⁷ Thus, Kellogg, Brown & Root’s award is irrelevant to competition in LNG tank market.

With respect to the LNG tank work, Respondents also assert that “[i]t strains credulity to suggest that Mitsubishi would agree that its affiliate MHI is unqualified to build an LNG tank.”⁷⁸ Respondents may be correct – Mitsubishi may think that its subsidiary, MHI, is technically able to build an LNG tank. However, as we stated in our Opinion, technical qualifications alone do not equate to a supplier’s ability to constrain CB&I at the

⁷⁴*Id.* at Ex. 1 ¶ 9.

⁷⁵Respondents’ Petition at 9 (stating that “CB&I unsuccessfully attempted to negotiate a sole-source contract for the EPC position.”).

⁷⁶*Id.* at 10-12.

⁷⁷Tr. at 4936-37; Respondents’ Petition at Ex. 2 ¶ 16.

⁷⁸Respondents’ Petition at 10.

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pre-acquisition level.⁷⁹ Furthermore, even if we presume that MHI will be awarded the LNG tank because of its affiliation with the customer, this project would tell us nothing about competition in the LNG tank market when the tank builder is not affiliated with the customer.

Respondents also point to two projects – Exxon/Mobil’s Sabine Pass and Corpus Christi terminals and Washington Gas Co.’s peak-shaving plant – as demonstrating competition because suppliers other than CB&I have been pre-qualified. As our Opinion explained at length, such early stage projects are not sufficiently advanced to provide us with evidence about these bidders’ ability to constrain CB&I.⁸⁰

3. CB&I’s Post-Acquisition Wins

Even if we credit the losses identified in Respondents’ Petition, we must consider those losses relative to the post-acquisition work that CB&I has obtained to determine the extent of competition in the LNG tank market. Although Respondents did not provide much evidence related to the work CB&I has obtained, it appears that CB&I has successfully negotiated at least three sole-source contracts since the record closed.⁸¹ In addition

⁷⁹Op. at 57 (“We do not suggest that the new entrants would be totally incapable of building an LNG tank in the U.S.” “The fact that CB&I has cultivated these skills through decades of experience means that it has some advantages compared to a supplier that has not yet built a tank.”).

⁸⁰*Id.* at 62-63.

⁸¹The post-acquisition projects comprise: (1) a terminal expansion for Dominion’s Cove Point facility; (2) a terminal expansion for Trunkline LNG’s Lake Charles facility; and (3) a peak-shaving plant for Yankee Gas in Waterbury, Connecticut. Complaint Counsel’s Opposition at Ex. C, Ex. E, Ex. F.

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to these contracts, CB&I had already obtained five sole-source commitments after the acquisition but before the record closed.⁸² Thus, of the eleven LNG tank contracts that have been awarded post-acquisition,⁸³ CB&I has successfully negotiated eight on a sole-source basis.

We are mindful that there is some variation in the value of the post-acquisition projects in terms of both size and number of tanks, which complicates the ability to state CB&I's precise market share. However, even accounting for these differences, it appears that CB&I has obtained sole-source contracts for the vast

⁸²At the close of the record, CB&I had negotiated (or was negotiating) sole-source contracts for: (1) El Paso's Elba Island facility; (2) British Petroleum's three import terminals; (3) CMS' Lake Charles terminal; and (4) a facility for Poten & Partners. Op. at 60 n.356. While these projects total six, we have not included the CMS project in our count, because it is the same as the October 7, 2003 award to CB&I for the Lake Charles facility. See Complaint Counsel's Opposition at Ex. C. Panhandle Eastern Pipeline (a subsidiary of CMS) and its subsidiary Trunkline were sold by CMS to Southern Union Company. CMS Energy Corp., SEC Form 10-K Report at 14 (Mar. 12, 2004) ("In June 2003, CMS Gas Transmission sold Panhandle to Southern Union Panhandle Corp., a newly formed entity owned by Southern Union"), <http://www.sec.gov/Archives/edgar/data/811156/000095012404000855/k82154e10vk.txt>. Although this 10-K filing was not part of the record, we take official notice of it under 16 C.F.R. § 3.43(d).

⁸³We have excluded the Dynegy project from our analysis, because Dynegy sold the Hackberry facility to Sempra, which re-bid the project and selected a new EPC.

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majority of the LNG tank work post-acquisition.⁸⁴

We also do not suggest that CB&I's ability to obtain the majority of the post-acquisition work alone demonstrates market power. Respondents rightly point out that even those firms that bid unsuccessfully can *theoretically* constrain CB&I.⁸⁵ However, we are not convinced that the alleged new entrants have the attributes necessary to replace the competition lost in the LNG tank market as a result of CB&I's acquisition of PDM. At trial, numerous customers testified that an LNG tank supplier would need to have experience, a solid reputation, experienced

⁸⁴The three projects that Respondents assert CB&I lost after the record's close – the Sempra, Freeport LNG, and Sabine Pass terminals – total eight tanks (three 160,000 cubic meter full-containment tanks for the Hackberry terminal, two tanks for the Freeport LNG import terminal, and three single containment tanks for the Sabine Pass project). Respondents' Petition at Ex. 2(B) ¶ 3, Ex. 5 ¶ 3. CB&I has negotiated contracts to build six LNG facilities, which comprise at least nine LNG tanks and likely many more. The Cove Point terminal expansion will contain two 160,000 cubic meter tanks. Complaint Counsel's Opposition at Ex. F. The Lake Charles terminal expansion involves a 140,000 cubic meter tank, and the Yankee Gas facility will have a smaller full-containment tank. *Id.* at Ex. C, Ex. E. In addition, CB&I has negotiated sole-source contracts with BP (for three separate import terminals), Poten & Partners, and El Paso. *Op.* at 60 n.356. Because both the BP and El Paso projects will be import facilities, they are likely to comprise more than one LNG tank (the import facility awards in the record generally comprise more than one LNG tank). *See, e.g.*, *Tr.* at 6961, 6968 (Freeport LNG's facility comprises two LNG tanks); *Tr.* at 4539-40 (Dynegy's Hackberry Facility comprised three LNG tanks).

⁸⁵Respondents made this identical argument at trial and on appeal, *RAB* at 35; *see generally* *Tr.* at 4860-72, and we found the evidence in the record did not support it. *Op.* at 64-65.

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supervisors, access to local labor forces, and regulatory expertise to compete effectively in this market. The bidding evidence further established that customers take into account each of these elements when they analyze a bidder's strength. Moreover, the history of this market has shown that LNG tank suppliers without a U.S. presence have failed to compete effectively with CB&I.⁸⁶

Respondents did not argue at trial or on appeal that the attributes we have identified as necessary to compete were unnecessary. Rather, they asserted that three new entrants – Skanska/Whessoe, TKK/AT&V, and Technigaz/Zachry – could restore competition *because* their U.S. construction presence provided them with these attributes.⁸⁷ Luke Scorsone, the head of CB&I's Industrial Division, testified at length that Skanska/Whessoe's, TKK/AT&V's and Technigaz/Zachry's U.S. construction presence differentiated them from suppliers that had no U.S. presence and had bid unsuccessfully on previous projects.⁸⁸ He also stated that this U.S. presence made the new entrants very serious competitors.⁸⁹ Respondents' Petition does

⁸⁶Lotepro teamed with Whessoe and Black & Veatch teamed with TKK to submit bids for MLGW's peak-shaving plant in Capleville, Tennessee, and their bids were well above that of CB&I. Tr. at 560, 3196-98.

⁸⁷*See, e.g.*, RAB at 1 ("Each firm owns or is allied with a U.S. constructor to form a combination focused on competing for U.S. LNG projects").

⁸⁸*See* Tr. at 4860-72.

⁸⁹*Id.* Some customers also testified that although they would have concerns about contracting with foreign LNG tank suppliers, the new entrants' U.S. presence largely alleviated these concerns. *See, e.g.*, Tr. at 1322 (stating that if a foreign company teamed up with an experienced US tank construction firm, that action would alleviate Bechtel's concern with subcontracting the tank).

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not put forth any evidence to suggest that such experience (and the attributes that flow from it) is no longer necessary for an LNG tank supplier to compete effectively.

We find, however, that the new entrants Respondents' Petition identifies lack of experience in the U.S. LNG tank market.⁹⁰ For example, Kvaerner/IHI has no experience in building LNG tanks in the United States and is not partnered with a U.S. construction firm.⁹¹ Similarly, MHI does not have a U.S. presence and, while Matrix is a U.S. firm, it has never built an LNG tank. Without such experience, it is unlikely that these suppliers have the ability to manage the project or attract and efficiently work with qualified field crews and local labor at the same level as PDM.⁹² Indeed, Matrix testified at trial that it would not expect to win an LNG tank bid against CB&I given its inexperience.⁹³ The recent evidence of a Matrix win does not undercut this evidence, because

⁹⁰The Opinion also discussed at length Technigaz/Zachry's lack of experience and why it was not a sufficient entrant. *See generally* Op. at 52-57. Respondents have not presented sufficient evidence to rebut these findings.

⁹¹Respondents also elicited testimony at trial that Kvaerner was not a good project manager. Tr. at 5543. Respondents took this position in an attempt to refute Complaint Counsel's argument that Whessoe's poor record in constructing LNG tanks outside of the United States would affect its ability to gain a foothold in the U.S. LNG tank market. Respondents accordingly argued that Kvaerner, which had previously owned Whessoe, mismanaged the projects at issue and that Whessoe would be more viable under Skanska's management.

⁹²Op. at 33-42. One of Respondents' witnesses even testified that it would consider IHI only if it were partnered with a U.S. construction firm. Tr. at 7017.

⁹³Tr. at 1604.

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the circumstances that surround the award do not demonstrate Matrix's ability to compete. We thus find that these firms do not have the capability to constrain CB&I at the pre-acquisition level.

We do not suggest that the new entrants will never be in a position to compete effectively with CB&I and thus constrain it. If the entrants that have been awarded LNG tank contracts successfully complete the projects, they will have established a foothold in this market. However, the evidence at trial established that it takes more than the successful completion of one LNG tank to be an effective competitor in this market. Thus, even if we were willing to assume that a few entrants will gain experience through their recent LNG tank awards, CB&I has not established facts sufficient to support a finding that such limited experience will allow those suppliers to constrain CB&I at the level PDM once did.

We also find evidence that the alleged new entrants' are unable to constrain CB&I in both CB&I's own conduct and its customers' responses. CB&I has adhered to an unwavering policy of insisting on sole-source contracts post-acquisition with little regard for whether its policy will cause some loss in sales.⁹⁴ Nonetheless, CB&I's market share appears to have *increased* post-acquisition – a trend that stands in sharp contrast to the dynamic that existed when CB&I competed with PDM. From 1990 to the acquisition, CB&I won five of nine of the LNG tanks awarded, PDM won the other four, and the value of the tank sales was roughly even.⁹⁵ The fact that CB&I has effected such an increase in market share while insisting on sole-source contracts suggests that CB&I obtained market power from the acquisition.

⁹⁴See discussion *supra* note 52.

⁹⁵Accounting for the value of the tanks, Dr. Simpson estimated that CB&I's total sales amounted to 45.3% and PDM's total sales amounted to 54.7% of the U.S. LNG tank market Tr. at 3055-58; CX 1645.

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Moreover, post-acquisition statements from CB&I's CEO suggest that CB&I views itself as unconstrained by new entry. At a shareholder discussion, he stated that CB&I can "win the work every time" if it chooses to do so.⁹⁶ Having carefully considered all this evidence, we adhere to our previous conclusion that the new entrants do not sufficiently constrain CB&I and that the competition lost from the acquisition has not been replaced.⁹⁷

⁹⁶See Complaint Counsel's Opposition at 8.

⁹⁷Contrary to Respondents' assertions, the evidence presented in their petition is also manipulable and can thus be viewed skeptically. See *General Dynamics Corp.*, 415 U.S. at 504-05 ("If a demonstration that no anticompetitive effects had occurred at the time of trial . . . constituted a permissible defense to a §7 divestiture suit, violators could stave off such actions merely by refraining from aggressive or anticompetitive behavior."); *Hospital Corp. of America v. FTC*, 807 F.2d 1381, 1384 (7th Cir. 1986) ("Post-acquisition evidence that is subject to manipulation by the party seeking to use it is entitled to little or no weight."); *B.F. Goodrich Co.*, 110 F.T.C. 207, 341 (1988) (same). See also *FTC v. Consolidated Foods Corp.*, 380 U.S. 592, 598 (1965) (finding that the court of appeals gave too much weight to post-acquisition evidence that, among other things, showed a declining share).

Although Respondents do not control the bids made by other LNG tank suppliers or which bidder a customer might select for a given project, CB&I does have control over its own bid. It can thus bid high enough to ensure that another LNG tank supplier wins some share of the post-acquisition market (and thereby point to these wins as evidence that meaningful entry has occurred). Because we have found that the balance of evidence does not support Respondents' argument, we need not determine whether the post-acquisition projects pointed to by Respondents deserve less weight than other evidence.

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4. Conclusions on the Sufficiency of Entry

We recognize that markets evolve and that monopolists may eventually be forced to adjust their behavior in light of new entry. However, the LNG tank market has historically been characterized by difficult entry conditions and dominated by CB&I and PDM for decades. There is inadequate evidence to suggest that the fundamental dynamics of this market have changed. Indeed, the evidence suggests that entry is extraordinarily slow in the LNG tank market and has not yet occurred on a sufficient scale.⁹⁸

Four years have passed since the acquisition and, at most, we find that new entrants have taken only the first steps toward meaningful entry. Moreover, at this juncture, we cannot predict what impact, if any, the awards identified by Respondents will actually have on the LNG tank market. The new entrants' potential for meaningful entry is dependent on their successful completion of the LNG tanks. Even if they successfully complete these projects, we strongly doubt that they will be viewed as comparable to the former PDM in the future, because the customers in this market have a preference for experienced tank suppliers that have completed multiple projects in the United States.⁹⁹ For all these reasons, we find that the evidence in

⁹⁸This conclusion is based on Respondents' new evidence as well as the post-acquisition evidence discussed in our Opinion. *See, e.g., Op. at 57-58, 81-82. See also Scherer & Ross, supra note 43 at 354* (“[U]ncertainty creates a switching cost that slows substitution in consumption. When the superiority of a product can be evaluated only after consuming or ‘experiencing’ the good, the substitution will depend upon the rate at which consumers sample new products.”).

⁹⁹It is worth noting that, as with the LIN/LOX tank market (which underwent a huge growth spurt and then faced declining demand), Tr. at 1542, the LNG tank market will likely flatten at some point in the future as the number of completed LNG tanks begins to

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Respondents' Petition does not demonstrate that new entry has restored the competition lost from the acquisition. We therefore affirm the findings in our Opinion and conclude that CB&I's acquisition of the PDM assets violated Section 5 of the FTC Act and Section 7 of the Clayton Act.

B. Remedy Issues

We are mindful that an evidentiary hearing on the scope of relief might be necessary where the trial does not address the issue of appropriate relief or where there is a factual dispute about the relief required to remedy an antitrust violation.¹⁰⁰ As we stated in our Opinion, however, Respondents did not proffer evidence at trial or on appeal to suggest that the provisions Complaint Counsel requested (many of which we implemented) were unnecessary.¹⁰¹ Rather, they argued that Complaint Counsel bore the burden of establishing that their Proposed Order was efficacious and feasible.¹⁰² We rejected this argument as not

meet demand. The fact that gaining a reputation in these markets requires more than winning one job is highly relevant to this point – even if those suppliers who have won a bid complete successfully the LNG tank, it is unlikely that having completed one job will put these suppliers in parity with CB&I once demand slows.

¹⁰⁰*United States v. Microsoft Corp.*, 253 F.3d 34, 101 (D.C. Cir. 2001).

¹⁰¹Op. at 104.

¹⁰²*Id.* at 103-04. The only evidence Respondents identified in their appeal was customer testimony that, according to Respondents, demonstrated that a divestiture would harm competition by reducing “the number of competitors that can bid on large LNG projects.” RAB at 52. We explained in our Opinion, however, that when read in context, this testimony did

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grounded in the law and thus concluded that we need not remand this case for an evidentiary hearing on relief.

Respondents' Petition similarly does not present any evidence to suggest that the remedy we ordered is unnecessary. Rather, it argues that "the Commission assumed without evidence, argument, or specific analysis that an equal division of the broadly defined 'Relevant Business' was necessary to achieve that goal."¹⁰³ They argue that, while we offered a rationale for our conclusion that certain types of assets needed to be included in the remedy, we "made no findings and cited no evidence supporting [our] conclusions as to the *quantity* of such additional relief."¹⁰⁴ Respondents' argument is inconsistent with the law and misreads the Final Order.

A remedy must bear a reasonable relationship to correcting the harm that flows from the antitrust violation. This is, however, a guiding principle and does not require a finder of fact to calibrate the relationship perfectly. The Opinion discusses at length the facts that CB&I and PDM were roughly equal competitors prior to the acquisition, the acquisition eliminated this competition, and entry does not constrain CB&I at the pre-acquisition level. One way to replicate the competition lost from this acquisition under these circumstances is by a divestiture creating two independent entities, each equally capable of competing in the relevant markets. We need not demonstrate – as Respondents suggest – that the particular quantity of assets included in the divestiture perfectly remedies the harm from the acquisition. Rather, our remedy need only "eliminate the tendency of the acquisition

not support Respondents' argument. *Id.* at 100.

¹⁰³Respondents' Petition at 15.

¹⁰⁴*Id.* (emphasis in original).

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condemned by §7.”¹⁰⁵

Moreover, contrary to Respondents’ assertions, the Final Order does not require CB&I to divide its “Relevant Business” equally. Rather, it requires CB&I to “reorganize the Relevant Business into two independent, stand-alone operating divisions . . . each fully, equally, and independently engaged in all aspects of the Relevant Business.”¹⁰⁶ It further states that the purpose of this provision is to “create two stand-alone business entities, each having approximately *equal shares of the markets* for the relevant products, each fully capable of being divested, and each fully (and to the extent practicable, equally) engaged in all aspects of the Relevant Business.”¹⁰⁷ That is, the Final Order requires CB&I to create two entities equally capable of competing in the relevant markets. Instead of requiring CB&I to divide its “Relevant Business” along specific lines, the Final Order also allows CB&I the flexibility to decide how best to effectuate the Final Order’s requirement.¹⁰⁸ As we stated in our Opinion, we took this approach to “give CB&I, which is best positioned to know how to create two viable entities from its current business, the opportunity to do so.”¹⁰⁹ The provision is thus grounded in the evidence and adaptable enough to ensure that the remedy restores the competition lost from the acquisition in a way that will not impede the efficient operation of the relevant markets. We therefore reject Respondents’ argument that the remedy is not reasonably related to the alleged violations.

¹⁰⁵ *Du Pont*, 366 U.S. at 325.

¹⁰⁶ Final Order ¶ III.A.

¹⁰⁷ *Id.*

¹⁰⁸ *Id.*

¹⁰⁹ Op. at 94.

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Respondents make two additional arguments with respect to the remedy. First, they assert that the definition of “Relevant Business” is too broad and potentially encompasses every project CB&I constructs. They thus argue that we should eliminate the requirement that CB&I divest these unrelated assets.¹¹⁰ Second, Respondents request that we modify the Final Order to make clear that the relief does not include assets beyond CB&I’s domestic business and contracts. Although Respondents should have raised these issues well before now, we have decided to seek additional briefing on each of them. This approach should ensure that the divestiture will include the assets necessary for an acquirer to compete effectively in the relevant markets without imposing unnecessary requirements on CB&I and interrupting the efficient operation of the market.

Therefore, we direct Respondents to file a brief within 10 days of service of this Decision and Order. The brief should specifically identify those assets in the “Relevant Business” definition that are unnecessary to build the relevant products and the water tank products. To the extent the brief identifies any assets, we direct Respondents to explain why the inclusion of such assets is unnecessary, especially in light of the facts that: (1) the assets identified in the “Relevant Business” definition match those identified in PDM’s offering memorandum to CB&I; and (2) the assets defined as CB&I’s “Relevant Business” are integrated with

¹¹⁰Respondents also request that we require the acquirer to justify the divestiture of assets beyond those acquired from PDM. Respondents’ Petition at 16. We reject this request. Our Opinion specifically discussed whether a divestiture of the assets acquired from PDM would remedy the harm from the acquisition. Based on the evidence, we concluded that a divestiture of solely those assets “leaves a substantial likelihood that the tendency towards monopoly of the acquisition condemned by § 7 has not been satisfactorily eliminated.” Op. at 103 (citing *DuPont*, 366 U.S. at 331-32).

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the assets necessary to build the relevant products.¹¹¹ Respondents may include an alternative suggestion for a divestiture package that is consistent with our findings that “the additional water tank assets, allocation of customer contracts, and transfer of employees are necessary to ensure that the divested entity can compete effectively in the relevant markets” and that the provision of technical assistance and administrative services may also be needed.¹¹² Respondents’ brief should also address which assets outside of the United States the “Relevant Business” definition encompasses and why the inclusion of such assets is unnecessary for an effective divestiture. Complaint Counsel may file a response within 10 days after service of Respondents’ brief on these issues.

Accordingly,

IT IS ORDERED THAT Respondents’ Petition, filed February 1, 2005, is **DENIED** to the extent it seeks reconsideration pursuant to § 3.55 of the Commission’s Rules of Practice, 16 C.F.R. § 3.55; and

IT IS FURTHER ORDERED THAT Respondents’ Petition is **DENIED** on its merits under § 3.72(a) of the Commission’s Rules of Practice, 16 C.F.R. § 3.72(a), insofar as it raises issues concerning the effectiveness of new entry; and

IT IS FURTHER ORDERED THAT Respondents file a brief within 10 days of service of this Decision and Order, addressing the issues identified in Part III.B of this Decision and Order; and

¹¹¹For example, the evidence shows that employees that build the relevant products also build other types of water tanks. Tr. at 4058-60.

¹¹²Op. at 99.

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IT IS FURTHER ORDERED THAT Complaint Counsel respond to Respondents' brief on these issues within 10 days of service or, in the alternative, give the Commission notice within that 10-day time period that no response will be filed.

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IN THE MATTER OF

RAMBUS INCORPORATED**ORDER GRANTING IN PART COMPLAINT COUNSEL'S
MOTION TO COMPEL PRODUCTION OF, AND TO
REOPEN THE RECORD TO ADMIT, DOCUMENTS
RELATING TO RAMBUS INC.'S SPOILIATION OF
EVIDENCE; AND GRANTING RAMBUS'S UNOPPOSED
MOTION FOR RELEASE OF TESTIMONY**

Complaint Counsel's Motion to Compel Production of, and to Reopen the Record to Admit, Documents Relating to Respondent Rambus Inc.'s Spoliation of Evidence ("Motion to Compel") was filed on July 2, 2004 in response to developments in ongoing litigation between Rambus and Infineon¹ in the United States District Court for the Northern District of Virginia. On May 18, 2004, Judge Payne entered two interlocutory orders (Attachments A & B to the Motion to Compel) in the *Infineon* litigation denying Rambus's claims of work-product and attorney-client privilege as to certain documents by reason of waiver and the crime-fraud exception and ordering additional discovery regarding Rambus's alleged spoliation of evidence. In its response to the Motion to Compel, Rambus opposed admission of any documents produced to Infineon by reason of Judge Payne's orders on the grounds, *inter alia*, that such orders were not final and the documents were still privileged. By Order dated December 6, 2004, we directed the parties to file designations of the record relevant to the issue of spoliation. The parties filed their designations on December 22, 2004.

¹Rambus Inc. v. Infineon Technologies AG, Civil Action No. 3:00cv524 (E.D. Va.) ("*Infineon* litigation"). This case involved, *inter alia*, patent infringement claims against Infineon with respect to production of JEDEC-compliant DRAM devices and counterclaims against Rambus for common law fraud and monopolization because of conduct within JEDEC.

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On March 30, 2005, Complaint Counsel filed a Supplemental Memorandum in Support of its Motion to Compel (“Supplemental Memo”) updating the Commission on the status of spoliation issues in the *Infineon* litigation. A five-day evidentiary hearing followed by oral argument on March 1, 2005 was held in the *Infineon* litigation (“evidentiary hearing”). At the end of the evidentiary hearing, Judge Payne entered bench rulings dismissing Rambus’s patent infringement claims with prejudice² and dismissing Infineon’s monopolization claims as moot.³ On March 21, 2005, all parties to the *Infineon* litigation entered into and filed a Stipulation of Dismissal with Prejudice regarding “all claims and counterclaims alleged by either Rambus or Infineon in this action at any time (including any claims and counterclaims previously dismissed either voluntarily or involuntarily).”

²At the conclusion of the March 1, 2005 arguments, Judge Payne ruled as follows:

I conclude, on the basis of the record and the law, that Infineon has proved, by clear and convincing evidence, that Rambus is guilty of and liable for unclean hands that bar its access to this court. And I have concluded that [Infineon] has proved, by clear and convincing evidence, a spoliation that warrants dismissal of this action as the only appropriate sanction after having – of the patent infringement case after having considered the alternatives. An opinion will issue in due course with findings of facts and conclusions of law. . . .

Infineon, Transcript of March 1, 2005 at 1138-39 (Attachment 1 to the Supplemental Memo).

³*Id.* at 1145.

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Stipulation at 1.⁴ That Stipulation appears to terminate the *Infineon* litigation for all purposes.

In light of these developments, the Supplemental Memo asks the Commission to “compel Rambus to produce the remaining Spoliation Documents, and reopen the record in this case to admit all Spoliation Documents used by Rambus or Infineon in open court and now in the possession of Complaint Counsel (including those documents attached [to the Supplemental Memo]), as well as all additional Spoliation Documents yet to be produced by Rambus.” Supplemental Memo at 26. Rambus has neither filed nor sought leave to file a response to the Supplemental Memo.

Reopening the record to admit supplemental evidence at this stage of the proceeding should only be done in compelling circumstances. Use of the Commission’s power under 16 C.F.R. § 3.54(a) to reopen the record to admit supplemental evidence after oral argument should only be countenanced where (1) the party offering the evidence has acted with due diligence; (2) the supplemental evidence is relevant, probative and non-cumulative; and (3) the supplemental evidence can be admitted without undue prejudice to the other party. *Chrysler Corp. v. Federal Trade Commission*, 561 F.2d 357, 362-63 (D.C. Cir. 1977); *Brake Guard Products, Inc.*, 125 F.T.C. 138, 248, n.38 (1998). The application of this standard to the instant motion weighs strongly in favor of reopening this record to admit evidence from the record of the evidentiary hearing.

Materials supporting the Motion to Compel raise potentially disturbing issues regarding the adequacy, completeness and reliability of the record in this matter. *Compare* Initial Decision at 244 (“[T]here is no indication that any documents, relevant and

⁴A filed copy of the Stipulation of Dismissal with Prejudice may be found at <http://investor.rambus.com/downloads/2005-03-21%20Stipulation%20of%20Dismissal%20With%20Prejudice.pdf>.

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material to the disposition of the issues in this case, were destroyed.”) *with Infineon* Order of May 18, 2004 at 18 (Attch. B to Motion to Compel) (“Those [privileged] documents contradict the assertions made by Rambus in the FTC proceeding and here that its document retention program was conceived, adopted, and implemented for benign and legitimate purposes.”). We must, therefore, take measures to insure the integrity of this proceeding.

The two issues that could weigh against reopening the record, privilege and prejudice, do not appear likely to be significant issues here. The materials that will be admitted to the record by this Order were all produced in open court during the evidentiary hearing. Counsel for Rambus participated fully in both the taking of the discovery preceding that hearing and in the hearing itself. Rambus had a complete opportunity to marshal and present its own evidence during the evidentiary hearing. Finally, the Stipulation of Dismissal filed on March 21, 2005 eliminates any possible appeals of Judge Payne’s spoliation orders. In light of these facts, there does not appear to be any credible argument either that the record presented during the evidentiary hearing contains privileged materials or that the use of that record, as permitted by this Order, will be unduly prejudicial to Rambus.⁵

Complaint Counsel’s pursuit of spoliation in this matter has been diligent. Much of the evidence at issue in this Motion either did not exist when the record closed in this matter or was denied to Complaint Counsel by claims of privilege that no longer apply.

⁵The motion papers did not provide the Commission with any guidance regarding the nature of the additional information Complaint Counsel was seeking to add to the record of this matter when they used the phrase “all additional Spoliation Documents” in their request for an order. Supplemental Memo at 26. The Commission is not in a position to assess any issues of privilege or other problems that might arise if such additional documents were included in this Order. Thus, this Motion must be denied in part.

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The materials supporting this Motion show that the evidence that will be added to the record is both probative and relevant to issues in this matter. In addition to being relevant to spoliation of evidence, the evidence that will be added to this record includes, for example, evidence indicating from which Rambus patent files materials were removed (DTX 5376, Attch. 14 to Supplemental Memo) and evidence that Rambus destroyed records of its participation within JEDEC in anticipation of litigation (DTX 4068, Attch. 11 to Supplemental Memo). Further, because some of these materials likely contradict evidence and positions taken in this matter previously, any claim that these materials will be cumulative does not appear likely to possess substantial merit. The Commission hereby expressly finds that good cause exists to grant in part Complaint Counsel's Motion to Compel. Accordingly,

IT IS ORDERED THAT, insofar as Complaint Counsel's Motion to Compel requests reopening this record to admit the record of the evidentiary hearing, such Motion shall be, and it hereby is, **GRANTED**; insofar as Complaint Counsel's Motion to Compel requests an order compelling production by Rambus of "Spoliation Documents" outside of the record of the evidentiary hearing in the *Infineon* litigation, such Motion shall be, and it hereby is, **DENIED** without prejudice; and

IT IS FURTHER ORDERED THAT:

1. On or before June 14, 2005, Complaint Counsel and Rambus may each file such parts of the record of the evidentiary hearing in the *Infineon* litigation as each party may deem relevant to any issue in this matter; provided, however, that the filing of such materials shall be accompanied by a schedule of exhibits which includes both exhibit numbers for each exhibit and a brief description of each exhibit; and
2. On or before June 24, 2005, either party may file any objections to the exhibits filed by the other party, stating

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with particularity each exhibit to which each objection is made and the nature of and legal basis for the objection; and

3. On or before July 5, 2005, Rambus and Complaint Counsel shall file their responses, if any, to the filings required or permitted by 2., above;⁶ and

IT IS FURTHER ORDERED THAT the March 21, 2005 Unopposed Motion of Respondent Rambus Inc. for Release of Certain Testimony Cited in the Initial Decision into the Public Record, made with the consent of both Complaint Counsel and Intel Corp., shall be, and it hereby is, **GRANTED**.

⁶If significant additional evidence remains in the record after the Commission rules on any objections filed pursuant to Paragraph 2, above, the parties should anticipate being ordered to file, and respond to each other's filing of, amended proposed findings of fact and conclusions of law cross-referenced to previously filed proposed findings and to the related provisions in the Initial Decision. Such order will also likely request the identification of any prior misstatements or misrepresentations of fact by any person in this matter which can now be identified by reason of the admission of any supplemental evidence and the filing of any motions seeking additional relief or inferences arising by reason of any alleged spoliation of evidence.

NORTH TEXAS SPECIALTY PHYSICIANS

Order

IN THE MATTER OF

NORTH TEXAS SPECIALTY PHYSICIANS**NOTICE SCHEDULING ORAL ARGUMENT**

The oral argument on the appeal and the cross-appeal from the Initial Decision in this matter has been scheduled for Friday, June 10, 2005, at 11:00 a.m., in the Federal Trade Commission's Hearing Room 532, Headquarters Building, located at 600 Pennsylvania Avenue, N. W., Washington, D.C., 20580.

Each side will be allotted thirty minutes to present its argument. Respondents will have the opportunity to open and close the argument.

By direction of the Commission.

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IN THE MATTER OF

CHICAGO BRIDGE & IRON COMPANY N.V.**ORDER GRANTING MOTION TO EXTEND TIME FOR
FURTHER BRIEFING ON SPECIFIC REMEDY ISSUES**

On May 10, 2005, the Commission issued a Decision and Order that required within 10 days of service Respondents Chicago Bridge & Iron Company and Chicago Bridge & Iron Company N.V. to file a brief addressing specific remedy issues. On May 19, 2005, Respondents filed a Motion to Extend Time for Further Briefing on Specific Remedy Issues (“Motion”). On May 20, 2005, Complaint Counsel filed a Response indicating that they do not object to Respondents’ Motion.

The Commission has decided to grant Respondents’ request for additional time and allow Respondents up to 20 days to file their brief. As a matter of equity, Complaint Counsel will be afforded equal time to file their response brief.

Accordingly,

IT IS ORDERED THAT Respondents’ Motion is **GRANTED**. Respondents shall file their brief pursuant to the May 10, 2005 Decision and Order on or before June 6, 2005; and

IT IS FURTHER ORDERED THAT Complaint Counsel respond to Respondents’ brief within 20 days of service or, in the alternative, give the Commission notice within that 20-day time period that no response will be filed.

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IN THE MATTER OF

RAMBUS INCORPORATED

**ORDER GRANTING JOINT PETITION TO MODIFY
SCHEDULE**

Counsel for Respondent and Counsel for the Complaint have filed a Joint Petition to Modify the Schedule in the Commission's May 13, 2005 Order. The parties state that as a consequence of scheduling constraints, the schedule in the Commission's Order appears to be impractical, and they therefore request a modified schedule.

The Commission has determined to grant the Joint Petition. Accordingly,

IT IS ORDERED THAT the parties' Joint Petition to Modify the Schedule in the Commission's May 13, 2005 Order is hereby **GRANTED**; and

IT IS FURTHER ORDERED THAT the following schedule shall replace the schedule set forth in the Commission's May 13, 2005 Order:

1. On or before June 17, 2005, Complaint Counsel and Rambus may each file such parts of the record of the evidentiary hearing in the Infineon litigation as each party may deem relevant to any issue in this matter; provided, however, that the filing of such materials shall be accompanied by a schedule of exhibits which includes both exhibit numbers for each exhibit and a brief description of each exhibit; and
2. On or before July 8, 2005, either party may file any objections to the exhibits filed by the other party, stating with particularity each exhibit to which each objection is made and the nature of and legal basis for the objection; and

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3. On or before July 19, 2005, Rambus and Complaint Counsel shall file their responses, if any, to the filings required or permitted by 2., above.

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IN THE MATTER OF

BASIC RESEARCH, L.L.C.

ORDER

This matter comes before the Commission on the certification by Chief Administrative Law Judge Stephen J. McGuire (“ALJ”) of three procedural motions relating to Respondents’ allegation that Complaint Counsel’s disregard of the Commission’s rules regarding electronic filings resulted in the posting and disclosure of Respondents’ confidential documents on the Commission’s public Web site. The Commission treats this allegation as a serious matter, and recognizes the public interest in ensuring that all reasonable measures be taken to safeguard confidential information from improper disclosure. Accordingly, as explained below, the Commission, after reviewing Respondents’ arguments and Complaint Counsel’s responses, has determined to dispose of the certified motions by: (1) imposing certain procedural restrictions on Complaint Counsel for the remainder of this proceeding to help prevent any recurrence of the posting of information designated confidential by Respondents or by any other submitter, but otherwise denying Respondents’ motion for an order to show cause why Complaint Counsel should not be held in contempt, including Respondents’ request for dismissal and monetary relief; (2) granting in part and denying in part Respondents’ motion seeking access to certain internal agency electronic files by providing Respondents’ with aggregate FTC Web server data; and (3) denying Respondents’ motion for additional discovery.

I. Background

A. The Documents and Motions at Issue

The documents at issue consist of five exhibits contained in Complaint Counsel's Motion for Partial Summary Decision, filed January 31, 2005, and one exhibit contained in Complaint

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Counsel's Motion to Compel, filed December 6, 2004.¹ Respondents allege that these exhibits were subject to the ALJ's protective order issued August 11, 2004, and should not have been posted to the Web site. Nonetheless, as explained further below, the exhibits accompanying Complaint Counsel's January 31 motion were posted to the FTC's public Web site on February 15, 2005, and, when Complaint Counsel discovered this situation, the documents were removed from the Web site at Complaint Counsel's request on February 17, 2005. At the same time, the allegedly confidential exhibit contained in Complaint Counsel's December 6 motion, which had been previously posted, was also removed from the Web site.

After learning of these postings, Respondents filed an emergency motion, dated February 18, 2005, seeking production of the Commission's web server logs and any other relevant electronic files to determine who may have accessed these exhibits while they were publicly posted. *See* Respondents' Emergency Motion Requiring the Commission to Provide Respondents With Electronic Files Showing Who Accessed Respondents' Confidential Information While It Was on the Commission's Website—Expedited Briefing Requested (Feb. 18,

¹ The five exhibits, or portions thereof, attached to Complaint Counsel's January 31 motion and at issue here are: Exhibit 11 (i.e., Exhibit A to Respondent's Response to Complaint Counsel's First Set of Interrogatories, containing product ingredients and ratios); Exhibit 15 (i.e., Exhibit A to Supplemental Answers and Answers to Complaint Counsel's First Set of Interrogatories, containing net gross revenue and advertising expenditures); Exhibit 36 (customer e-mail); Exhibit 42 (combined balance sheet and notes); and Exhibit 45 (advertising dissemination schedule). Also at issue is Exhibit R (gross sales figures) to Complaint Counsel's December 6, 2004, Motion to Compel.

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2005) (“Electronic Files Motion”).² By subsequent motion, Respondents further sought an order to show cause why Complaint Counsel should not be held in contempt of the ALJ’s protective order. *See* Respondents’ Motion for Order to Show Cause Why Complaint Counsel Should Not Be Held in Contempt (March 8, 2005) (“Contempt Motion”). Finally, Respondents moved for leave to take additional discovery regarding Complaint Counsel’s alleged violation of the protective order. *See* Respondents’ Motion for Leave to Take Discovery Regarding Complaint Counsel’s Violation of the Protective Order (March 8, 2005) (“Discovery Motion”).³

² Complaint Counsel filed a partial response to the Electronic Files Motion, requesting additional time for a supplemental response. *See* Complaint Counsel’s Partial Response to Respondents’ Emergency Motion (Feb. 18, 2005). By order dated February 22, 2005, ALJ McGuire granted Respondents’ request in its Electronic Files Motion for expedited briefing and ordered Complaint Counsel to file its supplemental response by February 25, 2005. *See* Complaint Counsel’s Supplemental Response to Respondents’ Emergency Motion (Feb. 25, 2005) (“Electronic Files Supplemental Response”); *see also* Reply to Complaint Counsel’s Partial & Supplementary Responses to Respondent’s Emergency Motion (Mar. 4, 2005); Order for Respondents to Show Cause (Mar. 9, 2005) (requiring respondents to show cause what information posted to the Web site was, in fact, confidential); Respondents’ Response to Order to Show Cause (Mar. 16, 2005).

³ *See also* Complaint Counsel’s Consolidated Opposition to Respondents’ Motion For Order to Show Cause Why Complaint Counsel Should Not Be Held in Contempt and Respondents’ Motion for Leave to Take Discovery (Mar. 21, 2005) (“Consolidated Opposition”).

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B. Respondent's Arguments and Complaint Counsel's Responses

Respondents assert that the exhibits in question contain, *inter alia*, business records and other confidential information, and, in one instance, a consumer's e-mail address and other personal information. Respondents assert that these exhibits containing this information were designated "confidential" pursuant to the ALJ's protective order, as noted earlier, and that Complaint Counsel violated the protective order by using e-mail for filings containing confidential material, in violation of Commission Rule 4.2(c)(3), 16 C.F.R. § 4.2(c)(3) (prohibiting the use of e-mail to transmit nonpublic filings to the Office of the Secretary). Respondents assert that Complaint Counsel's use of e-mail to transmit such confidential materials to other FTC document processing staff led to their erroneous posting on the FTC Web site by such staff, and constituted contempt of the protective order. Respondents assert that the posting of the materials caused them irreparable harm, and that the only appropriate remedy is dismissal of the complaint and monetary relief, including attorney costs. *See* Contempt Motion at 5-6, 23-35. Further, Respondents argue that production of certain electronic files is necessary to show who may have accessed the documents in question while they were posted on the Commission's Web site. *See* Electronic Files Motion at 2-3. Finally, Respondents seek additional discovery, including depositions of Complaint Counsel and other FTC staff, as well as documentary material relating to Complaint Counsel's alleged violation of the protective order. *See* Discovery Motion at 9-13.

Complaint Counsel have acknowledged that they used e-mail to transmit both the public and non-public versions of their January 31 motion and exhibits to the Commission's document processing staff. Complaint Counsel argue, however, that Respondents were fully aware of Complaint Counsel's ongoing use of e-mail to transmit electronic copies of non-public filings, that Respondents had failed to raise any objections to this practice, and that, in any event, the posting of the non-public version of the exhibits at issue resulted from an error once they

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were received by document processing staff, and not because the exhibits had been transmitted by e-mail. *See* Electronic Files Supplemental Response, Att. B, ¶¶ 14, 22.

Complaint Counsel assert that they have not acted in bad faith, and that when they discovered that the non-public version of the exhibits were publicly posted, they took immediate steps to have them removed from the public FTC Web site and to preserve the related electronic files. *See* Consolidated Opposition at 21-66. Further, Complaint Counsel argue that Respondents have failed to demonstrate, as a threshold matter, that the exhibits meet relevant standards for *in camera* treatment; that the Respondents had failed to designate certain exhibits properly in order for them to be subject to the protective order; and that no harm has been demonstrated from the posting of any of the exhibits on the FTC's Web site. *Id.* at 4-5; Electronic Files Supplemental Response at 4-6. Complaint Counsel argue that Respondents are not entitled either to dismissal of the complaint on the merits or monetary sanctions, that their Motion for discovery of electronic files cannot be granted without violating the Commission's privacy policy, and that their request for additional discovery should also be denied. *See* Electronic Files Supplemental Response at 3-4; Consolidated Opposition at 66-71.

C. The ALJ's Certifying Order

On April 6, 2005, after reviewing the Respondents' arguments and Complaint Counsel's responses, Judge McGuire issued an order certifying the Respondents' three motions to the Commission (*i.e.*, Electronic Files Motion, Contempt Motion, and Discovery Motion). *See* Order Certifying Motions to Commission and Staying Proceedings ("Certifying Order"). In his order, Judge McGuire concluded that Complaint Counsel violated Rule 4.2(c)(3) by e-mailing nonpublic filings, that all but one of the exhibits that were e-mailed appeared to contain information that is entitled to *in camera* treatment under the Commission's rules and precedent, and that the exhibits disclosed on the FTC's Web site were subject to the protective order applicable in this proceeding. Certifying Order at 7-10.

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Judge McGuire nevertheless determined that the three motions must ultimately be certified to the Commission because: “(1) the motions raise allegations, inter alia, requiring determination of matters beyond the merits of the violation of law charged in the Complaint; (2) the challenged conduct appears to involve components of the Commission and/or employees other than Complaint Counsel; and (3) the requested relief exceeds the authority delegated to the Administrative Law Judge.” Order at 2; *see also id.* at 10.

Accordingly, the Respondents’ three motions now are presented to the Commission for resolution. As described below, this Order: denies the Contempt Motion but grants appropriate alternative relief; grants in part and denies in part the Electronic Files Motion; and denies the Discovery Motion.

II. Discussion

The Commission addresses the Contempt Motion first, because the other two motions, which relate to discovery, turn upon the disposition of the Contempt Motion.

A. Contempt Motion

Respondents’ Contempt Motion seeks dismissal of the Commission’s complaint, asserting that such a remedy is appropriate when it is shown that a party has acted willfully or in bad faith in violating an order of an ALJ. We reject this request. While intent is a relevant factor on the issue of dismissal, it is not determinative. The Commission must also consider the strong public policy favoring disposition of cases on their merits, the potential availability of less drastic alternatives, and, most important, whether the Respondents have suffered any actual prejudice in the litigation itself as a result of the alleged violations. *See Pagtalunan v. Galaza*, 291 F.3d 639, 640 (9th Cir. 2002) (factors relevant to whether dismissal is warranted under Fed. R. Civ. P. 41); *Bowling v. Hasbro, Inc.*, No. 04-1364, 2005 U.S. App. LEXIS 5867 (Fed. Cir. Apr. 11, 2005).

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Here, we observe that the Commission's complaint is brought in the public interest, that dismissal would not be the only available or feasible remedy, and that Respondents have failed to allege or demonstrate how the posting of the documents on the FTC Web site has prejudiced the Respondents with respect to the merits of the proceeding. Accordingly, even assuming *arguendo* that Respondents could demonstrate that Complaint Counsel's actions constituted an intentional or willful violation of the ALJ's protective order, the extraordinary remedy of dismissal is not justified. *See, e.g., Coleman v. American Red Cross*, 23 F.3d 1091, 1095-96 (6th Cir. 1994) (although attorney intentionally violated a protective order, it was an abuse of discretion to dismiss the case on that ground unless moving party could show how it had been prejudiced in the litigation).

While Respondents note that Commission Rule 3.38 authorizes the striking of a pleading, motion or other submission as a sanction for violations of an ALJ discovery order, nothing in that Rule compels dismissal of the complaint here. These discovery sanctions are designed as potential compensation for an improper denial of access to testimony, documents, or other evidence resulting from a party's failure to comply with discovery. *See* 16 C.F.R. § 3.38(c). Although the protective order was undoubtedly issued in connection with discovery, the posting of the exhibits on the FTC's Web site has not deprived or interfered with the Respondents' access to any relevant testimony, document, or other necessary evidence. Likewise, Respondents' allegation of serious competitive business harm from the alleged improper disclosure, even if proven to be true, would not constitute prejudice to any substantive claims or defenses that might be a factor in this litigation.

Nonetheless, the Commission believes that there is a sufficient basis in the existing record of this proceeding to conclude that Complaint Counsel violated the terms of Commission Rule 4.2(c)(3), *supra*, which prohibits the filing of confidential exhibits by e-mail. Specifically, affidavits submitted by Complaint Counsel concede that e-mail was used to transmit an unredacted (non-public) version of their January 31 motion to FTC document

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processing staff.⁴ To the extent that Complaint Counsel's violation of this Rule contributed, in whole or part, to confusion by document processing staff about the nonpublic status of the exhibits at issue and resulted in their posting on the FTC Web site, the Commission believes that Complaint Counsel's Rule violation is enough to warrant remedies, irrespective of Complaint Counsel's alleged intent or any showing of actual harm by Respondents.⁵

The Commission has determined that an appropriate remedy, rather than dismissal, is to require that, for the remainder of the present proceeding, all future public filings by Complaint Counsel under Rule 4.2(c)(3) be reviewed and certified by the Associate

⁴ Complaint Counsel's admission obviates the need to determine whether Complaint Counsel's acts or omissions constituted contempt of the protective order, which would require the Commission to resolve numerous underlying factual and legal issues (*e.g.*, Complaint Counsel's alleged intent, the intervening responsibility or role, if any, of Commission staff other than Complaint Counsel in the posting of the documents on the Web site, and whether the documents at issue were properly subject to the protective order in this proceeding). Indeed, threshold issues might be raised about the possible overdesignation of confidential materials under the protective order; we note that Judge McGuire determined that at least one of the exhibits at issue would not satisfy the standards for *in camera* treatment. In any event, resolving such issues would require a show cause hearing to make additional factual or legal findings that ultimately are not necessary for the Commission to fashion appropriate relief.

⁵ The Chairman has already directed the Executive Director, in consultation with the Office of General Counsel, to examine whether any further action would be warranted, such as taking any additional safeguards or making other changes to the Commission's policies, procedures and practices for the handling of information designated confidential, in light of the violation in this proceeding.

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Director for the Division of Enforcement, Bureau of Consumer Protection, to ensure that such public filings have been properly redacted, and that they contain no unredacted material that would violate the Rule. This remedy is intended to help avoid any future violations of the protective order and the Rule.

The Commission is cognizant that a remedy designed to prevent a future violation does not necessarily address a past violation. In that regard, Respondents' Contempt Motion asks the Commission for monetary relief to redress it for the time and expense it has incurred in pursuing this matter. The Commission, however, has no authority to grant such relief in the context of this proceeding.⁶

Accordingly, for the reasons stated above, the Commission grants the relief described above, but otherwise denies Respondents' motion for an order to show cause why Complaint Counsel should not be held in contempt, including Respondents' request for dismissal or monetary relief.

B. Electronic Files Motion

In addition to sanctions and monetary relief, Respondents have asked for the production of Web server log information that Respondents allege would reveal who may have accessed the exhibits at issue from the Commission's Web site. The Commission has determined to grant this motion in part by granting Respondents access to aggregate Web log data that reveal the Web domains from which requests to the exhibits in question were received. Disclosure of this information provides Respondents with information regarding the extent of the disclosures and may allow the Respondents to contact these domains to determine to what extent the domain operators

⁶ Absent statutory authority, the Commission may not award attorney costs or other expenses allegedly incurred by Respondents as a result of Complaint Counsel's actions. *See, e.g.*, 67 Comp. Gen. 574, 576 (1988).

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themselves, or users of these domains, may have retrieved, stored, used, shared, or disclosed exhibits from the FTC's servers.⁷

The Commission, however, denies Respondents' Electronic Files Motion to the extent that it seeks specific Internet Protocol (IP) addresses or other information that would personally identify any specific individual. The Commission acknowledges that such personally identifiable information might better serve Respondents' stated purpose to identify and contact specific individuals who may have accessed the exhibits at issue. Nonetheless, the disclosure of such personally identifiable information would violate the Privacy Act of 1974, 5 U.S.C. § 552a, to the extent, if any, that disclosure would constitute the improper establishment, retrieval, and disclosure from an agency system of records pertaining to an individual by name or other personal identifier (*e.g.*, a number or electronic address). The Act prohibits the retrieval and disclosure or use of such information without the individual's consent unless authorized by the Act. Retrieval and disclosure of such information under the present circumstances to the Respondents would neither be consensual nor for a purpose authorized by the Act.

Moreover, such disclosure would violate the FTC's Web privacy policy, which unequivocally states that Web server log information is used strictly as "aggregate" data and is not used to "track or record" information about individuals. The Commission believes that it would not serve the public interest for the Commission to compound Complaint Counsel's violation of Rule 4.2(c)(3) and make a disclosure of Web log information that could violate the privacy rights of other individuals who have been assured a certain degree of anonymity when visiting the FTC's Web site. In disclosing aggregate data, the Commission is

⁷ The Commission is unable to grant the Respondents' related request for any relevant "security logs," because the exhibits at issue were posted on public FTC servers (*i.e.*, no password or other security clearance must be submitted in order to access those servers).

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making available as much information as possible to the Respondents while remaining consistent with applicable privacy laws and policy. As already discussed, disclosure of aggregate data would allow Respondents to contact the operators of the Web domains from which requests for the exhibits originated, and determine if those domains might assist in identifying, retrieving, or destroying any copies of the exhibits that may have been retained by users of those domains or by the domain operators themselves, without requiring that the Commission potentially violate privacy law and policy by disclosing personally identifying information (*e.g.*, IP addresses) to the Respondents.

C. Discovery Motion

In addition to seeking Web log information, the Respondents, through a separate Discovery Motion, also have sought additional internal FTC documents that they believe would shed light on the circumstances surrounding the posting of the exhibits at issue, including depositions of Complaint Counsel and other agency support staff, any relevant personnel or training files, and any other information concerning the agency's privacy policies and practices.

Discovery in Commission adjudicatory proceedings under Part 3 of the Commission's Rules is limited to matters that are relevant to the allegations of the Commission's complaint, to the relief proposed therein, or to the Respondents' defenses, none of which is at issue in this Discovery Motion. *See* 16 C.F.R. § 3.31. To the extent Respondents argue that such discovery is necessary regarding issues of Complaint Counsel's credibility and culpability for the posting of the exhibits, such discovery is unnecessary, given the relief granted by the Commission to address Complaint Counsel's violation of Rule 4.2(c)(3). Therefore, the Commission denies the Discovery Motion.

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III. Conclusion

Accordingly, for the reasons stated above, the Commission:

- (1) Orders Complaint Counsel for the remainder of this proceeding to obtain prior review and certification by the Associate Director of the Division of Enforcement, Bureau of Consumer Protection, or in the rare event that he or she is unavailable, the Bureau's Deputy Director, of any future public filings by Complaint Counsel to ensure the proper use and redaction of materials subject to the ALJ's protective order and protect against any violation of that order or applicable rule, but otherwise denies the Respondents' Contempt Motion, including the request for dismissal and monetary relief;
- (2) Grants the Respondents' Electronic Files Motion in part, by ordering that the General Counsel release to the Respondents aggregate Web log data responsive to the Motion, and denies the Motion in part, to the extent it seeks access to specific IP addresses or any other personally identifiable information;
- (3) Denies the Respondents' Discovery Motion; and
- (4) Orders that the stay of this proceeding is hereby lifted, that the proceeding shall not be further stayed, except pursuant to the conditions and requirements set forth in Part 3 of the Commission's Rules, and that the proceeding shall remain subject to the time limits prescribed by Rule 3.51, 16 C.F.R. § 3.51, for the issuance of the Initial Decision, with an additional allowance of time, if needed, equivalent to the number of business days that have elapsed between the date of the Certifying Order and the date of this Order.

Response to Petition

**Re: Petition to Quash Filed by United FreshStart
(hereinafter “Petitioner” or “UFS”), File No. 042 3195**

March 24, 2005

Dear Mr. Clabaugh:

This letter advises you of the disposition of the UFS Petition to Quash the Civil Investigative Demand (“CID”) for written interrogatories, documentary materials, and oral testimony issued in conjunction with an investigation of UFS’s conduct by the Federal Trade Commission (hereinafter “FTC” or “Commission”). The Petition to Quash is denied for the reasons hereinafter stated. The new dates for Petitioner to comply with the CID are April 8, 2005, with respect to interrogatory answers and the production of documents, and April 15, 2005, with respect to oral testimony.

This ruling was made by Commissioner Pamela Jones Harbour, acting as the Commission’s delegate. *See* 16 C.F.R. § 2.7(d)(4). Petitioner has the right to request review of this matter by the full Commission. Such a request must be filed with the Secretary of the Commission within three days after service of this letter.¹

I. Background and Summary

The CID was issued on December 21, 2004 – production of interrogatory answers and documents was required by January 20, 2005 and the investigational hearing was scheduled for February 11, 2005. On January 19, 2005, counsel for UFS spoke to Staff as technically required by Commission Rule § 2.7(d)(2), 16 C.F.R. § 2.7(d)(2), to discuss compliance issues related to the CID. In particular, you, on behalf of UFS, advised Staff that UFS would only comply with the CID if it were “granted immunity from

¹ This letter decision is being delivered by facsimile and express mail. The facsimile copy is being provided as a courtesy. Computation of the time for appeal, therefore, should be calculated from the date you received the original by express mail.

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prosecution.” Statement of Counsel for UFS at 1. Staff indicated that the FTC had neither the authority to prosecute criminal claims nor the power to grant immunity from prosecution. Later that same day, UFS’s Petition to Quash was timely filed.

II. Petitioner Has Failed to Substantiate Any Basis for Relief.

The factual basis for this Petition is provided by unsupported assertions of counsel. The Petition is not accompanied by any affidavits or other materials under oath.² In substance, UFS claims that it is entitled to relief from the commandment of the CID on four separate grounds: (1) the resolution authorizing the investigation only covers bankruptcy and financial counseling services, not foreclosure avoidance services and, thus, all the information sought is beyond the scope of the investigation authorized by the Commission; (2) the information sought is overly broad and not sufficiently related to the subject of the investigation to survive scrutiny under the Fourth Amendment; (3) UFS cannot be compelled to respond to the CID in violation of its rights against self-incrimination under the Fifth Amendment; and (4) tax returns and related information are statutorily privileged pursuant to 26 U.S.C. § 6103.

A. UFS has provided no factual basis for its claim under the Fifth Amendment.

Even conceding that an individual may sometimes be protected from the compelled provision of incriminating testimony and materials by reason of the Fifth Amendment, UFS has demonstrated no factual support for its claim that such protection is available to it or even that its claim of such privilege here has been properly invoked. In the first place, the privilege against

² The “Statement of Counsel for United FreshStart” was neither certified nor did it contain any factual representations supporting any claim for relief set forth in UFS’s Petition to Quash.

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compelled incriminating testimony does not extend to corporations or other collective entities. *See, e.g., Braswell v. United States*, 487 U.S. 99 (1988); and *Bellis v. United States*, 417 U.S. 85, 88-90 (1974). UFS has provided no facts suggesting either that it is a sole proprietorship or that the circumstances of the production of the materials requested would constitute compelled testimony of an inculpatory nature by an individual. *See United States v. Hubbell*, 530 U.S. 27, 34-39 (2000). Second, the privilege against compelled testimony cannot be asserted in a wholesale fashion. “A person may not make a ‘blanket assertion’ of the [Fifth Amendment] privilege.” *United States v. Aeilts*, 855 F. Supp. 1114, 1116 (C.D. CA 1994) (citing *United States v. Brown*, 918 F.2d 82, 84 (9th Cir. 1990)). The Commission’s Rules and general investigatory practice require privilege claims to be asserted in a more detailed manner to keep blanket claims of privilege from being used to sweep in unprivileged materials. *See, e.g.,* 16 C.F.R. §§ 2.7, 2.8A, and 2.9. The privilege must be asserted on a document-by-document basis, *Aeilts, supra*, and a “question-by-question basis.”³ *United States v. Bodewell*, 66 F.3d

³ Because the privilege must be asserted by the witness at the time each question is propounded and in response to each such question where it can be asserted, there is no reason to excuse the attendance of UFS from the investigational hearing commanded by the CID. Further, as the Sixth Circuit pointed out in *United States v. Mayes, et al*, 512 F.2d 637, 649 (6th Cir. 1975):

The Fifth Amendment privilege against self-incrimination is a privilege personal to the witness. *United States v. Goldfarb*, 328 F.2d 280 (6th Cir. 1964). . . . While the witness is entitled to the advice of counsel before determining whether he should invoke the privilege, *United States v. Compton*, 365 F.2d 1 (6th Cir. 1966), and while it is within the discretion of the trial judge to permit counsel for the witness to invoke the privilege on his behalf, 8 Wigmore, *supra*, § 2270, the nature of

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1000, 1002 (9th Cir. 1995); and *Brown*, 918 F.2d at 84 (“A person must have the chance to present himself for questioning, and as to each question elect to raise or not to raise the defense.”) (internal quotation marks omitted). Third, UFS must establish a factual basis for the Commission to believe that its compelled responses to the CID would subject it to “substantial and real, and not merely trifling or imaginary[] hazards of incrimination.” *United States v. Apfelbaum*, 445 U.S. 115, 128 (1980) (quoting earlier Supreme Court cases – internal quotation marks omitted). Fourth, since the contents of UFS’s documents were in all likelihood voluntarily prepared by UFS in the ordinary course of its business and not by reason of government commandment in furtherance of a criminal investigation, the contents of such documents are not likely to be entitled to any privilege. *United States v. Fisher*, 425 U.S. 391, 410 (1976). This is especially true with respect to so-called “required records” which must be produced even if the privilege against compelled testimony might otherwise apply. *Shapiro v. United States*, 335 U.S. 1, 17 (1948). Finally, no burden falls upon Staff to resolve any ambiguity regarding UFS’s assertion of a claim of privilege until such time as UFS has established “a prima facie claim of privilege.” See *United States v. Yurasovich*, 580 F.2d 1212, 1221 (3rd Cir. 1978). In the present circumstances, the Commission cannot assume that UFS is entitled to claim the privilege any more than it can assume that UFS will assert the privilege in the proper manner on each occasion where it might be entitled to do so. Accordingly, UFS’s Petition to Quash must be denied on its claim arising under the Fifth Amendment.

the privilege is such that in the final analysis the controlling decision is that of the witness himself. . . . There may be a constitutional privilege against testifying and at the same time be a powerful incentive to get on the stand and tell the truth. The alternatives for the witness are seldom easy.

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B. UFS's business falls within the scope of the resolution authorizing the use of compulsory process.

According to the Petition, "Petitioner provides services to help homeowners avoid foreclosure proceedings against their homes. It does not provide bankruptcy counseling or *typical* financial services of any type." Petition at 2 (emphasis supplied). The Commission's resolution of March 5, 1984, which authorized Staff's use of this CID, is directed toward investigation of "the bankruptcy and financial counseling services industry." The Commission does not understand UFS to deny that it provides financial counseling services, only that its services might not be "typical." An intent to limit Staff to only those investigations of the financial counseling industry involving "typical" services cannot be found in our resolution. The present investigation of UFS is precisely the type of investigation intended by the resolution of March 5, 1984. Furthermore, the materials sought by the CID are precisely the sort of materials that are relevant to such an inquiry. There is, therefore, no basis for the Commission to grant this Petition to Quash on the grounds that information sought by the CID is not reasonably related to the nature and scope of the investigation authorized by the resolution.

C. Nothing contained in the Fourth Amendment supports UFS's claim for relief from the CID.

Petitioner next claims that the CID is "overbroad, unnecessarily burdensome and oppressive" and violates its Fourth Amendment right to be free from unreasonable searches and seizures. Petition at 1. The Petitioner has "the burden of showing that an agency subpoena is unreasonable . . . and, where, as here, the agency inquiry is authorized by law and the materials sought are relevant to the inquiry, that burden is not easily met." *Securities and Exchange Commission v. Brigadoon Scotch Distributing Co.*, 480 F.2d 1047, 1056 (1973), *cert. denied*, 415 U.S. 915 (1974). This is especially so in light of the breadth of inquiry this Commission is permitted to conduct. *United States v. Morton Salt Co.*, 338 U.S. 632, 652 (1950) ("[I]t is sufficient if

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the inquiry is within the authority of the agency, the demand is not too indefinite and the information sought is reasonably relevant.”). UFS did not provide any factual or legal support for its Petition to Quash on this ground and it must, therefore, be denied.

Petitioner’s claim of overbreadth is simply without merit. The materials sought are relevant to the inquiry being undertaken.⁴ It would be somewhat anomalous for this Commission to grant UFS’s overbreadth claim when Petitioner did not even avail itself of the opportunity to narrow the scope of its production when it conferred with Staff in advance of filing its Petition to Quash. *See United States v. Bailey*, 228 F.3d 341, 349 (4th Cir. 2000) (“But before a court will conclude that a subpoena is ‘arbitrarily excessive,’ it may expect the person served ‘to have made reasonable efforts . . . to obtain reasonable conditions’ from the government.”).⁵ Indeed, asking Staff for immunity from prosecution is hardly comparable to seeking relief from the scope of required production. Rather than seeking relief from production, such a request merely seeks to escape one potential, alleged consequence of such production.

⁴ UFS claims that 14 of the Interrogatories and 10 of the document specifications “are not reasonably related to the nature and scope of the investigation. . . .” Petition at 3. UFS provides no explanation of the basis for this claim. The Commission has reviewed each of the specifications cited by UFS and expressly finds that each is reasonably related to the nature and scope of the investigation. Accordingly, these claims do not provide UFS with any additional ground for relief.

⁵ Quoting *Morton Salt*, 338 U.S. at 653 (“Before the courts will hold an order seeking information reports to be arbitrarily excessive, they may expect the supplicant to have made reasonable efforts before the Commission itself to obtain reasonable conditions.”).

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Allegations of burden must likewise be supported with specificity. As the Commission stated in *National Claims Service, Inc., Response to Petition to Limit Civil Investigative Demands*, 125 F.T.C. 1325, 1328-29 (1998):

In short, Petitioner's burden allegation must be rejected as completely unsubstantiated. At a minimum, a petitioner alleging burden must (i) identify the particular requests that impose an undue burden; (ii) describe the records that would need to be searched to meet that burden; and (iii) provide evidence in the form of testimony or documents establishing the burden (e.g., the person-hours and cost of meeting the particular specifications at issue). Petitioner has failed to do any of these things.

Likewise here, UFS has failed to provide "a single affidavit or shred of documentary evidence supporting the existence of this alleged burden." *Id.* at 1328. See *United States v. Stuart*, 489 U.S. 353, 360 (1989) (holding that the investigated party bears the burden of proving that the subpoena is unduly burdensome). Having failed to do any of these things with any reasonable degree of specificity, UFS is, therefore, entitled to no relief on this ground.

Invocation of the Fourth Amendment adds virtually nothing to the analysis of UFS's claim for relief. The test applied by a court to the enforcement of an administrative agency's investigative subpoena is "limited to determining 'if the inquiry is within the authority of the agency, the demand is not too indefinite and the information sought is reasonably relevant.'" *Federal Trade Commission v. Anderson*, 631 F.2d 741, 745 (DC Cir. 1979) (quoting *Morton Salt*, 338 U.S. at 652). This does not appear to be materially different from the Supreme Court's standard of review under the Fourth Amendment as set forth in *Donovan v. Lone Star, Inc.*, 464 U.S. 408, 415 (1984):

We [have] . . . described the constitutional requirements for administrative subpoenas . . . as follows:

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“It is now settled that, when an administrative agency subpoenas corporate books or records, the Fourth Amendment requires that the subpoena be sufficiently limited in scope, relevant in purpose, and specific in directive so that compliance will not be unreasonably burdensome.”

See v. City of Seattle, supra, 387 U.S., at 544, 87 S.Ct., at 1740 (footnote omitted). *See also United States v. Morton Salt Co.*, 338 U.S. 632, 652-653, 70 S.Ct. 357, 368-369, 94 L.Ed. 401 (1950).

Id. This CID is limited in scope to the subjects set forth in the Resolution attached to the CID, the materials sought have been found to be relevant to that purpose, and Petitioner makes no complaint that the materials sought are not described with sufficient particularity. The Constitution requires nothing more. Accordingly, the Petition to Quash must be denied on Fourth Amendment grounds.

D. Nothing contained in 26 U.S.C. § 6103 provides UFS with a ground for relief.

Petitioner objects to the provision of certain information on the ground that tax returns and related information are “confidential pursuant to the provisions of Title 26 U.S. Code Section 6103.” Petition at 1. UFS’s reliance on this provision of law is without merit. The prohibition of that statute runs against officers and agents of the United States with respect to copies of such materials in the hands of the government. If the Commission was seeking the information from the IRS, Petitioner’s claim might have some merit. However, as explained by the Second Circuit Court of Appeals:

The disclosure of tax returns which is forbidden by both federal and state law to protect the integrity of the tax reporting and collecting system is an unauthorized disclosure of the filed returns, directed primarily against

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employees of government in the taxing departments. Disclosure by the taxpayer himself of his copies of returns is not an unauthorized disclosure, even though it be made by reason of legal compulsion.

United States ex rel. Carthan v. Sheriff, City of New York, 330 F.2d 100, 101 (2nd Cir. 1964). UFS's Petition to Quash must, therefore, be denied on this ground.

III. CONCLUSION AND ORDER

For all the foregoing reasons, **IT IS ORDERED THAT** UFS's Petition to Quash should be, and it hereby is, **DENIED**. Pursuant to 16 C.F.R. § 2.7(e), the new dates for Petitioner to comply with the subject CID are: April 8, 2005, with respect to interrogatory answers and document production; and April 15, 2005, with respect to oral testimony.

Response to Petition

Re: Request to the Full Federal Trade Commission to Review the Ruling Denying the Petition to Quash Filed by United FreshStart (hereinafter “Petitioner” or “UFS”), File No. 042 3195

April 6, 2005

Dear Mr. Clabaugh:

This letter advises you of the Commission’s disposition of UFS’s Request to the Full Federal Trade Commission to Review the Ruling Denying the Petition to Quash the Civil Investigative Demand¹ (“CID”) issued in conjunction with an investigation of UFS by the Federal Trade Commission (hereinafter “FTC” or “Commission”). The Request to Review is denied for the reasons stated below. Pursuant to the provisions of 16 C.F.R. § 2.7(f), the dates for Petitioner to comply with the CID remain April 8, 2005, with respect to interrogatory answers and the production of documents, and April 15, 2005, with respect to oral testimony.

The Commission issued a CID to UFS on December 21, 2004 with return dates of January 20, 2005 and February 11, 2005. On January 19, 2005, counsel for UFS timely filed the Petition to Quash. On March 24, 2005, Commissioner Harbour, acting as the Commission’s delegate, *see* 16 C.F.R. § 2.7(d)(2), directed the issuance of the decision denying UFS’s Petition to Quash because UFS had not shown any facts which entitled UFS to relief from the commandment of the CID. On March 31, 2005, UFS filed its Request to Review.

UFS requested relief from the CID on the grounds that: (1) the resolution authorizing the investigation only covers bankruptcy and financial counseling services, not foreclosure avoidance services and, thus, all the information sought is beyond the scope

¹ The phrase “Request to Review” shall be used to refer to UFS’s request for Commission review of the prior decision of Commissioner Harbour which denied UFS’s Petition to Quash Civil Investigative Demand (hereinafter “Petition to Quash”).

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of the investigation authorized by the Commission; (2) the information sought is overly broad and not sufficiently related to the subject of the investigation to survive scrutiny under the Fourth Amendment; (3) UFS cannot be compelled to respond to the CID in violation of its rights against self-incrimination under the Fifth Amendment; and (4) tax returns and related information are statutorily privileged pursuant to 26 U.S.C. § 6103. The factual basis for the Petition to Quash was provided by unsupported assertions of counsel. The Petition to Quash was not accompanied by any affidavits or other materials under oath.² The Request to Review does not supply any additional facts or legal arguments.

The Commission has reviewed the record created by UFS in support of its Petition to Quash and its Request to Review. That record does not support any of the claims for relief advanced by UFS. Accordingly, UFS has not carried its burden of proof establishing its entitlement to relief from the CID. *See Securities and Exchange Commission v. Brigadoon Scotch Distributing Co.*, 480 F.2d 1047, 1056 (1973), *cert. denied*, 415 U.S. 915 (1974) (holding that the petitioner has “the burden of showing that an agency subpoena is unreasonable . . . and, where, as here, the agency inquiry is authorized by law and the materials sought are relevant to the inquiry, that burden is not easily met.”).

For the reasons set forth in the Commission’s ruling of March 24, 2005 denying UFS’s Petition to Quash, **IT IS ORDERED THAT** such ruling should be, and it hereby is, **AFFIRMED**. Pursuant to 16 C.F.R. § 2.7(f), the dates for Petitioner to comply with the subject CID remain: April 8, 2005, with respect to interrogatory answers and document production; and April 15, 2005, with respect to oral testimony.

² The “Statement of Counsel for United FreshStart” accompanying UFS’s Petition to Quash was neither certified nor did it contain any factual representations in support of any claim for relief set forth in the Petition to Quash.