Analysis to Aid Public Comment
***In the Matter of Idexx Laboratories, Inc.*, File No. 101-0023**

The Federal Trade Commission has accepted for public comment an Agreement Containing Consent Order to Cease and Desist ("Agreement") with IDEXX Laboratories, Inc. ("IDEXX"). The Agreement seeks to resolve charges that IDEXX engaged in exclusionary conduct to maintain its monopoly power in the companion animal diagnostic testing equipment and supplies industry in violation of Section 5 of the Federal Trade Commission Act, 15 U.S.C. § 45.

Specifically, the proposed Complaint that accompanies the Agreement ("Complaint") alleges that IDEXX has used its monopoly power to impose exclusive deals with its distributors. As a result, IDEXX has foreclosed rivals from key distribution channels and limited competition in the relevant market, leading to higher prices, lower output, reduced innovation and diminished consumer choice.

The Commission anticipates that the competitive issues described in the Complaint will be resolved by accepting the proposed Order, subject to final approval, contained in the Agreement. The Agreement has been placed on the public record for 30 days for receipt of comments from interested members of the public. Comments received during this period will become part of the public record. After 30 days, the Commission will again review the Agreement and comments received, and will decide whether it should withdraw from the Agreement or make final the Order contained in the Agreement. IDEXX has already entered into a non-exclusive distribution agreement with MWI Veterinarian Supply Co., Inc. ("MWI"), and that distribution agreement has been incorporated into the terms of the proposed Order.

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

The Agreement is for settlement purposes only and does not constitute an admission by IDEXX that the law has been violated as alleged in the Complaint or that the facts alleged in the Complaint, other than jurisdictional facts, are true.

I. The Complaint

The Complaint makes the following allegations.

A. Industry Background

Point of care ("POC") diagnostic products include rapid assay tests, equipment and supplies that permit a companion animal veterinarian to test, diagnose and treat certain conditions such as heartworm during a single office visit. POC diagnostic products provide real-time results that cannot be obtained through other testing alternatives, such as services offered by outside reference labs.

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

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

There are no close substitutes for POC diagnostic products. Although veterinarians can purchase some diagnostic services by sending specimens to outside laboratories, POC testing allows veterinarians to provide timely, state-of-the-art care. Veterinarians value faster results, particularly when testing is associated with emergencies, pre-surgery, and for diagnoses of conditions that may require the veterinarians to perform follow-up testing or dispense or prescribe medicine as soon as possible.

Nearly all veterinarians buy their supplies, including POC diagnostic products, from distributors who specialize in supplying companion animal veterinary clinics. Veterinarians overwhelmingly prefer to buy through distributors because of the efficiency and customer service they offer. Other purchasing options are less efficient and more costly.

Most veterinarians buy a majority of their equipment and supplies from a preferred distributor. More than 75% of veterinarians name Butler Schein Animal Health (“Butler”), Webster Veterinary Supply, Inc. (“Webster”), MWI, Midwest Veterinary Supply, Inc. (“Midwest”), or Victor Medical Company (“Victor”), as their preferred distributor. Combined, these top tier distributors sell more than 85%, by revenue, of the products sold to companion animal veterinarians in the United States.

Butler, Webster and MWI are recognized by manufacturers, distributors and veterinarians as the pre-eminent national companion animal veterinary supply distributors in the United States. There are no other distributors that provide equivalent levels of service to manufacturers and regularly visit veterinarians in as wide a geographic area as Butler, Webster or MWI. Midwest and Victor are large, regional distributors, also with strong reputations for high-quality service.

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

The top tier distributors provide better services to their manufacturer clients than other distributors. Those better services can include, but are not limited to, more sales, better sales and inventory data transfer, more experienced sales representatives, better market forecasting, more timely payments, and more frequent visits to veterinarian clients.

B. The Respondent

IDEXX Laboratories, Inc. is a corporation with its principal place of business located in Westbrook, Maine. IDEXX develops, manufactures and sells diagnostic products to veterinarians through distributors. IDEXX has monopoly power in the POC diagnostic products market.

IDEXX's core business is companion animal diagnostics, including POC instruments and their related consumables, rapid assay test kits (SNAP© tests), digital radiography equipment, practice management software, and diagnostic services through wholly owned and operated reference laboratories. IDEXX's share of the POC diagnostic products market has been at least 70% during each of the past five years (2006-2011). No other firm had more than a 20% share of the relevant market in those same five years.

C. IDEXX's Conduct

IDEXX bars its distributors from carrying any competing POC diagnostic testing products. IDEXX distributors include all three of the major, national distributors of these products and the two large, regional distributors named above. As noted previously, these distributors sell 85% of equipment and supplies that companion animal veterinarians buy through distributors.

D. Competitive Impact of IDEXX's Conduct

Because IDEXX has a broad line of products and a dominant position in the POC market, large distributors need to carry the IDEXX line. While distributors need to carry the IDEXX line, they would prefer to carry competing products as well. However, by insisting that distributors make an "all-or-nothing" choice, IDEXX compels distributors to forgo competitors' products. The features of the market that make anticompetitive exclusion possible – IDEXX's status as a "must carry" supplier coupled with its insistence on exclusivity – have endured for many years, and thus the relatively short nominal duration of IDEXX's distribution contracts has not mitigated the anticompetitive effects of the exclusive deals.

IDEXX's control of distributors means that it forecloses its competition from effectively and efficiently reaching large segments of the veterinarian market, and forces veterinarians to incur greater costs to obtain non-IDEXX products.

IDEXX has used its monopoly power, the threat of termination, and explicit agreements to prevent those top tier distributors from selling rival POC diagnostic products that the distributors would otherwise choose to sell. As a result, IDEXX has foreclosed its competitors from distributors that sell over 85% of all products purchased through distribution by companion animal veterinary clinics in the United States, and those competitors are impeded from effectively and efficiently marketing their POC diagnostic products to veterinarians.

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

IDEXX intentionally engages more distribution than it needs, even though that excess distribution is costly and inefficient for IDEXX. Nevertheless, IDEXX continues to engage the excess distribution because it allows IDEXX to block its rivals from using those distributors and insulates IDEXX from competition from its rivals. Thus, IDEXX maintains its monopoly and harms both distributors who would prefer to offer a greater variety of POC diagnostic products, and veterinarians who could buy cheaper, superior, and more convenient POC diagnostic products. IDEXX's exclusionary acts and practices require competing manufacturers to settle for less efficient means to sell their products to veterinarians.

IDEXX's exclusionary acts and practices erect significant barriers to entry for those manufacturers that have developed, would otherwise have developed, or offered for sale POC diagnostic products that would compete with IDEXX products, thereby resulting in reduced choice for veterinarians.

II. Legal Analysis

The offense of monopolization under § 2 of the Sherman Act has two elements: (1) the possession of monopoly power in the relevant market; and (2) the willful acquisition, enhancement or maintenance of that power through exclusionary conduct.[1] Exclusive dealing by a monopolist is condemned when the challenged conduct significantly impairs the ability of rivals to compete effectively with the respondent and thus limits the ability of those rivals to constrain the exercise of monopoly power.[2]

The Complaint alleges that IDEXX has monopoly power and used it to create competitive harm. IDEXX's policy of requiring exclusivity from its distributors has foreclosed its rivals

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[1] *Verizon Commc'ns v. Law Offices of Curtis V. Trinko LLP.*, 540 U.S. 398, 407 (2004); *United States v. Grinnell Corp.*, 384 U.S. 563, 570-71 (1966).

[2] *See, e.g., Aspen Skiing Co. v. Aspen Highlands Skiing Corp.*, 472 U.S. 585,605 & n.32 (1985) (exclusionary conduct "tends to impair the opportunities of rivals" but "either does not further competition on the merits or does so in an unnecessarily restrictive way") (citations omitted); *Lorain Journal Co. v. United States*, 342 U.S. 143, 151-54 (1951) (condemning newspaper's refusal to deal with customers that also advertised on rival radio station because it harmed the radio station's ability to compete); *United States v. Microsoft*, 253 F.3d 34, 68-71 (D.C. Cir. 2001) (condemning exclusive agreements because they prevented rivals from "pos[ing] a real threat to Microsoft's monopoly"); *United States v. Dentsply*, 399 F.3d 181, 191 (3d Cir. 2005) ("test is not total foreclosure but whether the challenged practices bar a substantial number of rivals or severely restrict the market's ambit"); *LePage's, Inc. v. 3M*, 324 F.3d 141, 159-60 (3d Cir. 2003) (same).

from over 85 percent of available sales opportunities at this level of the distribution chain. This foreclosure is particularly significant because nearly all POC diagnostics are sold to veterinarians through distributors, and other channels to the veterinarians are inconvenient, impractical and more expensive for both the veterinarians and IDEXX's competitors.

A monopolist may rebut a showing of competitive harm by demonstrating that the challenged conduct is reasonably necessary to achieve a pro-competitive benefit.[3] Any proffered justification, if proven, must be balanced against the harm caused by the challenged conduct.[4] In this case, however, no pro-competitive efficiency justifies IDEXX's exclusionary and anticompetitive conduct. Further, IDEXX cannot show that the exclusive arrangements were reasonably necessary to achieve a procompetitive benefit.

A concern about interbrand free-riding also does not justify the substantial anticompetitive effects found here.[5] Free-riding might occur if, for example, IDEXX provided a great deal of training or services to its distributors, and if the training or services help promote the product category as a whole rather than just IDEXX's product. In such an instance, promotion of the competitors' products would "free-ride" on IDEXX's activities. In this case, however, the vast majority of IDEXX's promotional efforts are relevant to IDEXX's products only, thereby reducing the risk of free-riding by IDEXX's competitors. While IDEXX's marketing efforts may generate some consumer interest in the product category as a whole – and not just in IDEXX's own products – this is a part of the natural competitive process. This type of consumer response does not raise a free-riding concern sufficient to justify the substantial anticompetitive effects found here.[6]

III. The Order

Together with the distribution agreement between IDEXX and MWI Veterinary Supply, Inc., signed in September 2012, the proposed Consent Order is designed to make the market for POC diagnostic testing products more competitive. Generally, the Order prohibits IDEXX from maintaining exclusive distribution arrangements with all three national distributors. Specifically, Part II of the Order addresses this core provision. Part III imposes reporting requirements for

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[3] *E.g., Microsoft*, 253 F.3d at 59.

[4] *Id.*

[5] "Interbrand free-riding" occurs when a manufacturer provides services, training, or other incentives in the promotion of its products for which it cannot easily charge its dealer, and that dealer "free-rides" on these demand-generating services by substituting a cheaper, more profitable product made by another manufacturer that does not invest in comparable services. *See generally,* Howard P. Marvel, *Exclusive Dealing*, 25 J.L. & ECON. 1, 8 (1982).

[6] *See United States v. Dentsply Int'l, Inc.*, 277 F. Supp. 2d 387, 445 (D. Del. 2003), *aff'd in rel. part*, 399 F.3d at 196-97; Marvel, *Exclusive Dealing,* 25 J.L. & ECON. at 8 (explaining that an interbrand free-riding justification "does not apply if the promotional investment is purely brand specific. In such cases, the dealer will not be in a position to switch customers from brand to brand.").

four years. Parts IV and V impose other reporting and compliance requirements. Unless otherwise indicated, the Order will expire in ten years.

The Order defines the “national distributors” as Butler, MWI and Webster, so long as they continue to distribute companion animal POC diagnostic equipment and supplies. Starting in January, 2013, MWI can distribute both IDEXX products and competitive products. Either IDEXX or MWI can terminate the agreement. If the parties agree that MWI will return to an exclusive arrangement with IDEXX, IDEXX must have a non-exclusive agreement with one of the two other national distributors.

All future non-exclusive agreements between IDEXX and a national distributor must meet the requirements of the Order. Paragraph II.B requires that such an agreement begin with a two year term, and provide for additional renewal terms of at least one year; that IDEXX shall not urge, induce, coerce, threaten, pressure, penalize, withhold the sale of product, or otherwise retaliate against the non-exclusive national distributor in order to limit its sales of other manufacturers’ products.

Paragraph II.B also requires IDEXX to notify the Federal Trade Commission about the termination of any non-exclusive distribution agreement. Paragraph II.C orders that IDEXX show any future non-exclusive distribution agreement to the Commission at least thirty (30) days before it is signed.

Further, if the non-exclusive national distributor merges with, acquires, or is acquired by a distributor that has an exclusive distribution arrangement with IDEXX, the non-exclusive distribution agreement stays in effect.

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