Analysis of Proposed Consent Orders to Aid Public Comment
***In the Matter of Marker Völkl (International) GmbH, File No. 121-0004,* and**
In the Matter of Tecnica Group SpA., File No. 121-0004.

The Federal Trade Commission has accepted, subject to final approval, an agreement containing consent order ("Agreement") from Marker Völkl (International) GmbH ("Marker Völkl") and a separate Agreement from Tecnica Group SpA. ("Tecnica"). Marker Völkl and Tecnica are hereinafter sometimes referred to collectively as "Respondents."

Respondents are manufacturers of various types of ski equipment. The Agreements settle charges that Marker Völkl and Tecnica both violated Section 5 of the Federal Trade Commission Act, 15 U.S.C. § 45, by agreeing with each other not to compete for the services of athlete endorsers and not to compete for the services of employees.

The Agreements have been placed on the public record for 30 days for receipt of comments from interested members of the public. Comments received during this period will become part of the public record. After 30 days, the Commission will again review the Agreements and comments received, and will decide whether it should withdraw from the Agreements or make final the orders contained in the Agreements.

The purpose of this Analysis to Aid Public Comment is to invite and facilitate public comment concerning the proposed orders. It is not intended to constitute an official interpretation of the Agreements and proposed orders, or in any way to modify their terms.

The proposed orders are for settlement purposes only and do not constitute an admission by the Respondents that they violated the law or that the facts alleged in the Complaint, other than jurisdictional facts, are true.

I. The Complaints

This action addresses anticompetitive conduct in the ski equipment industry. The allegations of the Complaints are summarized below.

A. Background

Marker Völkl and Tecnica manufacture, market, and sell ski equipment. The most effective and most costly tool for marketing ski equipment consists of securing endorsements from prominent ski athletes.

Endorsement agreements between a ski equipment company and a ski athlete are typically of short duration, and are subject to renewal. Commonly, the ski athlete: (i) authorizes the company to use the athlete's name and likeness in promotions and in advertisements, (ii) agrees to use and promote the company's equipment on an exclusive basis, (iii) agrees to display the company's equipment when the athlete can attract media exposure, such as by holding up the skis at the end of a race, or taking the skis to the podium when receiving a medal, and/or (iv) agrees to

appear at promotional events on behalf of the company. The association of a ski equipment brand with a prominent ski athlete generates sales, goodwill, and other benefits for the company.

As consideration for the ski athlete's endorsement services, the ski equipment company commonly provides the ski athlete with monetary compensation (keyed to the athlete's success in competitions), support services at competitions, free or discounted equipment, and/or travel expenses.

Ordinarily, ski equipment companies compete with one another to secure the endorsement services of prominent ski athletes. At the expiration of an endorsement agreement, a ski athlete can be induced to switch from one company to another in return for greater compensation, in much the same way that an employee can be induced to change employers in return for a higher salary or better benefits.

Endorsement agreements are the primary source of income for professional ski athletes.

B. The Marker Völkl/Tecnica Collaboration

In 1992, Marker Völkl began collaborating with Tecnica in the marketing and distribution of certain complementary ski equipment: Völkl brand skis, and Tecnica brand ski boots. Initially, these companies were not competitors: Tecnica did not have a ski; Marker Völkl did not have a ski boot.

In 2003, Tecnica acquired the Nordica ski equipment unit from Benetton Group SpA. Nordica manufactured and sold both skis and ski boots. Tecnica acquired a second ski manufacturer, Blizzard GmbH ("Blizzard"), in 2006.

The ski brands acquired by Tecnica (Nordica and Blizzard brands) were not included in the Marker Völkl/Tecnica collaboration. That is, Tecnica independently manufactures, markets, and distributes Nordica skis and Blizzard skis, in competition with Völkl skis.

C. The Challenged Conduct

Marker Völkl and Tecnica agreed not to compete with one another to secure the services of ski athletes and employees.

Beginning in or about 2004, Marker Völkl and Tecnica agreed not to compete with one another to secure the endorsement services of ski athletes. Specifically, Marker Völkl agreed not to solicit, recruit, or contract with a ski athlete who previously endorsed Tecnica's skis, or who was otherwise claimed by Tecnica. Tecnica agreed not to solicit, recruit, or contract with a ski athlete who previously endorsed Marker Völkl's skis, or who was otherwise claimed by Marker Völkl.

In 2007, Marker Völkl and Tecnica agreed to expand the scope of their non-compete agreements. Marker Völkl and Tecnica agreed not to compete for the services of any employee.

Specifically, Marker Völkl agreed not to solicit, recruit, or contract with any employee of Tecnica. Tecnica agreed not to solicit, recruit, or contract with any employee of Marker Völkl.

Marker Völkl and Tecnica intended that these non-compete agreements would enable them to avoid bidding up (i) the cost of securing athlete endorsements, and (ii) the salaries paid to employees.

Respondents' conduct had the purpose, capacity, tendency, and likely effect of (i) restraining competition unreasonably, (ii) harming the economic interests of ski athletes, and (iii) harming the economic interests of the affected employees of Marker Völkl and Tecnica.

II. Legal Analysis

The Complaint alleges that both the athlete non-compete agreement and the employee non-compete agreement violate Section 5 of the Federal Trade Commission Act, 15 U.S.C. § 45.

These agreements are appropriately analyzed under the framework articulated by the Commission in the *Polygram* case.[1] Agreements between competitors not to compete for professional services, for employees, or for other inputs, are presumptively anticompetitive or inherently suspect, if not *per se* unlawful.[2]

When an agreement is deemed inherently suspect, a party may avoid summary condemnation under the antitrust laws by advancing a legitimate (cognizable and plausible) efficiency justification for the restraint.[3]

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[1] *In the Matter of Polygram Holding, Inc., et al.*, 136 F.T.C. 310 (F.T.C. 2003), *aff'd*, 416 F.3d 29 (D.C. Cir. 2005). *See also North Texas Specialty Physicians v. FTC, 528 F.3d 346 (5th Cir. 2008)*; *In the Matter of Realcomp II Ltd., A Corp.*., 2009-2 Trade Cas. (CCH) ¶ 76784 (F.T.C. Oct. 30, 2009).

[2] *See, e.g.*, *United States v. Brown*, 936 F.2d 1042 (9th Cir. 1991); *Mandeville Island Farms, Inc. v. Am. Crystal Sugar Co.*, 334 U.S. 219, 235 (1948). *See also Todd v. Exxon Corp*., 275 F.3d 191, 198 (2d Cir. 2001) (stating that *per se* rule would "likely apply" to allegations of actual agreement among competitors to fix employee salaries); *Knevelbaard v. Kraft Foods, Inc*., 232 F.3d 979, 988-89 (9th Cir. 2000) ("Most courts understand that a buying cartel's low prices are illegal . . . . Clearly mistaken is the occasional court that considers low buying prices pro-competitive or that thinks sellers receiving illegally low prices do not suffer antitrust injury."); *NBA v. Williams*, 45 F.3d 684, 687 (2d Cir. 1995) ("Absent justification under the Rule of Reason or some defense, employers who compete for labor may not agree among themselves to purchase that labor only on certain specified terms and conditions . . . Such conduct would be *per se* unlawful."); *Vogel v. Am. Soc'y of Appraisers*, 744 F.2d 598, 601 (7th Cir. 1984) (Posner, J.) ("[B]uyer cartels, the object of which is to force the prices that suppliers charge the members of the cartel below the competitive level, are illegal *per se*."); *U.S. v. eBay*, 968 F. Supp. 2d 1030 (N.D. Cal. 2013) (denying defendant's motion to dismiss government's claim that an agreement between employers not to solicit or hire each other's employees was a naked restraint of trade subject to *per se* or quick look analysis).
These cases must be distinguished from (1) non-compete agreements between employers and their employees and (2) a no-hire agreement between the seller of a business and its buyer. Non-compete or no-hire agreements in those contexts do not generally receive *per se* condemnation to the extent that the courts deem the restraints ancillary to a legitimate and procompetitive transaction.

[3] *PolyGram Holding, Inc. v. FTC*, 416 F.3d 29, 35-36 (D.C. Cir. 2005).

Here, the Commission finds reason to believe that the athlete non-compete agreement and the employee non-compete agreement serve no pro-competitive purpose. More specifically, these restraints are not reasonably necessary for the formation or efficient operation of the marketing collaboration between Marker Völkl and Tecnica. That the restraints are, at a minimum, overbroad is demonstrated by the fact that the agreements adversely affect competition for – and the compensation available to – athletes and employees who have no relationship with the collaboration.[4] Further, Respondents cannot plausibly claim that the restraints serve to align the incentives of the companies in a manner that promotes the cognizable efficiency goals of their collaboration. Rather, the ski businesses of Tecnica (the Nordica and Blizzard brands) were at all times outside of and apart from the collaboration.[5] In sum, the Respondents did not provide evidence demonstrating why Marker Völkl and Tecnica cannot cooperate in the marketing of certain ski products, yet at the same time compete for the services of endorsers and employees.

The athlete non-compete agreement and the employee non-compete agreement serve to protect Marker Völkl and Tecnica from the rigors of competition, with no advantage to consumer welfare. The justifications for the non-compete agreements proffered by the Respondents were neither supported by the evidence nor cognizable under the antitrust laws. Because there is no plausible and cognizable efficiency rationale for the non-compete agreements, these inherently suspect agreements constitute unreasonable restraints on trade, and are properly judged to be illegal.

III. The Proposed Orders

The proposed Orders are designed to remedy the unlawful conduct charged against Respondents in the Complaints and to prevent the recurrence of such conduct.

The proposed Orders enjoin Marker Völkl and Tecnica from, directly or indirectly, entering into, or attempting to enter into, an agreement with a ski equipment competitor to forbear from competing for U.S. athletes to sign endorsement contracts for the company's ski equipment. The proposed Orders also enjoin Marker Völkl and Tecnica from entering into an agreement with a ski equipment competitor to forbear from competing for the services of any U.S. employee. A proviso to the cease and desist requirements allows reasonable restraints ancillary to a legitimate joint venture.

The proposed Order will expire in 20 years.

[4] *Cf.*, Federal Trade Comm'n and U.S. Dep't of Justice, *Antitrust Guidelines for Collaborations Among Competitors* (2000) § 3.36(b).

[5] *See In the Matter of Polygram Holding, Inc., et al.*, 136 F.T.C. 310, 322, 357-63 (F.T.C. 2003).